NOW THAT THE FUTURE HAS ARRIVED, MAYBE THE LAW SHOULD TAKE A LOOK: MULTIMEDIA TECHNOLOGY AND ITS INTERACTION WITH THE FAIR USE DOCTRINE

JONATHAN EVAN GOLDBERG*

TABLE OF CONTENTS

* B.A., Swarthmore College, 1992; J.D. Candidate, Washington College of Law, The American University, May 1995. Senior Articles Editor, *The American University Law Review* (Volume 44). I wish to thank Ann Goldberg and Julie Pinchuk for their inspiration, as well as Dr. Edward Goldberg of The Global Institute for Interactive Multimedia and Professor Peter Jaszi of The Washington College of Law for their guidance.

One of the most exciting things about the new digital technology is the way in which it empowers people. Users will have the ability to modify digital information they receive from others and to reuse it in their own fashion. Everyone will be able to mix, combine and rework text, sounds, still and motion images. We are entering an era of unprecedented democratization in the means of expression and the means of communication. We are going to have to learn to think in new ways to exploit the non-linear nature of the

> interactive media of the future. *We are also going to have to think hard about how we strike the balance between creative freedom and protection of intellectual property.*[1]
>
> From its beginning, the law of copyright has developed in response to significant changes in technology.[2]

INTRODUCTION

When AT&T[3] asks in its television and print advertisements, "Have you ever . . . ?", and then answers with "You Will," the $65 billion corporation is envisioning our multimedia future.[4] Multimedia can be defined in many ways.[5] The best definition of multimedia, for the purpose of this Comment, comes from attorney Michael D. Scott: "Multimedia is a form of computer software that combines two or more of the following: video, audio, photographs, text, graphics, animation, and computer programs, stored in digital[6] form on magnetic or optical media which can be displayed on a video display screen and with which the user can interact."[7]

A multimedia revolution[8] is percolating.[9] While it is true that the

---

1. Mary K. Duggan, *Copyright of Electronic Information: Issues and Questions*, ONLINE, May 1991, at 20, 21 (quoting DIGITAL WORLD, PROGRAM INFORMATION, SEYBOLD SEMINAR, June 26-28, 1990, at 8) (emphasis added).

2. Sony Corp. v. Universal City Studios, 464 U.S. 417, 430 (1984).

3. American Telephone & Telegraph (AT&T) is one of the major investors in multimedia technology. *See* Bart Ziegler, *American Telephone & Multimedia?*, BUS. WK., Sept. 6, 1993, at 78, 78 (describing AT&T's proposal to build electronic storage libraries throughout United States). The libraries will contain movies, television shows, music, and text, stored on computers, and will be accessible for anyone with a personal computer or television and the desire to pay for such a service. *Id.*

4. *See id.* at 79 (placing AT&T at helm of information superhighway with its plans of helping content owners deliver video to homes and offices).

5. *See* Thomas F. Villeneuve & Daniel M. Kaufman, *A Multimedia Blitz*, NAT'L L.J., Jan. 18, 1993, at S1, S1 (stating that word "multimedia" can refer to several different things, including computers, computer hardware add-ons, and software used to create audiovisual presentations); *see also* MICHAEL D. SCOTT, MULTIMEDIA: LAW & PRACTICE § 1.01, at 3 (1993) (discussing fact that several sources use term "multimedia" too broadly). For an example of this misuse, see Brian D. Handrigan, *Multimedia: The Litigation Tool of the '90s*, MASS. LAW. WKLY., Apr. 12, 1993, *available in* LEXIS, News Library, MALAWR File (including "filmstrip" and "slideshow" in definition of "multimedia").

6. *See* Robin Nelson, *Swept Away By the Digital Age*, POPULAR SCI., Nov. 1993, at 92, 94 (describing "digital" process as one that filters out distortions in what we see and hear (and eventually, through virtual reality, what we will smell, taste, and feel) in contrast to "analog," which provides exact model of original).

7. SCOTT, *supra* note 5, § 1.01, at 6.

8. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1545 (3d ed. 1992) (defining revolution as "a sudden or momentous change in any situation"). An alternate definition refers to a "single complete cycle," that is, something that has happened before and is repeating itself. *Id.* In this instance both definitions apply, for while multimedia technology is new, general advancements in technology are not. Therefore, some of the questions that this new multimedia technology raises for our legal system are questions the legal system has

digital age is here,[10] and that we can already attest to digital presence in the music we listen to,[11] the movies we watch,[12] and the games we play,[13] the megachanges expected to occur in our society through the use of *multimedia* technology are still years away.[14] Although there are several reasons for the delay in the inevitable[15] revolution, one of the primary reasons relates to the difficulties experienced by those companies who develop[16] multimedia software.[17]

---

addressed previously, albeit in another context. *See* Susan Orenstein, *Digital Multimedia Madness*, LEGAL TIMES, Sept. 13, 1993, at S29, S29, S35-S39 (quoting several attorneys who believe that multimedia technology raises few, if any, novel legal issues). For example, Jonathan Band, a copyright lawyer, expressed his doubts: "We're all scratching our heads and saying, 'Is there anything new?'" *Id.* at S29. *But see infra* note 118 (explaining unique characteristics of digital technology that make it impossible to apply current intellectual property law to newer multimedia issues).

9. *See* John Teresko, *Tripping Down the Information Superhighway*, INDUSTRY WK., Aug. 2, 1993, at 32, 33 (stating that merging computer, cable and telecommunications technologies are leading to restructuring of existing industries, development of new business opportunities, and establishment of new ways to compete). Experts estimate that "during the next decade more money will be put into the world's network infrastructure than in all the years since the telephone was invented." *Id.* at 34. In addition, John Sculley, former chairman of Apple Computer Inc., predicts that by 2001 the various components of this multimedia infrastructure will add up to a $3.5 trillion industry. *Id.* The multimedia revolution will affect both consumers and producers. Even the government is getting involved. *See Text of Clinton Technology Report*, U.S. Newswire, Nov. 5, 1993, *available in* LEXIS, News Library, USNWR File (stating that ITTF will study how traditional concepts of fair use should apply with respect to new media and new works).

10. *See* Michael Antonoff, *The Digital World*, POPULAR SCI., Nov. 1993, at 85, 85 (proclaiming that "[t]he Digital Age arrives" and introducing current and potential effects of digital media on entertainment, education, business, and communications).

11. Compact discs (CDs) and Digital Audio Tapes (DATs) provide digital sound.

12. *See* Peter Britton, *The Wow Factor*, POPULAR SCI., Nov. 1993, at 86, 86-91 (describing digital special-effects created by computer in movies TERMINATOR 2: JUDGMENT DAY and JURASSIC PARK). Movies can be delivered digitally, on laser disc, CD-ROM, or over fiber-optic wires.

13. Sega Genesis, Super Nintendo (SNES), and 3DO are examples of interactive home video-game systems. *Cf.* Suzanne Stefanac, *Interactive Hollywood*, NEWMEDIA, Aug. 1993, at 40, 40 (reporting that sales of Sega Genesis had been expected to grow by $1.6 billion by end of 1993).

14. *See, e.g.*, David Bunnell, *Media Madness*, NEWMEDIA, Sept. 1993, at 1, 1 (predicting that less than one third of U.S. homes will be wired for digital technology by year 2000); *see also* Mark Landler, *Media Mania*, BUS. WK., July 12, 1993, at 110, 112 (citing H. Wayne Huzienga, former chairman of Blockbuster Video, Inc., who believes that fewer than 20% of homes will have multimedia services by turn of century). *But cf.* William F. Allman, *Pioneering the Electronic Frontier: For Many People, the Information Revolution Is Already Here*, U.S. NEWS & WORLD REP., Dec. 6, 1993, at 56, 58-60 (discussing Internet as electronic superhighway).

15. *See* Stefanac, *supra* note 13, at 48 (stating that "with all these [big business] players lining up their business units and promotional machines, *it looks inevitable that our future will include some level of interactive media*-whether we want it or not. *There's just too much money at stake and too many alliances riding on it*" (emphasis added)).

16. To "develop" software is to "create" the software. *See* Jack Shandle, *Multimedia Computing Hits a Sour Note*, ELECTRONICS, June 1991, at 48, 53 (discussing multimedia developers' creation of content and software). For the purpose of this Comment, multimedia developer may refer to either the actual person who creates the software program or the company who sponsors the software's development/creation.

17. *See id.* at 49-53 (discussing problems faced by multimedia developers).

Generally, multimedia developers have several options to choose from when planning a multimedia package:[18] they can create their own content,[19] acquire the rights to use someone else's content,[20] use content that is in the public domain,[21] or abandon their projects altogether.[22] For various reasons, despite a number of costs and difficulties,[23] the most desirable of the above mentioned options is to acquire the rights to existing content.[24] At this point, none of these options are very good for multimedia developers.[25] There is one last, desperate alternative: multimedia developers can use others' content without paying for the rights.[26] Selecting this option, however, has obvious legal implications because most content is

---

18. "Multimedia *package*" simply refers to the computer software. "Multimedia *title*" may also be used. *See infra* Part I.B.1 (discussing increasing number of CD-ROM titles).

19. *See* TAY VAUGHAN, MULTIMEDIA, MAKING IT WORK 55 (1992) (stating that most multimedia developers who need music, in order to "play it safe," and not get sued, create their own content using synthesizers).

20. *See* SCOTT, *supra* note 5, § 1.02, at 12 (stating that vaults filled with unused movies, photos, and audio recordings could potentially be put to use by multimedia developers).

21. *See* SCOTT, *supra* note 5, § 9.06, at 26 (defining public domain works as those that may be used without infringing copyrights). Public domain works include works whose copyright has expired, U.S. government works, and works where "the author has intentionally abandoned copyright protection." *Id.* at 27. Works in the public domain may still have other rights attached, however, such as rights of publicity, which protect the commercial value of public figures. *See id.* §§ 14.01 to .02, at 3-12 (defining rights of publicity and providing checklist to determine whether such rights are attached to particular content).

22. *See* Shandle, *supra* note 16, at 50 (describing *Sporting News'* abandonment of baseball card multimedia project due to impossible cost of negotiating and stating that some CD-ROM titles may never be created because of huge per-disc royalties). Acquiring content is different from acquiring the rights to use the content. Most content can be easily acquired: one can easily rent or buy a Hollywood movie on videotape and thereafter digitize it. Acquiring the rights to such a movie, however, are a different story. *See infra* Part II (discussing major problems for multimedia developers in acquiring rights to use content).

23. *See* SCOTT, *supra* note 5, § 1.02, at 12-15 (listing problems associated with licensing pre-existing works); James Daly, *Multimedia: A Royal(ty) Mess*, COMPUTERWORLD, July 16, 1990, at 43, 43, 47 (discussing problems faced by multimedia developers); Allen R. Grogan, *Acquiring Content for New Media Works*, COMPUTER LAW., Jan. 1991, at 2, 2 (discussing multimedia project and explaining reasons for slow and difficult market development); Paul Karon, *Electronic Publishing Faces Legal Traps over Copyrights*, INFOWORLD, March 9, 1992, at S70, S70 (detailing problems over acquiring rights because of content owners' fears and because of conflicts between CD-ROM publishers and content owners); Sean Silverthorne, *High Anxiety*, PC WK., June 28, 1993, at A1, A32 (addressing problems for multimedia developers in acquiring rights and suggesting ways to cope successfully with such problems).

24. *See infra* notes 105-09 and accompanying text (discussing reasons why acquiring rights to existing content is most desirable option). The reasons include: (1) the expense of creating original content, (2) the demand for multimedia based on content with which people are familiar, (3) the necessity of using existing content for educational purposes, (4) the fact that multimedia technology makes using existing content very easy, and (5) the fact that there is a surplus of existing content not being used for any purpose. *Id.*

25. *See* Orenstein, *supra* note 8, at S35-S36 (explaining high expense of creating content); Shandle, *supra* note 16, at 50 (articulating fact that acquiring rights is not easy venture). In addition, content in the public domain may be dated and limited, while abandoning a project altogether is a waste of resources and deprives the public of a creative enterprise.

26. *See* VAUGHAN, *supra* note 19, at 55 (mentioning risk of breaking law and expense of acquiring rights).

copyrighted and the copyright owners have the exclusive right to create derivative works.[27]

Although copyright law gives authors, in this case "content holders," exclusive rights with regard to their work, there is an affirmative defense to an action for infringement of these exclusive rights known as "fair use."[28] This doctrine of fair use allows others in certain circumstances "the right to use the protectible material in the copyrighted work without liability of infringement."[29] The likely success of a fair use defense by multimedia developers who use the content of others is debatable.[30] This issue has yet to be tested in court[31] or answered in print.[32] In fact, until a recent Supreme

---

27. *See* 17 U.S.C. § 106 (1988 & Supp. V 1993) (listing exclusive rights of copyright owners); *see also id.* § 101 (defining derivative work). Congress defined a derivative work as follows:

> [A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, *or any other form in which a work may be recast, transformed, or adapted.* A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

Id. (emphasis added).

28. *See id.* § 107 ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright."). In deciding whether the use of another's work is a fair use, Congress has asked courts to consider the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the copyrighted work. *Id.*; *see also infra* Part III.C-F (providing in-depth discussion of fair use doctrine).

29. Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955).

30. *See* Orenstein, *supra* note 8, at S36 (explaining that multimedia developers believe their uses of content are fair uses because multimedia packages contain only small pieces of others' works). Orenstein also notes that "[m]ultimedia developers—and other users of digitized data—may try to cloak their activities in fair use protections, but should not count on succeeding." *Id.*; *see also* Edward Morris, *Nashville Summit Mulls Boundaries of Copyright Law*, BILLBOARD, May 29, 1993, at 23, 23 (arguing that copyright law is being "stretched to breaking point"). "[F]air use . . . is the most serious legal issue raised by the large capacity of CDs. . . . Since many optical publications are compiled for educational purposes, for instance, their publishers may argue that the inclusion of unlicensed material is covered by fair-use protection." *Id.*; SCOTT, *supra* note 5, § 9.35, at 93-101 (discussing fair use doctrine for benefit of multimedia developers and suggesting that developers try to avoid litigation). Still others have argued that the multimedia revolution will not occur if people are allowed to infringe copyrights. *See* John Markoff, *In a World of Instant Copies, Who Pays for Original Work?*, N.Y. TIMES, Aug. 9, 1992, at D18 (quoting Denise Caruso, editor of *Digital Media*, as stating: "[A] way has to be found to protect data if this revolution is going to be real."); James E. Rush, *In the Name of Access: The Economics of Information Dissemination*, BULL. AM. SOC'Y INFO. SCI., Dec./Jan. 1993, at 13, 13 (arguing that "incredible technological ability to violate the intellectual property rights of another is truly fearsome" and "[a]s these practices become more widespread and more widely accepted, capital simply will not be risked to disseminate data, thereby seriously restricting the flow of data we all want and need"); *The Networked States of America*, FUTURIST, Nov.-Dec. 1993, at 58, 58-59 (stating that "[i]n order to make a national network attractive to publishers . . . it will be crucial to protect copyrighted materials").

31. To date, there are no reported cases applying the fair use doctrine in the multimedia context. There are, however, three cases worth mentioning that foreshadow the presence of these issues in future cases. *See* Sega Enters. v. Maphia, 857 F. Supp. 679, 688 (N.D. Cal. 1994)

Court case, *Campbell v. Acuff-Rose Music*,[33] the fair use doctrine was in desperate need of clarification.[34] The Court's decision in *Campbell* has provided guidance to the legal community by following the lead of another case, *American Geophysical Union v. Texaco Inc.*,[35] noted for its sensitive application of the fair use doctrine[36] and affirmed just months ago by the Second Circuit.[37]

This Comment will explore whether, given the unique characteristics and likely uses of multimedia, and the particular problems encountered by multimedia developers, the fair use doctrine can serve as a justifiable defense to copyright infringement when a multimedia developer uses content without paying for the rights.[38] This Com-

---

(finding it unlikely that defendant computer bulletin board operator who copied plaintiff's video-games will succeed at trial with fair use argument); Playboy Enters. v. Frena, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993) (holding that there was no fair use where computer bulletin board operator displayed *Playboy* magazine's photographs); *see also Music Publishers File Class-Action Against Compuserve for Infringement*, Pat., Trademark, & Copyright Law Daily (BNA), Dec. 27, 1993, *available in* LEXIS, BNA Library, BNAPTD File [hereinafter *Music Publishers*]. Music publishers claimed that Compuserve infringed their copyrights by allowing users to upload (give to the computer network) and download (take from the computer network) their songs. Frank Music Corp. v. Compuserve Inc., No. 93 Civ. 8153 (JFK) (S.D.N.Y. filed Nov. 29, 1993), *cited in Music Publishers, supra*; *see also Who's Playing My Song?*, BUS. WK., Dec. 20, 1993, at 50, 50 (reporting on lawsuit against Compuserve).

32. *Cf.* Heather J. Meeker, *Multimedia and Copyright*, 20 RUTGERS COMPUTER & TECH. L.J. 375 (1994) (discussing copyright and multimedia, but not fair use doctrine); Rick G. Morris, *Use of Copyrighted Images in Academic Scholarship and Creative Work: The Problems of New Technologies and a Proposed "Scholarly License"*, 33 IDEA J.L. & TECH. 123 (1993) (discussing fair use of content by scholars using new technologies, but not discussing fair use of content by software developers, which is focus of this Comment); Robert D. Sprague, *Multimedia: The Convergence of New Technologies and Traditional Copyright Issues*, 71 DENV. U.L. REV. 635 (1994) (focusing generally on copyright issues and multimedia).

33. 114 S. Ct. 1164, 1171 (1994) (clarifying fair use doctrine and acknowledging necessity of case-by-case analysis in considering fair use). This case determined that a rap-parody using the song "Pretty Woman" constituted a fair use. Campbell v. Acuff-Rose Music, 114 S. Ct. 1164, 1179 (1994).

34. *See infra* Part III.E (stating that courts have misread statutory language of fair use defense, and have taken language from two Supreme Court decisions out of context).

35. 802 F. Supp. 1, 11-18 (S.D.N.Y. 1992) (holding that infringement in question was not fair use after careful application of four fair use factors), *aff'd*, 37 F.3d 881 (2d Cir. 1994).

36. *See* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 706 n.173 (1993) (referring to *Texaco* as example of case that correctly applies fair use doctrine). The district court's "sensitive balancing" has to do with its attentiveness to the historical development of the fair use doctrine and to its ability to place in perspective recent developments in the law, specifically statements found in two Supreme Court cases. *Cf. Campbell*, 114 S. Ct. at 1171 (discussing historical development of fair use doctrine and clarifying language of Court's statements in Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 566 (1985), and Sony Corp. v. Universal City Studios, 464 U.S. 417, 449 (1984)).

37. American Geophysical Union v. Texaco Inc., 37 F.3d 881 (2d Cir. 1994), *aff'g* 802 F. Supp. 1 (S.D.N.Y. 1992).

38. It is important to note that the purpose of this Comment is not to invite multimedia developers to use other people's content without negotiating rights and payment. Instead, the purpose is to raise the issue of fair use and analyze its potential application to multimedia development.

ment concludes that a multimedia developer could successfully assert the fair use defense under the present and foreseeable circumstances.[39] Part I describes multimedia's characteristics, market, and common uses. Part II presents the unique problems that multimedia developers have encountered in trying to acquire the rights to use content. Part III discusses the U.S. copyright law, with particular emphasis on the fair use doctrine as articulated by the district and circuit courts in *American Geophysical Union v. Texaco Inc.*[40] Finally, Part IV analyzes whether, under current statutory and judicial law, the fair use doctrine is applicable to multimedia developers' use of unlicensed content.

I. MULTIMEDIA TECHNOLOGY

There are several features common to multimedia and its development. First, the characteristics of multimedia technology are standard.[41] Second, multimedia developers face the same market for their creative goods, which includes a growing number of entities with the requisite hardware and the requisite interest.[42] Third, the types of uses, as seen to date, generally fall into the same few categories.[43] Finally, the content needs of most developers generally do not vary.[44] Each of the above mentioned features is relevant in analyzing whether

---

Additionally, this Author sees little difference between a multimedia developer's acquiring of digital content by accessing computer databases or by scanning content directly into a personal computer. In both cases, the question is: Does the developer have a valid argument against copyright infringement? There is, however, a distinct copyright issue with regards to computer networks such as the Internet. As Professor Jaszi explains:

> A battle is shaping over the future of the Internet. On the one side are those who see its potential as a threat to traditional notions of individual proprietorship in information, and who perceive the vigorous extension of traditional copyright principles as the solution. On the other side are those who argue that the network environment may become a new cultural "commons," which excessive or premature legal control may stifle . . . .

Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 320 (1992); *see also* Allman, *supra* note 14, at 60, 61 (discussing Internet and its relation to new information superhighway).

39. This Author does not pretend to represent the views of all, or even most, multimedia developers. Indeed, those developers who are or have become "content holders" will probably not treat the arguments in this Comment kindly.

40. 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994).

41. *See infra* Part I.A (discussing five essential characteristics of multimedia and describing hardware used in development of multimedia software).

42. *See infra* Part I.B (discussing growing supply of and demand for multimedia software).

43. *See infra* Part I.C (discussing three current uses for multimedia: entertainment, books, and education). This section is especially important because the fair use defense against copyright infringement relies heavily on the way in which the alleged infringer used the content. *See, e.g., infra* Part IV (analyzing potential legal ramifications if content is used for socially useful purpose and/or used to make profit).

44. *See infra* Part I.D (discussing use of content by multimedia developers).

the use of content would be fair.[45]

A. *Characteristics*

Attorney Michael D. Scott suggests that any definition of multimedia must contain five essential characteristics.[46] First, multimedia involves more than one media.[47] Second, multimedia is adaptable[48] for a variety of different uses.[49] Third, multimedia can be delivered through three sources: CD-ROM,[50] computer networks, and high-definition television (HDTV).[51] Fourth, multimedia information is stored in digital form.[52] Fifth, multimedia is interactive;[53] with a mouse or other device,[54] the user makes choices and changes the presentation of information on the display screen. In addition to the

---

45. *See* 17 U.S.C. § 107 (1988 & Supp. V 1993) (presenting statutory fair use defense to copyright infringement); *infra* Part IV (applying fair use analysis to multimedia technology).

46. SCOTT, *supra* note 5, § 1.01, at 4-6 (listing five essential characteristics of multimedia and explaining that each characteristic, without others, would skew definition).

47. SCOTT, *supra* note 5, § 1.01, at 4. For example, a printed book is a single media work; however, a printed book with photographs may be said to have more than one media. *Id.* Likewise, an audio recording is a single media work; however, when a music CD is sold with printed lyrics, this CD may now be deemed "multimedia." *Id.* The characteristic of multiple media, therefore, can create a slippery slope of overinclusion if taken as the sole characteristic in defining what constitutes multimedia. *Id.*

48. SCOTT, *supra* note 5, § 1.01, at 4 (defining adaptability as being "suitable for many different applications, including professional services, education, training, sales, and entertainment").

49. *See infra* Part I.C (discussing three major uses of multimedia: entertainment, books, and education).

50. *See* FREDERICK HOLTZ, CD-ROMS: BREAKTHROUGH IN INFORMATION STORAGE 1 (1989) (describing CD-ROM (Compact Disc-Read Only Memory) as optical disc, measuring 4 3/4 inches in diameter, capable of storing text, audio, animation, photographs, or video).

51. SCOTT, *supra* note 5, § 1.01, at 5 (listing three information storage and retrieval systems that can be used to deliver multimedia and arguing that other such delivery systems, like motion pictures (which technically deliver multiple media) fall outside scope of definition of multimedia). Despite the existence of three delivery systems for multimedia, this Comment is primarily concerned with CD-ROM because there has been extensive CD-ROM multimedia development, whereas extensive computer network and HDTV multimedia progress is still years away. *But see infra* note 86 (discussing several interactive multimedia systems currently being delivered through television).

52. SCOTT, *supra* note 5, § 1.01, at 5-6 (stating that multimedia's "digital" characteristic allows for uses of content "never envisioned by the creators of the underlying works"). Content in digital form can be easily manipulated. *Id.* at 6. Although certainly not permanent, words, sentences, and works in digital form may be "fixed in a tangible medium of expression," thus giving rise to copyright protection. *See infra* Part III.B (discussing U.S. copyright law's fixation requirement).

53. SCOTT, *supra* note 5, § 1.01, at 6 (defining interactive works as those that allow users to "affect the work's performance"). Interactivity is not just "seeing" or "hearing," it is "doing." *Id.*

54. SCOTT, *supra* note 5, § 1.01, at 6. Another device allowing interactivity is the touch screen. For example, at the U.S. Holocaust Museum, visitors using the museum's multimedia software can search through video (containing survivors' interviews), text (describing various topics on the Holocaust), photographs (containing people, items, and places) and music (recorded during the 1940s).

characteristics listed above, multimedia is non-linear;[55] a user is not forced to "go," or more precisely, "read" in the case of text or "see" in the case of video, from A to B to C . . . to Z. Rather, the user can *choose* to go from A to B, or to C, or from B to A and then to D, or to A1, or to Z23. Given this quality, each person who uses multimedia will rarely use it in the same way as another.[56]

Presently, multimedia benefits greatly from a process known as digital compression, a technique that allows full motion video to be stored in a way requiring far less storage space than in the past, thus facilitating its inclusion in a multimedia package.[57] Digital compression also facilitates the transmission of data, be it text or video, over computer networks and phone lines.[58] The marriage of digital compression and CD-ROM gives the multimedia developer the ability to store a tremendous amount of information. One CD-ROM can hold 250,000 pages of text, thousands of images, or seventy-four minutes of audio;[59] the CD-ROM's storage capacity is greater than that of hundreds of floppy disks.[60]

Multimedia software delivered on CD-ROM requires CD-ROM hardware, known as a CD-ROM drive.[61] Generally, this drive attaches to one's personal computer.[62] The multimedia developer uses a

---

55. Duggan, *supra* note 1, at 20, 21. "Non-linear" describes a way of retrieving information so that the user retrieves information not necessarily as the author meant for it to be retrieved, i.e., from start to finish, but in any order the user wants it to be retrieved. Literally, "non-linear" means "not having to do with lines"; multimedia frees the user from moving in a straight, pre-ordained line. *Id.*

56. Shandle, *supra* note 16, at 50. One argument offered by multimedia developers suggests that it is unfair for content owners to charge high prices for the use of their content, particularly when no one knows how often users of a multimedia package will actually use that content, if at all. *Id.* An example might better explain this point. If a multimedia package contains several thousand photographs, the chances of a particular photograph being seen by any one user is small. While the photograph may be significant to the photographer, it becomes a very small piece of the multimedia work. Thus, multimedia developers argue they should not have to pay large sums of money for "bricks" when they are in the business of building "walls." *See* Orenstein, *supra* note 8, at S36 (discussing this argument). Unfortunately for multimedia developers, the Supreme Court has rejected this type of argument. *See infra* note 218.

57. For a discussion of how digital compression works, see Ron Goldberg, *The Big Squeeze*, POPULAR SCI., Nov. 1993, at 100, 100-03. *See also* Steve Rosenthal, *MegaChannels*, NEWMEDIA, Sept. 1993, at 38, 38-46 (describing compression of digital signals and its expected effect on cable television).

58. Rosenthal, *supra* note 57, at 46. Indeed, the mergers between companies in the entertainment and communication fields are occurring because these companies envision our multimedia future and understand that they must combine content with a way to deliver the content. As mentioned earlier, multimedia content can be delivered on CD-ROM or over computer networks and HDTV. *Id.*

59. HOLTZ, *supra* note 50, at 1.

60. SCOTT, *supra* note 5, § 1.03, at 19 (discussing large storage capacity of CD-ROM).

61. SCOTT, *supra* note 5, § 1.03, at 24-25.

62. SCOTT, *supra* note 5, § 1.03, at 25. Some companies, such as Phillips, are marketing stand alone players (CD-I) that work with a television set. *Id.*

scanner to "copy" text and images into the computer and then stores them as digital images.[63] The multimedia developer also uses special software, called an authoring language, to combine the various media for multimedia packages and productions, thereby allowing the developer to arrange the material in an infinite number of ways.[64] Using a video toaster, a relatively inexpensive piece of hardware, a multimedia developer (or scholar, or anyone for that matter) can edit video using his or her personal computer for inclusion in a multimedia package.[65]

B. Increasing Use

1. Increasing number of CD-ROM titles

Software developers, in particular, are taking advantage of CD-ROM and multimedia technology. The number of CD-ROM titles[66] is growing at an impressive rate, doubling every year.[67] Just six years ago, only 200 titles were marketed,[68] while today at least 10,000 are available.[69] This increase demonstrates the high demand and growing market for multimedia products. The increasing market for multimedia will have ramifications both on the likelihood of litigation and on one of the four factors of fair use, the effect of the use on the copyrighted work's potential market.

2. Increasing sales of CD-ROM and CD-ROM drives

Consumers also play a part in driving the revolution forward. In 1988, consumers purchased 100,000 CD-ROM discs.[70] In 1992, that number reached two million.[71] At the end of 1993, the value of CD-

---

63. SCOTT, *supra* note 5, § 1.03, at 17.

64. *See* VAUGHAN, *supra* note 19, at 15.

65. VAUGHAN, *supra* note 19, at 17; *see also* Morris, *supra* note 32, at 128 (describing scholars' ability to manipulate video using computers).

66. A CD-ROM "title" simply refers to the software package itself. *Cf.* Peter Jerram, *CD-ROM Titles Explosion*, NEWMEDIA, June 1994, at 40, 41. One should note that not all CD-ROM packages would fit the definition of multimedia. For example, although CD-ROM can be used to store multiple media, it also may be used to store only one media, such as text. A CD-ROM with only text would not be considered multimedia. SCOTT, *supra* note 5, § 1.01, at 4.

67. Kent Gibbons, *More Customers Tapping More Power as PC Makers Thrive on Sound, Video*, WASH. TIMES, Dec. 23, 1993, at B7 (discussing exceptional growth of CD-ROM markets).

68. Terre Haute, *Digital Audio Disc Corporation Celebrates Production of 50 Millionth CD-ROM Disc*, PR NEWSWIRE, Dec. 2, 1993, *available in* LEXIS, News Library, PRNEWS File (maintaining that few foresaw current proliferation of CD-ROM titles).

69. Jerram, *supra* note 66, at 41 (listing several estimates as to number of CD-ROM titles available).

70. Evan I. Schwartz, *Scrolled Any Good Books Lately?*, BUS. WK., Sept. 7, 1992, at 61, 61 (discussing explosion in CD-ROM sales and stating that retail sales in CD-ROM are expected to grow by 80% per year).

71. *Id.*

ROM sales reached almost six billion dollars.[72]

Further, in 1992, U.S. consumers purchased 14.5 million personal computers.[73] In 1993, one-third of all such sales included CD-ROM drives.[74] It is estimated that eight percent of American homes now contain a multimedia-ready personal computer,[75] and it can only be anticipated that the proportion containing CD-ROM technology will continue to grow.[76] As more people invest in CD-ROM drives, the market for multimedia packages grows.

3. Increasing number of strategic alliances between large corporations

Many thought that "merger mania" died with the 1980s. Nevertheless, the quest to fulfill Americans' multimedia desires (and to make money in the meantime)[77] has fueled the creation of powerful, strategic corporate alliances.[78] The nature of these alliances and the

---

72. *CD-ROM Explosion Creates Multimedia Millionaires*, PR Newswire, Dec. 14, 1993, *available in* LEXIS, News Library, PRNEWS File (citing JO-ANNA JACOBS, CD-ROM FACT BOOK (1993) [hereinafter CD-ROM FACT BOOK]). It is worth noting here that Jacobs divides CD-ROM titles into four categories: information and reference (which grew at a rate of 136% in 1993), non-commercial (40% increase), consumer and edutainment (50% increase), and integrated learning (80% increase). *See id.*

73. Peter Burrows, *There's No Place Like Home. Just Ask PC Makers*, BUS. WK., Sept. 6, 1993, at 80, 80.

74. Russell Blinch, *Consumers Snap Up Multimedia PCs*, Reuter Bus. Rep., Dec. 17, 1993, *available in* LEXIS, News Library, REUBUS File (reporting that multimedia and CD-ROM are in high demand and finding consumers willing to pay for latest technology); *see also* Jerram, *supra* note 66, at 40 (stating that 8.3 million CD-ROM drives were shipped in 1993, representing 141% increase over 1992).

75. Bruce Schwartz, *CD-ROMers: Plugged in or Unglued?*, USA TODAY, Nov. 14, 1994, at D1, D2.

76. Bunnell, *supra* note 14, at 1 (predicting huge increase in multimedia use). Realize, however, that the numbers for CD-ROM drives are much higher if worldwide statistics are considered. *See News*, THE CDROM REP., Nov./Dec. 1994, at 8 (estimating, for 1994, worldwide installed base of computers at 121 million, CD-ROM drives shipped at 17.5 million, and computers with CD-ROM drives at 23 million).

77. *See* Stefanac, *supra* note 13, at 40 (stating that, in 1991, interactive entertainment (arcade games and computer games) generated $10 billion in revenues, as compared with $5 billion generated by movie tickets, and that this fact has given profit-seeking corporations incentive to enter field of interactive entertainment).

78. *See* Landler, *supra* note 14, at 112 (stating that, as of July 12, 1993, corporations had formed at least 348 alliances "in pursuit of multimedia services"). Some of the major players include Time Warner and its new partner, U.S. West (a Baby Bell that purchased 25% of Time Warner for $2.5 billion). *Id.* at 113. Together they are ready to spend $5 billion to lay down fiber-optic "multimedia ready" wire. *Id.* Bell-Atlantic is also prepared to spend its share in rewiring. *See* Andrew Kupfer, *The Race to Rewire*, FORTUNE, Apr. 19, 1993, at 42, 60 (pronouncing that Bell Atlantic will replace all copper wire in New Jersey with fiber-optic wire by 2010). The largest proposed multimedia merger involved Bell Atlantic's planned buyout of TCI (Tele-Communications) for $26 billion worth of stock. *See* John Burgess & Paul Farhi, *The Makings of a Multimedia Marriage*, WASH. POST, Oct. 17, 1993, at H1. These corporations hoped to bring the multimedia future sooner than expected. This deal collapsed, however, in February 1994, as a result of falling stock prices and FCC price rollbacks. Paul Farhi & Sandra Sugawara, *Hurdles Slow Information 'Superhypeway,'* WASH. POST, Apr. 7, 1994, at A1. Regardless of that failure, the mergers will continue. *See* John Burgess, *Will the Failure of One Romance Spoil It for*

media's coverage reveal that corporations are positioning themselves to take advantage of huge expected returns from interactive multimedia.[79] Many corporations are preparing for multimedia through networks and HDTV, while some, like Sony, MCA, and Paramount, are actively pursuing the CD-ROM market.[80]

In addition to forming alliances, businesses "are spending millions of dollars to acquire rights to such 'content' as music, film, video, photos, animation and art for development of multimedia products."[81] This multimedia boom must be taken into account in the analysis of the fair use doctrine's applicability to the new technology.

C. Uses

Large corporations and independent developers create primarily three types of multimedia software. Though they often overlap,[82] these uses may be summarized as entertainment, books, and education. The success of a fair use defense will depend, in part, on the use for which the multimedia software is created.

1. Entertainment

Interactive entertainment is one of the largest markets for multime-

---

Others?, WASH. POST, Feb. 25, 1994, at A1 (quoting many who believe that mergers between content owners and delivery system owners still make financial sense). Even if merger mania gives way to tough FCC regulations, the multimedia revolution will be fueled by smaller companies. *See* Amy Harmon, *Say You Want a Multimedia Revolution? Bold Techno-Wizards Program a New Industry*, WASH. POST, Oct. 24, 1994, at F21 (describing ventures of thousands of multimedia entrepreneurs).

79. *See generally* Kupfer, *supra* note 78, at 42-61 (describing corporations' "race to rewire" United States with fiber-optic cable in order to increase their share of multimedia market); Stefanac, *supra* note 13, at 40-48 (discussing corporations' desire to take advantage of multimedia technology).

80. *See* Stefanac, *supra* note 13, at 44 (stating that Sony and MCA are attending to CD-ROM game players, while Paramount is focusing on CD-ROM edutainment).

81. Villeneuve & Kaufman, *supra* note 5, at S1. Several of the large corporations buying rights to content include Apple Computer, Inc., IBM, Inc., Microsoft Corp., Sony Corp., The Walt Disney Co., and Time-Warner Inc. *Id.*; *see also* Stefanac, *supra* note 13, at 48 (stating that interest in interactive multimedia has exploded and that "[t]here's a feeding frenzy"). Most of the corporate alliances are being formed between those who own content and those who have a means to deliver the content. Some content companies are merging with companies that will deliver via computer network and HDTV. Others are merging with companies that will deliver via CD-ROM. *See id.* at 43 (reporting that Matsushita, one maker of computer hardware, spent $6 billion to purchase MCA and Universal Pictures, two giant content holders, to create multimedia for recently-released interactive gaming system, 3DO). On the one hand, these alliances help create a market. On the other hand, these alliances leave the small, independent multimedia developer little content with which to work.

82. *See infra* Part I.C.3 (discussing educational multimedia). Almost every multimedia package is "entertaining." The technology's "newness," its brilliant visuals and sounds, and the wealth of information that can be stored using the technology will help turn educational into recreational. This phenomenon has already occurred with the advent of "edutainment," software that combines play with learning.

dia; many corporate deals are made to advance corporations' entertainment market share.[83] The large storage capacity of CD-ROM, and the advanced graphics and sound capabilities of multimedia, enable developers to create highly desirable computer games.[84] Many of these games contain snippets of digital video, usually no more than thirty seconds long.[85] The best selling CD-ROM titles during the 1993 winter holiday season were computer games.[86] In addition to computer games, many consumers use multimedia for pornography.[87] With a mouse or other pointing device the user can interact with computer characters (usually women), and, depending on the user's choices, can experience a number of alternate sexual fantasies.[88]

2. Books

Developers also produce electronic versions of classics and best-sellers, and for good reason: electronic books easily allow the user to find references to particular words or paragraphs, allow the user to mark pages with electronic bookmarks, and provide the user with interactivity.[89] The user has the ability to click on a word in the book and get either its definition or an animated graphic. In this

---

83. *See generally* Stefanac, *supra* note 13, at 43-48 (discussing interactive entertainment plans of, among others, Sony, MCA, Time-Warner, Paramount, Fox, Disney, and Apple); *see also* SCOTT, *supra* note 5, at xxx (discussing rise in stock of 3DO gaming system and revenues from coin operated video games).

84. Stefanac, *supra* note 13, at 40.

85. *See* Jeffrey J. Rose, *Multimedia is Making Computer Sales Merry*, SAN DIEGO TRIB., Dec. 21, 1993, at 1 (stating that Rebel Assault, by LucasArts, in which player commands X-Wing fighter out of movie STAR WARS, contains digital video-clips from movie).

86. *See id.* (detailing retail boom in multimedia products). Additionally, CD-ROM will soon, as reported a few months ago, store full-length movies. *See* Kathleen O'Steen, *Little Disc Sparks Big Problems for Studios*, VARIETY, Nov. 7-13, 1994, at 7, 16. Corporations are also planning to send digitally compressed movies over fiber-optic wires. *See* Kupfer, *supra* note 78, at 56 (relating test survey that found that movie spending would increase three to five times if user could order movies at any time). This "video on demand," where people can order a movie through their television set at any time, is already being tested in several locations throughout the world. *See id.* at 60 (stating that AT&T, USWest, and TCI are going to test market "video on demand" in Denver, Colorado); Landler, *supra* note 14, at 112 (reporting that Groupe Videotron currently delivers movies on demand in Eastern Canada to hundreds of thousands of customers); Mark Landler, *Bell Atlantic Reaches for the Stars—In Hollywood*, BUS. WK., Sept. 27, 1993, at 134, 134 (reporting that Stargazer, an interactive mall, is currently in use in some Virginia homes); Deirdre Carmody, *Time's Chief Sees Need for Magazines to Evolve*, N.Y. TIMES, Oct. 12, 1993, at D15 (relating that Time Warner would install Full Service Network in 4000 Orlando homes in April 1994).

87. *See* Suzanne Stefanac, *Sex and the New Media*, RECORDER, Sept. 8, 1993 (describing uses of interactive multimedia for pornography).

88. *Id.*; *see also* Michael Krantz, *Extremely User Friendly*, NEW YORK, Nov. 21, 1994, at 23, 23-24 (stating that pornographic multimedia is driving multimedia revolution forward). It is also worth noting that the sale of pornographic tapes fueled the video revolution. *Id.* at 23.

89. *See* Schwartz, *supra* note 70, at 61 (discussing reasons that multimedia/electronic books are increasing in popularity and describing types of books being produced).

way, a fictional book can be educational, in that the user can access additional, perhaps factual, information that might otherwise disrupt a linear reading of the text.[90] In addition to multimedia books, corporations have also marketed multimedia magazines.[91]

3. Education

Colleges and universities throughout the country use CD-ROM.[92] Many of these educational institutions also use multimedia.[93] But perhaps multimedia's most important educational use is for school children. Between 500,000 and one million school-age children are educated at home,[94] and as part of their education they use computers, on-line services, and multimedia.[95] "Edutainment," which combines entertainment with education, is a fast growing market for multimedia developers.[96] Its continuing development may be important in terms of the copyright fair use doctrine, as courts generally look more favorably on uses of content in educational works than on uses of content in commercial, non-educational works.[97]

Many businesses also use multimedia to train employees for the very same reasons: multimedia creates a very efficient learning environ-

---

90. Schwartz, *supra* note 70, at 61. This is precisely what a user can do with the electronic version of Michael Crichton's 1990 bestseller JURASSIC PARK: at the click of a mouse, the user can call to the screen either animated dinosaurs or scientific data regarding gene-splitting. *Id.*

91. *See* Deirdre Carmody, *For Magazines, a Multimedia Wonderland*, N.Y. TIMES, Oct. 11, 1993, at D1 (reporting that magazine companies are placing executives in multimedia departments because "the hottest expansion areas for magazines are on-line services and CD-ROM technology" and stating that *Newsweek* has quarterly on CD-ROM).

92. *See* Duggan, *supra* note 1, at 20 (stating that, by end of 1988, 80% of universities had acquired CD-ROM).

93. For a detailed analysis of current uses of multimedia technology for education, see MATTHEW E. HODGES & RUSSELL M. SASMETT, MULTIMEDIA COMPUTING: CASE STUDIES FROM MIT PROJECT ATHENA 29-36 (1993). For a detailed projection of future uses, see PARKER ROSSMAN, THE EMERGING WORLDWIDE ELECTRONIC UNIVERSITY (1992).

94. *See Classless Society: Home Schooling*, ECONOMIST, June 11, 1994, at A24, A24 (explaining that according to some, there are 500,000 or more home-schooled children); Nancy Gibbs, *Home, Sweet School: Seeking Excellence, Isolation, or Just Extra "Family Time," More and More Parents Are Doing the Teaching Themselves*, TIME, Oct. 31, 1994, at 62, 63 (same).

95. *See* David C. Churbuck, *The Ultimate School Choice: No School at All*, FORBES, Oct. 11, 1993, at 144 (asserting that today many home-schooled children are being taught at home because computer technology is efficient learning tool and home is supportive learning environment). "[R]ecent advances in multimedia and compact disc technology have combined to give parents a wealth of good, albeit expensive, computer based teaching aids." *Id.*

96. *See* Robert McCarthy, *CD-ROM Spins into Schools*, ELEC. LEARNING, Oct. 1993, at S10, S10 (discussing types of CD-ROM programs being used in classrooms). As one would imagine, "edutainment" multimedia appeals to children because the children learn in an environment of colors, sounds, and interactive play. *Id.*

97. *See* Encyclopedia Britannica v. Crooks, 447 F. Supp. 243, 251 (S.D.N.Y. 1978) (referring to education and science as "two traditionally favored areas of endeavor" in terms of finding fair use).

ment.[98] The importance of multimedia as a learning tool cannot be underestimated. Studies show that people learn more when several senses are stimulated, and multimedia does just that.[99]

D. Use of Content

Most multimedia packages are made up of pieces of information.[100] The software contains content snippets derived from a variety of sources. Packages can use information from multiple sources because of CD-ROM's huge storage capacity[101] and the fact that the software holds multiple media.[102] For example, multimedia encyclopedias derive their content from separate volumes of text, computer animations, films, and photographs. The typical user never accesses a large percentage of this content, but it is there if the user wants it.[103] Some multimedia packages contain content from only a few sources, but most developers use multimedia as the ultimate compilation.[104]

II. PROBLEMS WITH DEVELOPMENT

Although all multimedia developers must create new packages from scratch, there are several reasons why most of the content in these packages is created by someone else. Multimedia developers generally do not have the financial or temporal resources to create enough

---

98. *See* Lura K. Ruma, *Holiday Inn Worldwide Puts Out the Welcome Mat for Multimedia*, MANAGING OFF. TECH., Oct. 1993, at 53, 53 (reporting that Holiday Inn Worldwide, world's largest hotel chain, will become one of largest corporate users of interactive multimedia technology for purpose of training its employees).

99. *See, e.g.*, Churbuck, *supra* note 95, at 144 (relating that 1990 survey places homeschoolers in 84th national percentile in reading and 81st national percentile in math); McCarthy, *supra* note 96, at S10 (quoting Richard Pollak, publisher of *Videodisc Compendium*: "The CD technology is a natural for education. . . . With text, sound, pictures, and video, it hits all the learning modes; and CD's interactivity makes it engaging for students to learn in-depth.").

100. *See* Orenstein, *supra* note 8, at S36 (stating that multimedia projects consist of segments of content from variety of sources and stating that this fact alone may give rise to fair use arguments by multimedia developers).

101. HOLTZ, *supra* note 50, at 1 (discussing fact that one CD-ROM can store equivalent of 1500 floppy discs).

102. SCOTT, *supra* note 5, § 1.01, at 4. By its very definition, multimedia may contain music, sound, text, photos, video, and animation, all from different sources. *See id.* at 1-2.

103. *See, e.g.*, MICROSOFT CINEMANIA '94, INTERACTIVE MOVIE GUIDE (including complete text of LEONARD MALTIN'S MOVIE AND VIDEO GUIDE 1994 (19,000 reviews), complete text of ROGER EBERT'S VIDEO COMPANION (over 1300 reviews), 5001 NIGHTS AT THE MOVIES (2500 reviews), 4000 movie personality biographies, 2000 photographs of movie stars, video-clips from 20 movies, music from 100 songs, and 150 audible dialogue lines).

104. *See* 17 U.S.C. § 101 (1988 & Supp. IV 1994) (defining compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship").

content to fill a CD-ROM.[105] This is a direct result of CD-ROM's huge storage capacity: imagine how long it would take, and what costs would be incurred, to create 250,000 pages of text or thousands of images. Further, a wealth of content already exists, much of which is not being used for any purpose.[106] In addition, people enjoy multimedia titles, be they entertainment or educational, based on content with which they are familiar.[107] In fact, the very nature of multimedia technology begs to use pre-existing works.[108] Finally, for educational or reference purposes, it makes little sense to create original content when that content is factual in its nature.[109]

Despite the necessities and preferences for using pre-existing content, developers have experienced a myriad of problems in acquiring the rights to such content.[110] Acquiring the rights to

---

105. Grogan, *supra* note 23, at 3 (stating that slow multimedia market development is due to "expense and complexity of creating or acquiring content for new media products").

106. SCOTT, *supra* note 5, § 1.02, at 12 (stating that "[t]here are enormous vaults filled with films, television episodes, audio recordings, news-reels, photographs, etc., which could be exploited in the multimedia arena and earn substantial revenues for their owners").

107. *See* Rose, *supra* note 85, at 1 (describing best selling CD-ROM). For example, Rebel Assault, the hottest selling computer game of the 1993 winter holiday season, is based on the box-office smash STAR WARS. *Id.*

108. Ethan Katsh & Janet Rifkin, *The New Media and a New Model of Conflict Resolution: Copying, Copyright, and Creating*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 49, 55 (1992) (asserting that "[t]he copying of electronic information . . . allows it to be processed, manipulated and put to use in ways not possible with print"). Katsh and Rifkin also argue that "[a]s we become a more visually oriented culture, the redefinition of copyright begins to occur because much more of the act of creation in the future . . . will involve working with copied information." *Id.* at 58; *see also* Tad Crawford, *Standards in a Digital Age*, COMM. ARTS, Sept.-Oct. 1993, at 32, 33 ("The digital image not only eliminates originality in the sense of physical uniqueness (since the art can be reproduced an infinite number of times without any generational loss of quality), but it also challenges the concept of the individual creator's originality as the memory of the computer holds more and more appropriated imagery."); John C. Dvorak & Paul Somerson, *Hands Off That Scanner! The Media Police Are on Your Tail*, PC-COMPUTING, Nov. 1992, at 1, 1 (stating that multimedia technology invites borrowing of sounds, drawings, and film clips).

109. *See* Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991) (stating that "copyright . . . encourages others to build freely upon the ideas and information conveyed by a work"). Obviously, existing content should be used for multimedia education, but even non-commercial uses have been denied access. *See* Thomas J. DeLoughry, *Computers and Copyrights*, CHRON. HIGHER EDUC., Nov. 24, 1993, at A15 (asserting that institutions, Library of Congress included, have been unable to develop multimedia teaching tools using existing content because of difficulty in acquiring rights).

110. *See* SCOTT, *supra* note 5, § 1.02, at 11-16 (listing problems multimedia developers face); Daly, *supra* note 23, at 43 (discussing business barriers that make acquiring rights laborious in multimedia context); Grogan, *supra* note 23, at 2 (discussing, in length, efforts required to acquire rights for multimedia project); Karon, *supra* note 23, at S70 (stating that process of acquiring rights for multimedia projects is difficult one); Shandle, *supra* note 16, at 50 (providing examples of failed multimedia projects because acquiring rights was impossible); Silverthorne, *supra* note 23, at A1, A32 (reporting problems that multimedia developers face in trying to assemble copyrighted material). It is worth noting that the problems that James Daly describes in his 1990 article are the same problems discussed by Sean Silverthorne in his 1993 article and that continue to this day. This Comment is one attempt to find a long-awaited solution to the multimedia mess.

copyrighted content generally requires the acquisition of a license to use the material for a specified price and purpose.[111] The chief problem that multimedia developers have faced is content holders' refusal to license any use of their content.[112] Several reasons exist for this refusal.

First, content holders fear that they will not get paid an adequate amount for their content.[113] Content holders, therefore, have taken a 'wait and see' attitude until the value of their content becomes clearer.[114] Because content is easily acquired by multimedia developers,[115] however, content holders with this attitude are potentially sacrificing great benefits, including profits from the unlicensed uses.[116]

Second, content holders fear that once the work is in digital form they will lose control.[117] This fear is a direct result of the technology; digitization makes reproduction, transmission, and the creation of derivative works very easy.[118] This fear is rational, however, only

---

111. Stephen L. Haynes, *Intellectual Property & Licensing Concerns, in* HYPERTEXT/HYPERMEDIA HANDBOOK 227, 234-35 (Emily Berk & Joseph Devlin eds., 1991) (discussing how rights are generally acquired through license).

112. SCOTT, *supra* note 5, § 1.02, at 12.

113. John Burgess, *Avoiding Highway Robbery*, WASH. POST, Nov. 29, 1993, (Wash. Bus.), at 19 ("It's a time of great confusion. . . . [T]he emerging highway is killing off time-honored notions of what a given picture, essay, word processor, trademark, or news story is worth."); *see also The Light Appears at the End of the Multimedia Tunnel*, OPTICAL & MAGNETIC REP., Apr. 1991 (quoting Bob Stein, president of Voyager, multimedia development company: "Nobody knows how much multimedia rights are worth. I can tell people how many copies of something I can sell today. But the rights holders feel that in 2 years it may be worth 50 times that amount."). This action may be rational given that large corporations are spending top dollar to acquire the rights to content. Some content holders are probably hoping to be approached in a similar manner. *See supra* Part I.B.3 (discussing acquisition of rights by large corporations).

114. SCOTT, *supra* note 5, § 1.02, at 12 (mentioning attitude of content holders towards licensing their rights).

115. *See supra* note 22 (discussing distinction between acquiring content and acquiring right to use content).

116. *See* SCOTT, *supra* note 5, § 1.02, at 13 (arguing that content holders have more to lose than gain if they deny multimedia developers opportunity to acquire rights to their content); Shandle, *supra* note 16, at 50 (quoting Tim Mott, multimedia developer: "Over the long haul . . . it is in the interest of artists . . . to come to some sort of accommodation with the computer industry, which represents a vast, untapped revenue stream.").

117. LINDA W. HELGERSON, CD-ROM: FACILITATING ELECTRONIC PUBLISHING 258 (1989) (stating that one reason why traditional publishers have shied away from CD-ROM development is ease with which others can assume control of and manipulate content); SCOTT, *supra* note 5, § 1.02, at 14 (discussing ease of copying content once in digital form).

118. Paula Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMPUTER & TECH. L.J. 323, 323-24 (1990) (arguing that current intellectual property law cannot protect works in digital form). Samuelson lists the characteristics that make such protection difficult as:

> (1) the ease with which works in digital form can be replicated; (2) the ease with which they can be transmitted; (3) the ease with which they can be modified and manipulated; (4) the equivalence of works in digital form; (5) the compactness of works in digital form; and (6) the capacity they have for creating new methods of searching

when a multimedia developer seeks to place an entire work in digital form, and is usually unjustified when a developer wants to borrow a small piece of content.[119]

Even when the content holder is willing to issue a license, problems continue to besiege the multimedia developer.[120] Assuming the licensing price is reasonable, which it generally is not,[121] the multimedia developer must work through scores of people[122] in order to acquire all the necessary rights.[123] Along these lines, there are

---

digital space and linking works together.

Id. Without legal protections, many content holders will be unwilling to license their works. *See also* Grogan, *supra* note 23, at 9 (relating fear of content holders with regards to digitization); Markoff, *supra* note 30, at D18 (discussing content holder's fear of proceeding without copyright protection in wake of digitization).

119. A 30 second video-clip, for example, would not reasonably threaten the owner of a motion picture (in economic terms) because such a short clip could not possibly supersede or be used in lieu of the original. *Cf.* William W. Fischer III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1678 (1988) (stating that amount of content used helps determine whether use was superseding, i.e., smaller amount, less likely use was superseding). Some unauthorized uses may, however, threaten the content owner because of the way in which the content is being used. For example, the content owners may object to the use of a 30 second video-clip in a pornographic multimedia package; this objection would probably be deemed reasonable. U.S. copyright law, unlike copyright laws in other countries, does not explicitly protect the "moral rights" of all authors, that is, "the right to insist that the work not be mutilated or distorted; . . . the right to be acknowledged as the author of the work and to prevent others from naming anyone else as the creator; and . . . the right to decide when and in what form the work will be presented to the public," but such rights are protected through a variety of state and federal legislation. CRAIG JOYCE ET AL., COPYRIGHT LAW § 7.07, at 610-11 (3d ed. 1994).

120. *See* Stephen I. McIntosh, *Intellectual Property Issues in Multimedia Productions*, *in* HYPTEXT/HYPERMEDIA HANDBOOK, *supra* note 111, at 243, 245-52 (discussing expense in licensing graphics, photos, film, video, music, and sound); Shandle, *supra* note 16, at 50 (demonstrating, through example, how costs of acquiring rights to content quickly becomes unreasonable for multimedia developers); *cf. generally* David L. Gersh & Sheri Jeffrey, *Structuring the Multimedia Deal: Legal Issues—Part I, Licensing in the Multimedia Arena*, CD-ROM PROF., Mar. 1993, at 36 (providing information necessary to negotiate often difficult multimedia deals); David L. Gersh & Sheri Jeffrey, *Structuring the Multimedia Deal: Licensing Issues—Part II, Licensing in the Multimedia Arena*, CD-ROM PROF., May 1993, at 108 (providing additional information necessary to negotiate often difficult multimedia deals).

121. *See* Silverthorne, *supra* note 23, at A32 (providing example of unreasonable licensing fee). The author tells the story of J. Wesley Baker, an educational multimedia developer, who approached the Ohio Historical Society to license their photographs. He was given a quote of $3 a photograph. *Id.* For a multimedia developer needing as many as 50,000 photographs, this price was clearly unreasonable. *Id.*; *see also* Daly, *supra* note 23, at 43 (discussing Rotisserie League multimedia package that died in negotiations stage because rights owners demanded nearly 50% of gross wholesale). Note that some companies, like Microsoft, can easily create a baseball multimedia package. *See* Sandra Sugawara, *Microsoft's Very Big Ballpark Estimate*, WASH. POST, May 7, 1994, at C1, C7 (discussing unveiling of Microsoft's COMPLETE BASEBALL software).

122. The chain of people with whom the multimedia developer must negotiate will vary from project to project, but the chain will most often be long. *See, e.g.*, Silverthorne, *supra* note 24, at A32 ("[T]o include a 60-second clip of Neil Simon's appearance on 'The Tonight Show' . . . [f]irst call is to Carson's agent. Then to Simon's. Then you've got to get Ed McMahon's representative, the directors' guild, the writers' guild, every member of the band and maybe other guests.").

123. *See* William H. Neukom & Robert W. Gomulkiewicz, *Licensing Rights to Computer Software*, *in* TECHNOLOGY LICENSING AND LITIGATION 775, 783-85 (1993) (listing extensive number of people with whom developer must negotiate to acquire license). The reason is simple:

generally so many potential rights holders that the developer often does not know where to begin; and even if the developer does know where to start searching for potential rights holders, the developer will not know when to stop looking.[124] Furthermore, each content holder will exist in a different industry with different ways of doing business.[125]

Notwithstanding an increase in multimedia titles,[126] the problems encountered by multimedia developers are severely hindering, or forcing the discontinuance of, multimedia projects. Moreover, it is usually the small, independent multimedia developer who is hurt,[127] because large corporate developers can at least afford to negotiate for expensive rights.[128] When multimedia developers need a particular piece of content for which they cannot obtain a license, they may be forced to either abandon their projects or use the content without licensing it.[129] This circumstance will likely lead to a great deal of litigation.[130] Will a multimedia developer, who fails to license

---

multimedia relies on more than one media, and so developers must deal with more people than the average content seeker. *Id.*

124. *See* VAUGHAN, *supra* note 19, at 126 (quoting Trip Hawkins, Chairman, Electronic Arts, Inc.: "The bottom line is that there are so many rights attached to so many of these things, with so many different people involved, that it's very complicated even to figure out if you have the right to use it in any way at all, and again that's too bad because it's just going to slow us down."); *see also* SCOTT, *supra* note 5, § 1.02, at 13 (explaining that many content holders, particularly in Hollywood, do not know what rights they own); Villeneuve & Kaufman, *supra* note 5, at S1, S18 (stating that "multimedia software developers often go into shock when they realize the number of permissions they must obtain, the number of people they must contact to do so and the multiplicity of royalties and fees they may have to pay for those permissions"); Silverthorne, *supra* note 24, at A32 (explaining how Compton's NewMedia Inc. was unable to use live performances for its interactive history of Grammy awards because project's sponsor, National Academy of Recording Arts and Sciences, did not own rights to Grammy performances and some artists could not be located).

125. *See* Grogan, *supra* note 23, at 2-3 (discussing absence of uniform technical standards and uncertainty over related standards); William Rodarmor, *Rights of Passage*, NEWMEDIA, Sept. 1993, at 49, 49 (stating that video, audio, photograph, and print industries each have their own rules and traditions for doing business).

126. *See supra* Part I.B.1 (discussing huge increase in number of multimedia titles and attributing this phenomenon to increased demand by consumers).

127. Shandle, *supra* note 16, at 53 (stating that "any developers smaller than IBM, Microsoft and Apple may have to settle for artistic material they create themselves, find in the public domain, or buy from a company that has already cleared the rights"); *see also* Villeneuve & Kaufman, *supra* note 5, at S1 (stating that large corporations spend millions of dollars in order to acquire rights). Obviously, independent developers do not have that kind of money.

128. *See, e.g.*, Richard Raysman & Peter Brown, *Multimedia Licensing*, 210 N.Y. L.J. 3, 3 (1993) (reporting that Microsoft paid $500,000 for photographic images for ENCARTA Multimedia Encyclopedia).

129. SCOTT, *supra* note 5, § 2.02, at 5 (stating that "some multimedia developers take the attitude that it is easier simply to use pre-existing material, and wait to see if anyone complains"); Orenstein, *supra* note 8, at S35 (explaining that "[m]ost developers do not have the money to produce so much content on their own and often work with existing material").

130. *See* Daly, *supra* note 23, at 47 (stating that copyright infringements will occur and that content owners will not hesitate going to court to protect their rights); Charles Morgan, *Sampled Unto Death*, NEWMEDIA, Sept. 1993, at 17, 17 (stating that "there are bound to be breakthrough

content and who uses the content in the creation of a multimedia package, have a valid fair use defense? The answer to this question cannot be found without exploring the copyright law and applying it in the multimedia context.[131]

III. COPYRIGHT LAW

A. *Purpose and Constitutional Setting*

The purpose of the copyright law is to ensure the creation and dissemination of works for the public.[132] This social benefit has been balanced and coupled with the idea that authors deserve to be compensated for their works.[133] As the argument goes, failure to compensate authors will turn them away from being authors; the public will then be harmed by the lack of resulting creations.[134] This policy is embodied in the United States Constitution: "Congress shall have Power . . . To Promote the Progress of Science and useful

---

[multimedia] works that attract larger audiences, and liberally steal imagery from Hollywood hits, which will set off a different sort of frenzy in the courts").

131. A number of non-legal solutions to the "multimedia mess" have been suggested. These include: educating users to behave ethically, Markoff, *supra* note 30, at D18; having the Software Publishers Association crack down on schools and computer users, *id.*; creating copy-protection schemes, *id.*; placing contents on CD-ROM, Orenstein, *supra* note 8, at S37; or establishing an ASCAP-like arrangement, Morgan, *supra* note 130, at 17. Despite the potential success of these solutions, none would deal with the present question of what to do with a multimedia developer who uses another's content.

132. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 558 (1985) ("'[T]he ultimate aim [of copyright law] is . . . to stimulate [the creation of useful works] for the general public good.'" (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975))).

133. *See* JOYCE ET AL., *supra* note 119, § 1.05, at 15 (stating that there are two arguments justifying intellectual property rights). The natural law argument justifies intellectual property rights on the grounds that a person has the right to reap the benefits from one's labors. *Id.* In addition, because the creation of works generally benefits society, authors of creative works are entitled to control their works and should be compensated for their creation. *Id.* at 16. Second, the economic argument justifies such rights on the grounds that without economic incentive many authors will stop being authors as a matter of necessity. *Id.* at 18-20. Thus, copyright owners are rewarded for their creativity and their productivity. *Id.* at 18. But the rewards are limited by regulating the duration and scope of the rights. *Id.* at 19. The American system of copyright has, for the most part, relied on the economic justification. *Id.* at 17.

134. *See* American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 9 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994). The court stated:

> If authors are guaranteed the opportunity to profit from their writings, they will have an incentive to create, and the public will ultimately reap the resulting expansion of human knowledge. In contrast, if no copyright protection were granted and others were permitted to copy freely works of authorship, authors would find it difficult to earn a living from their writings; their energies would be diverted to other pursuits by the need to feed their families; consequently, the public's right to appropriate the works of authors would make the public poorer through the loss of the benefit of the authors' endeavors.

Id.; *see also Harper & Row*, 471 U.S. at 546 (explaining that the copyright law "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").

Arts, by securing for limited Times, to Authors and Inventors, the exclusive right to their respective Writings and Discoveries."[135]

B. The Copyright Act of 1976

Congress first exercised that power[136] by enacting the Copyright Act of 1790, followed more than a century and a half later by the Copyright Act of 1976.[137] The 1976 statute grants authors the limited monopoly called for by the Founders.[138] Authors have the exclusive rights to reproduce their work, make derivative works based upon their work, distribute their work, perform their work, and display their work in public.[139] In order for these protections to attach, the work in question must be original and fixed[140] in a tangible state.[141]

C. Common Law Fair Use

Notwithstanding the legal protections provided to authors, courts recognized that sometimes the policy behind copyright law, that of

---

135. U.S. CONST. art. I, § 8, cl. 8.

136. *Id.*

137. Among other things, the 1976 Act provided, for the first time, protection for unpublished works. Copyright Act of 1976, Pub. L. No. 94-533, § 303, 90 Stat. 2541. Subsequent amendments to the Act have recognized changing technologies and their effect on the law. *See* JOYCE ET AL., *supra* note 119, § 1.04, at 13. One such change was the 1980 amendment to § 117 adding computer programs to the list of works receiving protection. Act of Dec. 12, 1980, ch. 38, sec. 10, § 117, 94 Stat. 3015, 3028 (1980).

138. U.S. CONST. art. I, § 8, cl. 8.

139. 17 U.S.C. § 106 (1988 & Supp. V 1993). Section 106 of the Copyright Act states:

> Subject to sections 107 through 119, 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;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by the sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, 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.

Id.

140. *See* Midway Mfg. Co. v. Artic Int'l, 547 F. Supp. 999, 1007-08 (N.D. Ill. 1982) ("[T]he fixation requirement . . . does not require that the work be written down or recorded somewhere exactly as it is perceived by the human eye. Rather, all that is necessary . . . is that the work is capable of 'being reproduced . . . with the aid of a machine or device.'" (citation omitted)).

141. *See* 17 U.S.C. § 102(a) (Supp. V 1993) ("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.").

advancing science and the arts,[142] could best be served by allowing an otherwise unauthorized use of a work as long as the use was fair.[143] Justice Story, in *Folsom v. Marsh*,[144] stated the issue of fair use as "whether this [use] is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs."[145] Justice Story outlined several factors to be considered: "[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[146] In explaining what might constitute a fair use, Justice Story was clearly expressing a preference for secondary uses that did not supersede the original, such as a work that borrows heavily from the original for the purpose of criticism.[147] Such uses have subsequently been labeled "transformative" uses.[148]

D. Statutory Fair Use

Congress incorporated the fair use doctrine in § 107 of the Copyright Act of 1976.[149] In addition to deferring to the common law history of fair use,[150] Congress adopted Justice Story's characterization of the relevant factors in determining what is a fair use of copyrighted materials.[151] Section 107[152] states that uses of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use),

---

142. *See* Berlin v. E.C. Publications, 329 F.2d 541, 543 (2d Cir. 1964) (explaining that copyright protection "is designed 'to promote the Progress of Science and useful Arts,' and financial reward guaranteed to the copyright holder"), *cert. denied*, 379 U.S. 822 (1964).

143. *Id.* at 544 (explaining that unauthorized uses may be justified if they further this objective).

144. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

145. Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901). Justice Story explained:

> [A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Id. at 344-45.

146. *Id.* at 348.

147. *Id.* at 344-45.

148. *See infra* Part III.F.2.a.i-ii (discussing uses that transform original work).

149. 17 U.S.C. § 107.

150. Section 107 was inserted into the Copyright Act of 1976, but was not meant to "change, narrow, or enlarge" the common-law defense of fair use. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

151. *Id.*

152. 17 U.S.C. § 107.

scholarship, or research, is not an infringement of copyright."[153] The section outlines four factors "to be considered" in determining "fair use." The factors are:

> (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.[154]

E. Putting "Fair" Back Into "Fair Use"

The fair use doctrine is often problematic.[155] The problems stem from a variety of sources: the flexibility of the doctrine,[156] the overemphasis of some factors at the expense of others,[157] and the presence of the listed examples of fair uses in § 107.[158] There are two aspects of fair use, however, on which all will agree. First, at its heart, the doctrine is "an equitable rule of reason";[159] no matter how one weighs the four factors enumerated in the Copyright Act, one must apply the fair use doctrine fairly.[160] Second, the doctrine requires that cases be judged on their own particular facts; the factors listed in § 107 are not a checklist, but must be balanced.[161]

Some courts have overemphasized the potential fair uses listed in § 107,[162] while others have overemphasized the Supreme Court's

---

153. *Id.*

154. *Id.*

155. *See* Patry & Perlmutter, *supra* note 36, at 670-71 (describing problems resulting from misapplication of fair use doctrine).

156. *See* Patry & Perlmutter, *supra* note 36, at 667-68 (stating that fair use doctrine is thorny because in each case "courts can finely calibrate . . . the equities between the parties . . . and the . . . public policies").

157. *See* Patry & Perlmutter, *supra* note 36, at 670-71 & n.19 (stating that courts have overemphasized certain factors over others leading to mixed results).

158. *See* Patry & Perlmutter, *supra* note 36, at 670-71 (discussing how misinterpretation of statute has altered traditional approach in some courts).

159. Sony Corp. v. Universal City Studios, 464 U.S. 417, 448 (1984); *see also* H.R. REP. NO. 1476, *supra* note 150, at 65-66, *reprinted in* 1976 U.S.C.C.A.N. at 5679-80 (stating that fair use doctrine "is an equitable rule of reason").

160. *See* Fischer, *supra* note 119, at 1668-69, 1692-95 (describing fair use doctrine and its equitable nature).

161. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 549 (1985) (explaining that "[s]ection 107 requires a case-by-case determination whether a particular use is fair").

162. For example, in *Association of American Medical Colleges v. Mikaelian*, the court explained that in order for a use to qualify as a fair use, the user "must show that [the defendant] is engaged in one of the activities enumerated in § 107." Association of Am. Medical Colleges v. Mikaelian, 571 F. Supp. 144, 151 (E.D. Pa. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984). The court argued that the defendant did not show involvement in "criticism, comment, news reporting, teaching" and therefore the use was presumptively unfair. *Id.* Congress' use of the words "for

statement in *Sony Corp. v. Universal City Studios*[163] that "if . . . used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair."[164] Accordingly, defendants have been unable to escape a finding of copyright infringement when a proper analysis would have revealed a fair use.

Fortunately, the Supreme Court's recent decision in *Campbell v. Acuff-Rose Music*,[165] appears to adequately safeguard litigants from future fair use abuses by the courts.[166] The Court reversed the erroneous trend of emphasizing the commercial nature of the use and stated that the "elevation of one sentence from *Sony* to a *per se* rule . . . runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication."[167]

The Court's decision parallels a fairly recent district court case, *American Geophysical Union v. Texaco Inc.*,[168] which has been applauded for its sensitive balancing of the four fair use factors.[169] Just a

---

purposes such as," however, would weigh against such a reading. *See Harper & Row*, 471 U.S. at 561 (stating that "[t]his listing was not intended to be exhaustive . . . or to single out any particular use as presumptively a 'fair' use"); *see also* Patry & Perlmutter, *supra* note 36, at 670 ("Despite Congress's desire that the courts continue to chart their own development of fair use, the very presence of the statutory provision has inhibited many from doing so. Rather than looking to the plain language of section 107 . . . courts have isolated and overemphasized individual words and phrases, taking as limitations on their power language intended as guidance."). "[N]ews reporting" and "teaching" were listed as examples of potential fair uses because in prior common-law cases these uses were "productive ones" in the sense of creating something new. *Id.* at 674-75.

163. 464 U.S. 417 (1984).

164. Sony Corp. v. Universal City Studios, 464 U.S. 417, 449 (1984). This "profit presumption," coupled with the Court's statement in *Harper & Row* that the "potential effect on the market" is the most important factor, has led to "a double whammy" from which the defendant cannot escape. *Harper & Row*, 471 U.S. at 566; *see, e.g.*, Acuff-Rose Music v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (combining both propositions to reject fair use argument), *rev'd*, 114 S. Ct. 1164 (1994). Once the use is determined to be commercial, it affects the market, and it is therefore unfair. *See* Patry & Perlmutter, *supra* note 36, at 706-08 (discussing "Double Whammy" effect on fair use defense in commercial setting).

165. 114 S. Ct. 1164 (1994).

166. For an understanding of the problems with fair use adjudication, see Patry & Perlmutter, *supra* note 36, at 671 (hoping that Supreme Court would "reverse the damage" done by misapplication of fair use doctrine). The Supreme Court, responding to Patry's and Perlmutter's wishes (and citing to their Article five times), confidently stated that "[t]he language of the statute [section 107] makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry." Campbell v. Acuff Rose Music, 114 S. Ct. 1164, 1174 (1994). Further, the Court stated that "[i]f . . . commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107." *Id.* While the decision dealt with one specific type of work, that of a parody, courts are not likely to limit the Court's holding to parody cases alone. *See, e.g.*, American Geophysical Union v. Texaco Inc., 37 F.3d 881 (2d Cir. 1994) (relying on *Campbell* in nonparody fair use case).

167. *Campbell*, 114 S. Ct. at 1174.

168. 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994).

169. *See* Patry & Perlmutter, *supra* note 36, at 706 & n.173 (citing Judge Leval's opinion as one that engages in "sensitive balancing [of] fair use demands"); *see also* Gloria C. Phares, *The Unlicensed Photocopying of Copyrighted Works: 'Texaco' Deals Blow to For-Profit Businesses*, 9 J.

few months ago, the Second Circuit affirmed the district court's "ultimate determination,"[170] differing only somewhat from the district court's legal analysis.[171] Both the district court opinion and the circuit court opinion will be used as the paradigmatic templates for this Comment's legal analysis. There are four reasons to focus on the *Texaco* opinions. First, and most importantly, the technology described in the *Texaco* case, photocopying, is closely analogous to multimedia technology.[172] Second, the district court opinion's spirit is unmistakably present within the Supreme Court's *Campbell* opinion.[173] Third, the circuit court's opinion is the first non-parody fair use decision to take advantage of the Court's opinion in *Campbell.* Finally, the opinions' legal analyses are persuasive given their

---

PROPRIETARY RIGHTS 4 (1992) (stating that *Texaco* case will be used by other courts as persuasive authority because of this district court's importance in publishing and copyright).

170. American Geophysical Union v. Texaco Inc., 37 F.3d 881, 886 (2d Cir. 1994).

171. *Id.*

172. Photocopying technology and multimedia technology have similarities relevant to this discussion of intellectual property rights. First and foremost, both technologies make copying of works extremely easy. Further, both technologies are affordable and accessible to the public. Photocopying technology and multimedia technology allow for the creation of derivative works, some of which will be infringing and others of which will be noninfringing, and both can be used for commercial or noncommercial enterprises. Interestingly, the circuit court's discussion of photocopying could just as easily have been applied to multimedia:

> As a leading commentator astutely notes, the advent of modern photocopying technology creates a pressing need for the law "to strike an appropriate balance between the authors' interest in preserving the integrity of copyright, and the public's right to enjoy the benefits that photocopying technology offers."

Id. at 885 (quoting 3 NIMMER ON COPYRIGHT § 13.05[E][1], at 13-226).

Of course, these analogies could also be drawn between video-tape recording technology and multimedia technology, which would logically lead to the conclusion that *Sony Corp. v. Universal City Studios* is the case to use as a backdrop. While this argument seems attractive, the *Sony* case is inappropriate to use as this Comment's focus as that case deals with whether the video-tape recording technology itself was an infringement of the copyrights and not whether the uses of the video-tape recorders were infringements. *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 442, 456 (1984) (stating issue as "whether the Betamax [video-tape recorder] is capable of commercially significant noninfringing uses" and concluding that "Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights"). This Comment is not concerned with whether multimedia technology is an infringement in-and-of itself, but whether particular uses of multimedia technology would constitute infringements or be deemed fair uses. Even had this Author chosen to deal with the issue presented in *Sony,* he would have concluded that, under *Sony,* multimedia technology would not be a contributory infringer because the technology allows for noninfringing uses.

173. Although the Court in *Campbell* does not specifically cite the *Texaco* district court opinion, the Court cites to its author, Judge Leval, no less than 13 times. Campbell v. Acuff Rose Music, 114 S. Ct. 1164 (1994). Further, a comparison of the two cases reveals a striking similarity, particularly in their focus on the origin and purpose of the fair use doctrine. *Compare Texaco,* 802 F. Supp. 1 (satisfying Patry and Perlmutter by deciding case based on both statutory and common law principles) *with Campbell,* 114 S. Ct. 1164 (considering both statutory factors and common law principles in its fair use analysis). *Campbell* now makes this analysis the "law of the land." *Cf. Texaco,* 37 F.3d at 890-91 ("The District Court properly emphasized that Texaco's photocopying was not 'transformative.' After the District Court issued its opinion, the Supreme Court explicitly ruled that the concept of a 'transformative use' is central to a proper analysis under the first factor." (citation omitted)).

adherence to the fair use doctrine as it developed at common law.[174]

F. American Geophysical Union v. Texaco Inc.: *The District and Circuit Court Opinions*

1. *Facts and issue*

A scientist researcher in a profit-seeking corporation photocopied eight articles from scientific and technical journals[175] to be used for his research.[176] The corporation subscribed to these journals,[177] some of which were published by plaintiffs. Plaintiffs claimed that defendant corporation infringed its copyrights.[178] The district court stated the issue of the case as whether the copying was a fair use under 17 U.S.C. § 107.[179] Although both courts ultimately decided against the corporation,[180] their analyses are informative and well-reasoned.

2. *Analysis*

a. *The purpose and character of the use*

i. *The district court*

The court began its inquiry with a discussion of the historical development of the fair use doctrine.[181] Courts have generally focused on whether the use under consideration was "productive."[182] The court emphasized that "productive" was not meant in the sense

---

174. As mentioned earlier, § 107 of the Copyright Act of 1976 was not intended to "change, narrow, or enlarge" the common-law defense of fair use. *See* H.R. REP. NO. 1476, *supra* note 150, at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5659. Judge Leval, in the district court opinion, clearly recognized this fact. While many courts have overemphasized statements made by the Supreme Court in reference to § 107's first and fourth factors, Judge Leval exhumed the history of the common law and carefully explained that commercial uses have as good a chance as being found "fair" as noncommercial uses. *See Texaco*, 802 F. Supp. at 11-12. Likewise, Chief Judge Newman, in relying on the Supreme Court's most recent discussion of the fair use doctrine in *Campbell*, recognized the importance of the secondary use being "transformative." *Texaco*, 37 F.3d at 890-91.

175. *Texaco*, 802 F. Supp. at 4. Although many of Texaco's scientists engaged in this practice, only the copying habits of one, Dr. Donald H. Chickering, were examined. *See Texaco*, 37 F.3d at 883 (discussing parties' significant stipulation "that fair use trial would focus exclusively on the photocopying of particular articles by one Texaco researcher").

176. *Texaco*, 37 F.3d at 883.

177. *Id.*

178. *Id.*

179. *Texaco*, 802 F. Supp. at 4.

180. *See id.* at 28; *Texaco*, 37 F.3d at 899.

181. *Texaco*, 802 F. Supp. at 9-11.

182. *Id.* at 11.

of a use put to socially beneficial ends, but rather whether the use "transformed" the original.[183] Thus, uses that did not supersede or take the place of the original were preferred over uses that did.[184]

In judging the purpose and character of the use, courts need not focus completely on whether the use is commercial or noncommercial.[185] Finding that, not only did the Supreme Court not overturn the common law doctrine favoring productive/transformative uses,[186] but, in fact, affirmatively reinforced this doctrine in *Harper & Row, Publishers v. Nation Enterprises*,[187] the court placed the profit presumption in perspective: "What has emerged since the Supreme Court's *Sony* decision seems to be a two-tract pattern of interpretation of the first factor by reason of either (1) transformative (or productive) nonsuperseding use of the original, or (2) noncommercial use, generally for a socially beneficial or widely accepted purpose."[188] The court went on to explain that, even in cases where the defendant is motivated by profit, a transformative secondary use would favor the defendant on the first factor.[189] The court reasoned that all publishers of "textbooks, newspapers, criticism, historical books, medical and scientific materials"[190] have profit motives, and their uses are all commercial.[191]

In applying the law to the facts before it, the court found that Texaco's use was neither transformative nor noncommercial.[192] First, Texaco's use was nontransformative because it simply made photocopies of the originals.[193] Texaco did not vary the dimensions

183. *Id.* (calling word "productive" problematic "because it risked the misconception that it encompassed any copying for a socially useful purpose"). "Productive" and "transformative" are synonymous in this fair use context.

184. *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

185. *Id.* at 12 (explaining Supreme Court's language in *Sony* that suggested only noncommercial uses could be fair uses and placing concept of "commercial use" in historical perspective).

186. *Id.*

187. 471 U.S. 539 (1985).

188. *Texaco*, 802 F. Supp. at 12; *see* Sony Corp. v. Universal City Studios, 464 U.S. 417, 449 (1984) (noting that complete emphasis on commercial use "would presumptively be unfair"); *see also* Patry & Perlmutter, *supra* note 36, at 678 (arguing that common law focused on "commercial or noncommercial" aspect of use in determining whether or not it was a fair use).

189. *See Texaco*, 802 F. Supp. at 13 ("[A]lthough courts ritualistically proclaim, almost as a mantra, that every commercial use is 'presumptively' unfair, that presumption is easily overcome by a transformative, nonsuperseding use."); *see also* Consumers Union of United States v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (stating that most written works, whether educational or noneducational, are printed for profit, and thus their commercial nature will not defeat fair use defense), *cert. denied*, 469 U.S. 823 (1984).

190. *Texaco*, 802 F. Supp. at 12.

191. *Id.*

192. *Id.* at 13.

193. *Id.*

of the photocopy,[194] nor were the copies of the originals "employed as part of a larger whole, for some new purpose."[195] Second, although Texaco's copying was done by scientists and used "to assist in socially valuable scientific research,"[196] the research was done for corporate commercial gain.[197]

ii. The circuit court

The court began its analysis by focusing on the circumstances under which the photocopying took place, finding that the researcher primarily intended the copies for archival purposes.[198] The court, responding to one of Texaco's arguments on appeal,[199] stated that the district court should have made a distinction between a direct commercial use and an intermediate use.[200] As Texaco did not receive "direct or immediate commercial advantage" from its photocopying, Texaco's for-profit status should not have tipped the scales towards finding infringement on this factor.[201]

Courts must look, instead, to whether the secondary use "can fairly be characterized as a form of 'commercial exploitation,' i.e., when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material."[202] At the same time, fair use may be found when the secondary use "produces a value that benefits the broader public interest."[203]

---

194. *Id.* Although technically the court's statement regarding different dimensions is dictum, this very factor was taken into account in an earlier case involving photographs used in a magazine without permission. *See* Haberman v. Hustler Magazine, 626 F. Supp. 201, 205 (D. Mass. 1986) (stating that photographs were reproduced substantially in full, although they were partially cropped and reduced in size).

195. *Texaco*, 802 F. Supp. at 13.

196. *Id.* at 16.

197. *Id.*

198. American Geophysical Union v. Texaco Inc., 37 F.3d 881, 887-88 (2d Cir. 1994).

199. Texaco made three arguments on appeal with respect to the first factor: that the district court overstressed Texaco's status as a for-profit organization; that the district court overemphasized the importance of the transformative/productive concept; and that the district court ignored the "reasonable and customary" nature of the use. *Id.* at 888-89.

200. *Id.* at 889 (explaining direct commercial effect as one where corporation's "profits, revenues and overall commercial performance" are tied to allegedly infringing behavior).

201. *Id.* But note that here the court may have misinterpreted the district court's opinion, which rightly placed more emphasis on the lack of transformative quality of the use than on Texaco's for-profit nature. *See supra* Part III.F.2.a.i (discussing district court's analysis of first statutory factor). And even so, the circuit court in *Texaco* still considered the for-profit nature of Texaco to be important. *Texaco*, 37 F.3d at 889-90.

202. *Texaco*, 37 F.3d at 890.

203. *Id.* The court, in the quote that follows, implicitly laid out a balancing test reminiscent of the balance struck with the creation of the fair use doctrine: "The greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair." *Id.*

The court next recognized the district court's proper emphasis on the productive/transformative concept and the centrality of this concept to fair use analysis.[204] Agreeing with the district court, the court held that Texaco "merely transform[ed] the material object embodying the intangible article that is the copyrighted original work."[205] The court recognized, however, some independent value in physically transforming articles in a journal to freestanding copies;[206] however, the archival nature of the use tipped the scales against the corporation.[207] Finally, the court agreed with the district court and held that the photocopying was not reasonable because reasonable licensing arrangements were available.[208]

b. The nature of the copyrighted work

i. The district court

On the second factor, the nature of the copyrighted work, attention should focus on whether the content was the kind that should receive copyright protection.[209] In this context, it is easier to envision a continuum of works. Copyright protection is designed least for something like a bank robber's note, more for a factual work,[210] and most for a creative, fictional work.[211]

The district court found that on the one hand, the scientific journals at issue required copyright protection in order to earn revenue.[212] At the same time, however, and more importantly, the works at issue were factual in their nature, consisting of scientific research, charts, and graphs.[213] The district court concluded that this factor favored the corporation.[214]

---

204. *Id.* at 890-91 (stating that use is transformative if it does more than just reproduce original, adds some additional value, and if purpose is different from purpose of original) (citing Campbell v. Acuff-Rose Music, 114 S. Ct. 1164, 1171 (1994)).

205. *Id.* at 891.

206. *Id.* at 891-92 (describing independent value in having less bulky, more accessible articles that, if damaged in lab, would not cause corporation problem in replacing them).

207. *Id.* at 892.

208. *Id.*

209. *Texaco*, 802 F. Supp. at 16.

210. *Id.* at 17 (citing Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287 (1991) (stating that facts do not receive copyright protection)).

211. *Id.* The court states that "there are other types of writings that enjoy copyright protection although they are made for purposes incompatible with the public benefit objective of the copyright law." *Id.*

212. *See id.* (explaining that circulation of scientific journals is small and that copyright law is necessary for their distribution).

213. *Id.*

214. *Id.*

ii. The circuit court

The circuit court recognized that the articles were products of creative endeavors.[215] The court held, nonetheless, that the factual nature of the articles accorded them less protection and thus, like the district court, found that this factor favored Texaco.[216]

c. The amount and substantiality of the portion used

i. The district court

Generally, the reproduction of an entire work "'militat[es] against a finding of fair use.'"[217] When an entire work is not reproduced, courts will look to whether the copied material appropriated the "heart" of the original.[218] In applying the law to the facts, the district court found that the corporation copied entire articles.[219] The court rejected the argument that each article was just one-eighth of the copyrighted work. Texaco argued that because the publishers had registered each journal issue with the Copyright Office, and not the individual articles, only four percent of each issue was copied when one article was copied.[220] The court noted, however, that each article was a separately authored work, that the authors assigned their rights to the publisher, and that in doing so they expected their works to receive protection.[221]

ii. The circuit court

The circuit court agreed with the district court that the corporation copied entire works.[222] Noting that this weighs against a finding of fair use, the court nonetheless expressed some sympathy for the argument that third factor analysis is designed to help determine whether a secondary use supersedes the original.[223] But the court stated that the factor also helps explain the purpose of the secondary use: here, because the researcher copied entire articles, it was more

---

215. *Texaco*, 37 F.3d at 893.
216. *Id.*
217. *Texaco*, 802 F. Supp. at 17 (quoting Sony Corp. v. Universal City Studios, 464 U.S. 417, 450 (1984)).
218. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 565 (1985) (asserting that defendant cannot misappropriate content merely because "it is insubstantial with respect to the infringing work" (emphasis omitted)).
219. *Texaco*, 802 F. Supp. at 17.
220. *Id.*
221. *Id.*
222. *Texaco*, 37 F.3d at 893-94.
223. *Id.* at 894.

likely that he did so to create a personal library and not to use the articles for spontaneous lab use.[224]

d. The effect of the use on the market for the copyrighted work

i. The district court

On the fourth factor, the court referred to the Supreme Court's formulation in *Harper & Row*: "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'"[225] The plaintiff need not show present loss of profits; as long as the plaintiff would have received "significantly higher revenue but for the defendant's uncompensated copying,"[226] the fourth factor weighs against the defendant. Although the court noted that the Supreme Court in *Harper & Row* had called the fourth factor "the single most important,"[227] the court accepted defendant's argument that to overemphasize the fourth factor would deny fair use to uses that, after weighing the other three factors, deserved to be deemed fair.[228] The court continued by pointing out that the Supreme Court gave each factor importance.[229]

The court concluded that had the corporation not made "free" photocopies, plaintiffs would have received substantial revenue.[230] The corporation could have either ordered more subscriptions, negotiated a license, or ordered photocopies from document services, any one of which would have led to increased revenue.[231] The court found that there were convenient and reasonably priced procedures to acquire the material.[232]

ii. The circuit court

The court first noted that "there is neither a traditional market for, nor a clearly defined value of, individual journal articles."[233] The

224. *Id.*
225. *Texaco*, 802 F. Supp. at 20 (quoting *Harper & Row*, 471 U.S. at 568 (internal quotation marks and citation omitted)) (emphasis omitted).
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 21.
230. *Id.* at 19.
231. *Id.*
232. *Id.*
233. *Texaco*, 37 F.3d at 895 (emphasis omitted); *see also id.* ("As a result, analysis of the fourth factor cannot proceed as simply as would have been the case if Texaco had copied a work that carries a stated or negotiated selling price in the market.").

court found that there was not enough evidence as to whether the photocopying of articles affected the market for journal subscriptions.[234] But, following the district court's lead, the court also analyzed the effect of the use on the potential licensing revenues.[235] To assess the effect, courts should look only at potential licensing fees "for traditional, reasonable, or likely developed to be markets."[236] The court explained: "[I]t is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use."[237] The circuit court reasoned that because of the existence of a reasonable licensing scheme, lost licensing revenue is appropriate to take into account for a fair use analysis, and concluded that the publishers lost potential revenue.[238]

e. Equitable rule of reason

i. The district court

Though technically not a fifth factor, the court noted that the fair use doctrine is characterized as an "equitable rule of reason"[239] and therefore looked to other factors not enumerated in § 107 of the Copyright Act.[240] The court discussed the typically heavy transaction costs associated with acquiring a license.[241] The court found that when transaction costs are extremely high, most users simply do not pay the price.[242] Such practices become unacceptable when, and only when, a reasonable licensing structure is in place. The district

234. *Id.* at 896-97. The court made some telling observations regarding the fourth factor:

> Were the publishers able to demonstrate that Texaco's type of photocopying, if widespread, would impair the marketability of journals, then they might have a strong claim under the fourth factor. Likewise, were Texaco able to demonstrate that its type of photocopying, even if widespread, would have virtually no effect on the marketability of journals, then it might have a strong claim under this fourth factor.

Id. at 896.

235. *Id.* at 897-99.

236. *Id.* at 898. If the copyright holder has no intention or ability to enter the market for which its work was used by the alleged infringer, then the alleged infringer will have a good fourth factor argument. *Id.*

237. *Id.*

238. *Id.* at 899.

239. Sony Corp. v. Universal City Studios, 464 U.S. 417, 448 (1984).

240. *Texaco*, 802 F. Supp. at 21-22.

241. *Id.* at 23 (stating that "[a]n honest user, who would be happy to pay a reasonable royalty, faces the problem of the enormous administrative difficulty and expense of making an agreement with the copyright owner for a license to make a single copy").

242. *Id.* at 24 (stating that "[b]ecause of the outlandishly wasteful delay, expense, and inconvenience involved in negotiating such a transaction, virtually no user has been willing to do it").

court noted that "*Texaco's strongest arguments* may be that photocopying has become 'reasonable and customary,' . . . and that failure to permit it would substantially harm scientific research . . . . *Those arguments depend, however, on the absence of a convenient, reasonable licensing system.*"[243]

ii. The circuit court

The circuit court accepted in full the district court's findings with respect to equitable considerations.[244]

3. Conclusion

a. The district court

The court held that the corporation's use was not a fair use under § 107 of the Copyright Act.[245] Three out of the four factors were decided against the defendant.[246] The factors are for guidance, however, not tabulation, and the court seemed to place a good deal of emphasis on the doctrine's equitable nature, devoting many pages of the opinion to equitable arguments.[247] According to the district court, the fair use defense will not succeed when there is an easy and reasonable way to license copies, and when entire copies are appropriated for commercial use.

b. The circuit court

Like the district court, the circuit court found for the publishers on three of the four fair use factors[248] and concluded that the existence of a reasonable means to license copies prevented the corporation from succeeding on its fair use claim.[249]

---

243. *Id.* at 25 (emphasis added) (citations omitted).
244. *Texaco*, 37 F.3d at 899.
245. *Texaco*, 802 F. Supp. at 28.
246. *Id.* at 16, 17, 21 (holding against defendant on first, third, and fourth factors).
247. *See id.* at 21-28 (devoting seven pages of opinion to exploration of equities).
248. *Texaco*, 37 F.3d at 899 (holding against defendant/appellant on first, third, and fourth factors); *see supra* note 246 and accompanying text (discussing district court's tabulation).
249. *Texaco*, 37 F.3d at 899 (stating that "[i]f Texaco wants to continue the precise photocopying we hold not to be a fair use, it can . . . use the licensing schemes now existing or some variant of them"). The court refused to reach the issue of whether fair use would be appropriate had there not been such a licensing scheme. *Id.* As will be discussed in Part IV, that is currently a major issue for multimedia developers because no such licensing scheme exists.

IV. MULTIMEDIA AND FAIR USE

In order to determine whether a multimedia developer's use of content is a fair one, the four factors and other equitable considerations, as analyzed in the *Texaco* opinions, must be applied. While the fair use doctrine relies heavily on the facts of each case, the common features of multimedia, the type of multimedia development that has occurred to date, and the problems associated with multimedia development allow for and invite application of the four factors.

A. The Purpose and Character of the Use

Although noncommercial CD-ROM titles experienced growth in the past year,[250] the fastest growing multimedia markets involve entertainment and education. Both entertainment and education are commercial in that they are marketed to make a profit.[251] Courts will look less favorably on uses that provide the secondary user with "direct or immediate commercial advantage" and that can be easily characterized as commercial exploitation.[252] A court rigidly construing this concept will likely find developers' uses to be commercially exploitative; however, the developers' gain must be weighed against the public's benefit.[253] The public's benefit will likely be greater for commercial uses that are educational (even if having an entertainment component) to uses which are not, as in pornographic multimedia.[254] Certainly, any demonstration that the multimedia use in question is educational will affect the court's decision.

Regardless of the probable commercial nature of the use, the use may be "transformative."[255] The district court suggested that changing the dimensions of the original could be a transformative/

250. *See* CD-ROM FACT BOOK, *supra* note 72, at 1 (listing growth rate of commercial and noncommercial CD-ROM titles over past year).

251. In order for the use to be commercial, it is not necessary for the multimedia developer to be working for Paramount or Sony; even the small, independent developer may be engaging in commercial uses, in the same way that textbook publishers engage in them. *Cf. Texaco*, 802 F. Supp. at 7-8 (explaining how under Copyright Clearance Center, Inc., large corporations, as well as document delivery services and small businesses, seek authorization to copy).

252. *Texaco*, 37 F.3d at 890.

253. *Id.*

254. *See* Patry & Perlmutter, *supra* note 36, at 679-82 (arguing that commercial aspect should be viewed on continuum). Patry and Perlmutter go on to state that courts should not judge the particular work, but the particular genre. *Id.* at 681 n.64.

255. *Texaco*, 802 F. Supp. at 11 (explaining that this use is one that produces new result or purpose, one that "transform[s], rather than supersede[s], the original"); *Texaco*, 37 F.3d at 890-92 (discussing "transformative" use).

productive use.[256] A scanned photograph, in digital form, is likely to be altered by the multimedia developer. An image may be cropped, shortened, widened, colored, or morphed.[257] Parts of an image's foreground or background may be removed.[258] There is a chance that courts will find that such a use is a transformative one.

Another possible way to make a use transformative is to incorporate the content as part of a larger work.[259] Most multimedia software is designed to be a larger work, compiled of bits and pieces from others' works.[260] For example, one photo used in a multimedia package could be as little as 1/10,000 of the entire work,[261] and likewise one page of text could be as little as 1/250,000 of the entire work.[262] Because of multimedia's standard features, a multimedia developer's use of content is arguably a transformative use.

A content holder may argue that the use is superseding in that the "secondary use involves merely an untransformed duplication" that adds "little or nothing more than the value that inheres in the original."[263] For example, if a photograph were scanned, with no other significant changes, and an exact copy of the original were printed, this use might be superseding. In fact, with regard to digital media, photographers fear this use the most.[264]

There are, however, a few counter points. First, above and beyond the formal "transformation" that a court may find to have occurred, it is possible to argue that the secondary use will almost always add

---

256. *Texaco*, 802 F. Supp. at 13; *see also Texaco*, 37 F.3d at 891 (discussing value of secondary use in containing "different character").

257. *See* Jeff Prosise, *Morphing: Magic On Your PC*, PC MAGAZINE, June 14, 1994, at 325, 325-30. "Morphing" software allows several images to be digitally merged. *Id.* at 325. When animated, one image miraculously changes into another. See, for example, the closing segments of Michael Jackson's "Black or White" video and the movie TERMINATOR 2: JUDGMENT DAY. *Id.* These effects are not limited to humans. For instance, in a recent commercial by Exxon, Inc., a car "transforms" into a tiger. *Id.*

258. *See* Katsh & Rifkin, *supra* note 108, at 57 (displaying photographs that have been digitally altered). Digital media presents an endless creative possibility of what can be done to original content. *Id.* at 56.

259. *Texaco*, 802 F. Supp. at 13.

260. *See* Villeneuve & Kaufman, *supra* note 5, at S18 (stating that multimedia development usually involves using pieces of content from variety of sources).

261. *See supra* Part I.A (discussing fact that CD-ROM can hold thousands of images). Generally, one image is a small fraction of a completed multimedia project. Although the number of images that a developer incorporates in his project will vary from project to project, the number will still need to be large to take advantage of CD-ROM's large storage capacity. If not, the developer may as well place his software onto a regular computer disk.

262. *See supra* Part I.A (discussing fact that CD-ROM can hold hundreds of thousands of text pages).

263. *Texaco*, 37 F.3d at 891.

264. *See* Neukom & Gomulkiewicz, *supra* note 123, at 784 (noting that photographers fear alterations of work in digital form); *see also* Samuelson, *supra* note 118, at 324-26 (pointing out that exact copy of original may be reproduced over and over with little cost to user).

value not found within the original.[265] For example, the digital clip from a movie used in a multimedia encyclopedia could be said to add the value of instruction. The photograph scanned from a book arguably adds the value of accessibility;[266] perhaps in our digital age, manipulability of that photograph, even if not actually manipulated, would serve as independent value.[267] Second, punishing the developer of socially beneficial, or at least socially desirable, software will probably not stop the millions of people who now or will own digital equipment from using others' content; they all have the ability and desire to use that content in an infringing manner.[268] Third, some uses, such as those involving a thirty second video-clip, could in no logical way supersede or take the place of the original, full length feature film. Photographs and graphics, on the other hand, are probably in the most danger of replacement in the multimedia world.[269]

Content holders may also argue that developers' use of their content is archival in that the content is merely being stored for later use.[270] Multimedia developers could probably defeat this argument by demonstrating that they and consumers actively use the content.[271]

To date there has been a high degree of self-regulation by multimedia developers.[272] Although their concept of fair use may be somewhat rudimentary,[273] multimedia developers understand that

---

265. *Texaco*, 37 F.3d at 891.

266. *Id.* (stating that photocopies of journal articles add value of being in useful format).

267. *See supra* note 108 (discussing convergence of "copying" and creativity); *see generally* John P. Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84, 84-129 (discussing changing values and concepts in digital age). Of course, even with the added value of accessibility and manipulability, a court may find that the commercial use of the content weighs against a finding of fair use; *cf. Texaco*, 37 F.3d at 892 (finding that independent value of accessibility did not outweigh use of copies for personal library).

268. *See* Dvorak & Somerson, *supra* note 108, at 1 (arguing that consumers of computer hardware can easily copy material and see nothing wrong with doing so, particularly because it is so easy to do and because their uses are, generally, private ones).

269. Songs are probably not in danger of replacement. *See supra* note 19. *But see Music Publishers, supra* note 31 (discussing lawsuit against compuserve for allowing uploading and downloading of copyrighted songs).

270. *See Texaco*, 37 F.3d at 887 (discussing "archival"use); *see also supra* note 56 (mentioning multimedia developers' argument that some content may never be accessed by software purchaser).

271. *Texaco*, 37 F.3d at 892.

272. *See* Shandle, *supra* note 16, at 50 (explaining that, when unable to acquire rights, many multimedia developers have simply abandoned projects or changed their courses of action). Multimedia developers are also regulating themselves by consulting attorneys for advice and by learning through experience what rights are and are not acquirable. *Id.* at 53.

273. This is not necessarily the case, however, as multimedia books often contain in-depth descriptions of the copyright law. *See, e.g.*, SCOTT, *supra* note 5, §§ 9.01 to .36 (assisting reader in determining what materials are proper subject matter for copyright protection and how to

the use of an interactive game based entirely on a copyrighted book or movie would not be a fair use. It is unlikely, for example, that were a multimedia developer to use recognizable content (which will almost certainly sell more CD-ROMs) without paying for the rights, that the developer would not affix a copyright notice, giving credit to the owner of the content.[274] Fair use analysis presupposes good faith and fair dealing,[275] and affixing a notice of copyright is one way to meet that threshold.[276] Another way is to try to license material.[277] As mentioned earlier, multimedia developers have exhausted their financial and temporal resources in trying to license content.[278] For the foregoing reasons, multimedia developers are likely to have several arguments under the first factor.[279]

B. The Nature of the Copyrighted Work

In both *Texaco* opinions the district and circuit courts gave the second factor the least attention because the inquiry seems simple: is the content fictional, literary, or creative, or is the content factual, or statistical?[280] Multimedia raises questions as to how content should be classified: is the photographic image of a painting in an art-history multimedia package merely a form of creative expression, or is it now also factual, given that the importance of the work's nature lies mostly in its historical relevance?

Many photographs or videos are likely to be appropriated from the news.[281] Multimedia developers can assert that a use of newsclips is

---

protect, license, or utilize copyrighted works).

274. The threat of legal action would in all probability prevent such a use. *See* SCOTT, *supra* note 5, § 9.35 (suggesting that developers try to avoid litigation); Daly, *supra* note 23, at 47 (stating that content owners will not hesitate going to court to protect their rights). What about use of a video-clip from a film student's movie? If the developer does not provide notice, this would likely weigh against a finding of fair use.

275. Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir. 1983).

276. *See id.* at 1176 (finding lack of good faith where defendant did not give any credit to plaintiff for use of her material).

277. *Id.* (finding lack of good faith where defendant did not seek plaintiff's permission to use work).

278. *See supra* Part II (discussing problems with development of multimedia packages).

279. Multimedia developers might also argue, under the first factor, that their secondary uses are "reasonable and customary." While this argument was rejected by both the district and circuit courts in *Texaco*, the rejection stemmed from the lack of a reasonable licensing scheme. *See Texaco*, 802 F. Supp. at 25; *Texaco*, 37 F.3d at 892.

280. *Texaco*, 802 F. Supp. at 16-17; *Texaco*, 37 F.3d at 893.

281. A single frame of video appears to all naked eyes as a photograph, and has been used as such. *See* RUSSELL LIPTON, MULTIMEDIA TOOLKIT 148 (1992) (stating that newspapers routinely used single frames of CNN's Gulf War film footage as photographs). As an aside, CNN received no credit for the photos. *Id.* (explaining that film shot by CNN was published as "photographs from the front").

a fair use.[282] Generally, this second factor takes into account whether the content is important enough to be disseminated to the public. Multimedia developers will benefit the public by incorporating news video in their entertainment and educational packages.

C. *The Amount and Substantiality of the Portion Used*

Multimedia software development is creating an industry built on bits and pieces.[283] These pieces, however, might still be large enough or substantial enough for the use to be considered copyright infringement.[284] Generally, a photograph that is used will be considered a complete work. If only part of the photo were used, however, or if only a few film frames were used, this might be deemed a fair use.[285] Mathematically, if the average feature length film is ninety minutes, then a thirty second video-clip is .55% of the entire work, which as a whole is a very small amount.[286] Certainly this amount could not supersede the original film.[287] Assuming multimedia developers limit their appropriation of bits and pieces to a reasonably small amount, they would have a convincing argument under this factor.[288]

D. *The Effect of the Use on the Market for the Copyrighted Work*

In *Texaco,* both the district and circuit courts placed emphasis on the fact that had the defendant corporation paid for the copies, the

---

282. The Supreme Court has suggested that a news program would have less copyright protection than a motion picture. *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 455 n.40 (1984) (stating that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture"); *see also* Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1497 (11th Cir. 1984) (explaining that unauthorized use of news video favored defendants on second factor), *cert. denied,* 471 U.S. 1004 (1985).

283. Villeneuve & Kaufman, *supra* note 5, at S18 (noting that multimedia development oftentimes involves using pieces of content from numerous sources).

284. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 549-50 (1985) (finding that defendant's use of plaintiff's original language totaling between 300 and 400 words and constituting some 13% of defendant's article was infringement).

285. Morris, *supra* note 32, at 128 (reporting that Society for Cinema Studies considers taking 1-100 frames fair use).

286. *But see* Roy Export Co. v. Columbia Broadcasting Sys., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (concluding that taking 55 seconds out of 1 hour and 29 minute film was qualitatively substantial), *aff'd,* 672 F.2d 1095 (2d Cir.), *cert. denied,* 459 U.S. 826 (1982).

287. *See Texaco,* 37 F.3d at 894 (expressing sympathy for argument that amount and substantiality of portion used goes to whether secondary use supersedes original).

288. Too many unlicensed "borrowings," however, may add up to a substantial use, or an indication of bad faith. *See Harper & Row,* 471 U.S. at 564 (stating that amount and substantiality of portion used must be examined "in relation to the copyrighted work as a whole"); Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) (arguing that "[a]ny conclusion with respect to this factor requires analysis of both the quantity and quality of the alleged infringement"); *Roy Export,* 503 F. Supp. at 1145 (stating that substantiality of use "must be determined from a qualitative as well as quantitative point of view").

plaintiffs would have earned revenue.[289] This finding was conditioned on the existence of an adequate licensing structure.[290] To date, however, no such structure exists for multimedia.[291] Thus, while multimedia developers can get their hands on the content (by buying the movie, song, or magazine), they simply cannot afford to license the rights. Consequently, without an affordable way to license rights, no profits would accrue to the content owners.[292] Because multimedia developers have had extreme difficulty in licensing content,[293] their arguments under the fourth factor should garner sympathy.

Because the multimedia product will likely be commercial, courts may tend to presume an effect on the market.[294] Taking an example mentioned earlier, if a photograph were digitized and an exact copy were made available via computer printout, this use, "done on a large scale," would likely affect the market for the original.[295] In fact, content owners can easily point to the growing demand for multimedia to argue that any use of their content by a multimedia developer will affect their market. But this argument presupposes

---

289. *Texaco*, 802 F. Supp. at 18; *Texaco*, 37 F.3d at 897 (referring to district court's findings of fact).

290. *Texaco*, 802 F. Supp. at 18-21. Such a licensing structure is described earlier in the district court's opinion:

> The CCC [Copyright Clearance Center Inc.] is a non-profit, central clearing-house established in 1977 by publishers, authors and photocopy users which, as agent for publishers, grants blanket advance permission for a fee to photocopy copyrighted material registered with CCC, and forwards the fees collected to copyright owners, net of service charge. CCC was formed in response to a Congressional recommendation that an efficient mechanism be established to license photocopying.

Id. at 7; *see also supra* Part III.F.2.d.ii (discussing circuit court's analysis of fourth factor).

291. *See supra* Part II and accompanying notes (noting that chief problem facing multimedia developers is content holders' refusal to license any use of content); *see also infra* note 309 (discussing issue of licensing structure).

292. The alternative is to spend hundreds of thousands of dollars. Some companies have that ability; however, most do not. *See* Raysman & Brown, *supra* note 128, at 3 (noting that Microsoft paid $500,000 in fees to acquire rights to use photographic images in connection with its ENCARTA Multimedia Encyclopedia).

293. *See supra* Part II and accompanying notes (discussing problems encountered by multimedia developers when trying to license content).

294. *See* Patry & Perlmutter, *supra* note 36, at 688 (stating that "[t]oo broad an interpretation of the potential market, ... [i]f taken to a logical extreme, . . . would always weigh against a fair use, since there is always a *potential* market that the copyright owner could in theory license").

295. Use of a video-clip from a movie, however, with proper identification of the title, date, and year (and copyright notice) will likely only tease the consumer, increasing demand for the original. Imagine what would happen to sales of war movies if video-clips were shown in an interactive history of the particular war? Imagine, too, what would happen to the pocketbooks of content owners when a large corporation discovered that a multimedia war package, history or entertainment, requiring more than just a few video-clips, would be a good idea. Historical multimedia war packages do, in fact, exist. *See, e.g.*, *Review; Normandy: The Invasions of France, June 6, 1944*, CDROM REPORTER, Nov./Dec. 1994, at 15 (reviewing multimedia title that archives U.S. army's invasion of France).

either that the secondary use is superseding or that the content holder intends and/or has the ability to enter the multimedia market.[296] Perhaps the great fear of some content holders to place their work in digital form makes them literally unable to enter the market?[297]

As noted, the multimedia market is growing at a tremendous pace.[298] Eventually it may overtake the market for movies in the theaters, printed books, and other forms of current media. When the multimedia revolution occurs, content holders can either adapt or die—create multimedia or move on to other things. Multimedia developers have a chance to enlighten content holders about the impact this technology will have on all of us.[299]

E. Equitable Rule of Reason

At present, an entire industry is being held back and prevented from reaching its potential. The pressure to create multimedia is growing and will continue to grow. Should the law be the spoiler of the revolution?

There are four compelling arguments in equity for the multimedia developer. First, finding against fair use will stifle the new creativity that is a product of the digital age.[300] The purpose behind the copyright law is to foster such creativity.[301] Second, multimedia is a powerful educational tool,[302] and its further development should be supported by all branches of government. Third, rights to content are being purchased by large corporations, leaving the independent multimedia developer with fewer and fewer options.[303] Our

---

296. *See Texaco*, 37 F.3d at 898 (stating that fourth factor will favor secondary users when adverse effect would be to potential market that copyright holder has not generally sought).

297. *See supra* notes 113-19 and accompanying text (discussing paralyzing fear of some content holders).

298. *See supra* Part I.B (discussing growth of multimedia market).

299. Perhaps content holders are waiting to create their own multimedia packages. If this is true, then the benefits will accrue to them and the public. However, any one interactive multimedia package using content from a particular copyright holder probably will be quite different from any other package using the same content. Why not expand the market and allow both?

300. *See* Crawford, *supra* note 108, at 33 (discussing creative ventures possible with digital technology and providing examples of artistic appropriation of content).

301. *See supra* note 132 (providing support for notion that purpose of copyright law is to ensure creation and dissemination of works to public).

302. *See* Shandle, *supra* note 16, at 53 (quoting Cole Gilburne, attorney and editor of *Computer Lawyer* newsletter: "If you accept the premise that interactive multimedia products are the best source of education that we are likely to come across in our lifetimes, then all of a sudden very rich multimedia products acquire a very high societal priority.").

303. *See* Villeneuve & Kaufman, *supra* note 5, S1 (stating that corporations are engaged in frenzied acquisition of content).

children's education should not be controlled by a few large corporations.[304] Finally, the public is harmed by the delay in the multimedia revolution, for its coming will bring untold creative riches.[305]

Content holders and authors can argue that without protection from the multimedia developer, they will stop creating.[306] This argument is probably content holders' best in equity, given that it is a staple of our copyright law.[307] The argument fails, however, in the multimedia context. In cases where entire works are digitized and the derivative creations supersede the originals, findings of fair use would not be appropriate.[308] Content holders do deserve protection; however, such protection should not prevent the typical uses sought by multimedia developers. In the long run, given the market conditions, content holders are more likely to adapt and develop their own multimedia products than to stop creating, no matter what multimedia developers choose to do. This occurrence will undoubtedly benefit the public; the multimedia market will, as a result, flourish with creative enterprises. It will flourish even more, however, when uses are deemed fair.

---

304. The complete argument is as follows: corporations are acquiring the rights to desirable content and are creating educational and "edutainment" packages based upon that content. As this process of hoarding continues, monopolies on multimedia educational software will be created. As long as the prices are reasonable and the content is desirable, teachers and parents will flock to these packages. The result is a monopoly on education. As tenuous as this argument may seem, such monopolies have and do exist in our educational system, albeit with textbooks. The multimedia package is the textbook of the near future.

305. As with all revolutions, the multimedia revolution will not benefit everyone. Those content holders who do not adapt will likely not survive. The poor will be left out unless libraries remain accessible. Others will, no doubt, be unable to cope with the fast pace of the changing technologies. While it is important to keep these potential drawbacks in mind, and perhaps think of solutions before they become problems, the multimedia revolution will occur, regardless of the casualties.

306. *See* American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 9 (S.D.N.Y. 1992) (discussing how if authors are not granted copyright protection, they would find it difficult to earn a living and would be forced to divert their energies elsewhere), *aff'd*, 37 F.3d 881 (2d Cir. 1994).

307. *See* U.S. CONST. art. 1, § 8, cl. 8 (stating "[t]o 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"); *see also* Pamela Samuelson & Robert J. Glushko, *Intellectual Property Rights for Digital Library and Hypertext Publishing Systems*, 6 HARV. J.L. & TECH. 237, 237-38 (1993) (discussing how copyright law reflects author and reader behavior, i.e., authors are motivated to produce valuable texts and to make them available to others by copyright's protection and readers are motivated to purchase texts so that they have access to the work). Samuelson and Glushko go on to discuss how digital technologies are changing this behavior. *Id.* at 238.

308. *Cf. Texaco*, 802 F. Supp. at 17 (noting that Supreme Court acknowledged that reproduction of entire work ordinarily "'militat[es] against a finding of fair use'" (quoting Sony Corp. v. Universal City Studios, 464 U.S. 417, 450 (1984))).

CONCLUSION

One of the law's greatest strengths is its flexibility when society demands change. The copyright law, in particular, must develop in response to the changes brought by new technologies. Fundamental transformations in the way we communicate, teach, learn, conduct business, read, entertain, and live are beginning to take hold. Thoughtful attention to the possibilities and limitations of the fair use doctrine, coupled with a careful look at the equities involved with multimedia will facilitate the transition. If courts remain faithful to the "equitable rule of reason," we will all benefit substantially.[309]

---

309. The greatest benefit of the fair use doctrine, its flexibility, is also its greatest weakness. Multimedia developers need concrete assurances that their uses will not violate copyright laws. This Comment has concluded that, through an understanding of multimedia technology, the problems multimedia developers face, and the equities involved, courts might reasonably apply the fair use doctrine in favor of multimedia developers. Notwithstanding the merits of this conclusion, it still leaves multimedia developers uncertain because the Supreme Court has not firmly established specific parameters of the fair use doctrine. Although the Court clarified the fair use doctrine in *Campbell v. Acuff Rose Music*, the Court did not sacrifice the doctrine's inherent flexibility. Campbell v. Acuff Rose Music, 114 S. Ct. 1164 (1994). If the courts do not follow this Comment's analysis, one could argue that the independent multimedia developer will become extinct. As the argument goes, courts will find uses of content by multimedia developers unfair, and these multimedia developers will be left with few options. Fortunately, as this Comment has argued, this outcome is unlikely given the multi-faceted support for multimedia.

On the other hand, if the courts were to accept this Comment's analysis, and therefore find uses by multimedia developers to be fair uses, there will likely be an outcry by content holders. They will fight vigorously for a licensing structure so that they can be compensated for the use of their content. Reasonable licensing structures (in the context of negotiating rights), are generally supported by the have-nots, i.e., those who want to use the content of others, which is why today multimedia developers support them. *See* Orenstein, *supra* note 8, at 536 (suggesting that "efficient mechanisms for negotiating contracts" will help multimedia developers avoid being sued for using others' content). Support for a licensing structure is dependent on how courts decide the fair use issue (i.e., if the courts find against fair use, then the multimedia developers will continue to support a licensing structure, whereas if the courts find in favor of fair use, then content holders will want such a structure). The lack of certainty with regard to how courts will decide the fair use issue may, in and of itself, goad content holders into supporting a licensing structure. In any event, the structure must remain as neutral as possible. "Neutral," in the context of this area of law, means alleviating the fears of content holders while enabling the multimedia developers to create original works.

This author believes that such an accommodation can be reached. The key is to "reasonably" compensate content holders for uses that a court might deem fair. For example, under this Comment's legal analysis, were a multimedia developer to borrow a 30 second video-clip from a motion picture, this use would likely be deemed fair by a court because it could not reasonably supersede, or harm the market of, the original. If such a use were a fair use, then the content holder would have every incentive to subscribe to a licensing structure that compensated him because if he did not, the multimedia developer would be able to use the video-clip anyway. A licensing structure would compensate the content holder for the use of the 30 second video-clip, but at a price that both parties would find reasonable. Assume, for the sake of argument, that $10 is reasonable for the multimedia developer. Upon immediate inspection, the content holder, no doubt, would object. At that price, the license to use a 90 minute movie would cost $1800, an extremely low figure for using a Hollywood picture for multimedia applications. *Cf.* Silverthorne, *supra* note 23, at A32 (stating that Time Warner Music Group offers digital samples

of recording artists at $300 per 30 seconds). In addition, once the entire film were in digital form it could be manipulated in countless ways. Thus, at first glance, the $10 per 30 seconds quote is unreasonable for the content holder.

One potential solution, for film, is to raise the price exponentially for every additional video-clip used. Thus, were two video-clips from the same movie used, the first would cost $10 but the second would cost $50. The third would cost $250. The fourth would cost $1250. Though the original price of $10 and the factor of "5" were chosen arbitrarily, such a scheme would allow multimedia developers to use several video-clips from every movie imaginable, thus enabling them to create original works. At the same time, content holders would not have to fear losing control of their works because the cost of licensing 10 video-clips, a total of 5 minutes of a movie, would be out of reach for all multimedia developers, totaling $19,531,250. A similar scheme might also be developed for music.

The greatest problem remains for licensing photographs. Photographers share a reasonable fear that once their photographs are in digital form they can be reproduced perfectly, a countless number of times. The first question to answer is what type of use by a multimedia developer might be considered a fair use with a photograph? The answer may lie in the degree to which the developer plans to change the photo. For example, were the developer planning to maintain the photo "as is," then placing the photo in digital form would create a superseding work. Were the developer to change the photo, however, the use might not be superseding. This is not to say that the content owner will not object to the use because of the integrity of the work. One solution is to integrate "moral rights" into the licensing structure, so that when a multimedia developer desires a particular photograph he would have to show the rights' owner the way in which he planned to use the image. A second solution might be for multimedia developers to develop software-security to prohibit unauthorized transmissions or printings. *See, e.g.*, Barlow, *supra* note 267, at 129 (suggesting encryption as means to protect intellectual property in digital environment). A third solution might be to just fall back on the voluntariness of the licensing structure. Given that photographs are easily acquired (through magazines, books, etc.) it is highly likely that average users, some of whom are multimedia developers, will be sending photographs across the information highway without contacting the rights' holders. Thus, the rights' holder may as well try to get some form of compensation, because people will be infringing copyrights regardless. Because multimedia developers would want to use thousands of photographs, a reasonable price might be $.50 a photo. One-thousand photographs would thus cost $500.

These "solutions," like the fair use analysis found in this Comment, have yet to be tested. Their exploration, however, is critical if we are to strike a "fair" balance between content holders and multimedia developers.