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Market Effects Bearing on Fair Use

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Abstract: Copyright law, which promotes the creation of cultural and artistic works by protecting these works from being copied, excuses infringement that is deemed to be a fair use. Whether an otherwise infringing work is a fair use is determined by courts weighing at least four factors, one of which is the effect of the otherwise infringing work on the market for the copyrighted work. The Supreme Court's decision just over twenty years ago in *Campbell v. Acuff-Rose Music, Inc.* opened the door to a laudable analytical framework for the bearing of market effects on fair use. First, *Campbell* supports a more full-bodied investigation of the market effects—both harms and benefits—of defendants' works on plaintiffs' copyrighted works. Courts can eliminate conclusory reasoning by appreciating that both market harms and benefits can matter in assessing fair use. In so doing, courts avoid weighing only the mere possibility that a licensing market does or could exist for a copyrighted work as a reflection of market harm and ignoring the possibility that a use of a copyrighted work might confer benefits on the copyright holder. Second, *Campbell* implied two important ways to divide relevant from irrelevant market effects. One ought to exclude market effects from consideration if they are empirically unlikely or if there are effects unrelated to the protectable aspects of the copyrighted work, such as its ideas or the societal value attributed to the work. This analytical framework for market effects bearing on fair use advances copyright's goal of promoting the creation of artistic and cultural works from which society can benefit.

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INTRODUCTION

Copyright law, which promotes the creation of cultural and artistic works by protecting these works from being copied, excuses infringement that is deemed to be a fair use.[1] A fair use of a copyrighted work is generally one that would promote the general advancement of art and culture, even if it falls within the scope of a third party's copyright protection. A court determines whether an otherwise infringing work is a fair use by weighing at least four factors, one of which is the effect of the otherwise infringing work on the market for the copyrighted work.[2] Many scholars have long been troubled by courts' conclusory, or circular, analyses of this factor.[3] A prominent treatise on fair use calls this factor "[t]he least understood, and, as a consequence, most misapplied."[4] Sometimes, courts will summarily conclude that a copyright owner is harmed by the infringer's failure to license the copyrighted work, which, on its own, counts against any alleged infringement being a fair use.[5] Other times, courts will just as abruptly exclude certain market effects, such as markets for criticism,[6] from their consideration of this fair use factor, thereby deeming these uses to be fair with regard to this factor.[7] With such short-circuited analyses, courts can expand or diminish the scope of what constitutes fair use without the penetrating justifications this factor's examination deserves.[8]

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1. *See infra* Part I.A.

2. *Id.*

3. *See, e.g.*, MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(A)(4), at 13-199 to 13-206.4 (2014); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1465 (1997); Lydia P. Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 38–39 (1997); Frank Pasquale, *Breaking the Vicious Circularity:* Sony*'s Contribution to the Fair Use Doctrine*, 55 CASE W. RES. L. REV. 777, 781–84 (2005).

4. WILLIAM F. PATRY, PATRY ON FAIR USE § 6:1, at 536 (2014 ed.); *cf.* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 617 (2008) ("The fourth factor essentially constitutes a metafactor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome not simply of the fourth factor, but of the overall test.").

5. *See infra* Part II.

6. A market for criticism is simply any conceivable use of a copyrighted work to criticize or comment on it. *See infra* Part III.B.

7. *See infra* Part III.

8. *See, e.g.*, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) ("[C]opyright users . . . seek licenses even when they have a good fair use claim—i.e., even when proceeding unlicensed would probably result in no liability. This practice of unneeded licensing feeds back into doctrine because of one final uncontroversial premise: the fair use defense looks to the existence *vel non* of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of

In *Campbell v. Acuff-Rose Music, Inc.*,[9] the Supreme Court issued a foundational ruling on the contours of the fair use doctrine when it held that transformative works, such as parodies, will frequently be fair uses and thus immune from classification as copyright infringement.[10] In applying the law's four-factor fair use analysis, the Court emphasized that transformative works are important contributions to society unless they cause relevant harm to the copyright owner's market (from which the Court excluded a market for criticism).[11]

I argue that the *Campbell* decision opened the door to a laudable analytical framework for the bearing of market effects on fair use. However, the Court obfuscated this framework by not underscoring its reasoning for this fair use factor, which has meant that many—though not all—courts continue to offer malnourished or unreasonable analyses of this factor.

This Article seeks to excavate *Campbell*'s skeletal framework and to add analytical flesh and heft to it. *Campbell* can be read to improve consideration of market effects bearing on fair use in two ways. First, *Campbell* supports a more full-bodied investigation of the market effects—both harms and benefits—of defendants' works on plaintiffs' copyrighted works.[12] One can infer as much from a combination of *Campbell*'s analytical steps: placing a strong emphasis on the value of transformative works, differentiating different sorts of market effects, and recognizing the strong connections between a copyrighted work and a transformative work making use of it. Implicit in this reasoning is the possibility that works that transform existing material can draw attention to, enhance, or affirm the original work's role in the marketplace.

Approximately twenty years after *Campbell*, some courts have begun to recognize that market benefits ought to count in favor of finding that a defendant's use is fair.[13] The recent fair use decision in the Southern District of New York on Google Book Search is one such example.[14] Similarly, copyright holders—including those that have been litigiously

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copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users.").

9. 510 U.S. 569 (1994).

10. *See infra* Part I.C.

11. *Id.*

12. *See infra* Part II.

13. *Id.*

14. *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (reasoning that Google Book Search's service can drive book sales and increased attention to long-forgotten books).

protective of their copyrighted material in the past, such as Disney[15]—are increasingly acting in ways that suggest they realize that certain unauthorized third-party uses of their copyrighted works can redound to their financial benefit. For instance, Disney has opted not to rein in those who have covered, parodied, or built on the songs, characters, and other material from its hit movie *Frozen*.[16]

A court's appreciation that market harms and benefits can both matter in assessing fair use helps eliminate conclusory reasoning. Some courts weigh against fair use the mere possibility that a licensing market does or could exist for a copyrighted work, as this possibility reflects market harm.[17] Others have been skeptical that a glimmer or even the full-fledged development of a licensing market is enough to damn a defendant's use, as either can be asserted for just about any category of work that a defendant might reasonably seek to classify as a fair use.[18]

To break out of the analytical circularity of weighing against fair use the possibility that the defendant's use could have been licensed, courts should focus on market benefit alongside market harm in assessing fair use. A full-bodied assessment of the effect of a defendant's use on a work—not merely its harmful effects—gets courts to look at all effects once they surpass a specified degree of speculativeness, be they licensing harms or sales benefits.

There is a second way in which *Campbell* ought to be read to solve fair use's circularity problem. Specifically, *Campbell* recognizes generally that certain market effects ought to be weighed in the fair use analysis, while others are irrelevant. The *Campbell* decision does not articulate the reason for excluding markets for criticism from the analysis of the harm to its market a copyright owner might suffer. Nonetheless, *Campbell* implied two important ways to divide relevant from irrelevant market effects. One ought to exclude market effects from consideration if they are empirically unlikely or if the effects are unrelated to the protectable aspects of the copyrighted work, such as its ideas or the societal value attributed to the work.[19] By providing a rule

15. *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (involving a lawsuit by Disney for copyright infringement against a comic book maker that placed the Disney characters in lewd situations).

16. Andrew Leonard, *How Disney Learned to Stop Worrying and Love Copyright Infringement*, SALON (May 23, 2014, 9:43 AM), http://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement.

17. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

18. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

19. *See infra* Part III.

for which market effects to consider, fair use inquiries can be made analytically sturdy.

Part I sets out how *Campbell* opened the door—even if only obliquely—to consideration of a full-bodied set of market effects (market benefits alongside market harms) but only potential and copyright-relevant market effects. Part II sets out the case for considering both market harm and benefit together in light of the relevant law and scholarship, and shows how this consideration solves a lingering problem of conclusory reasoning and circularity in the fair use determination. Part III advocates for courts to consider only those market effects that are truly potential and copyright-relevant in assessing fair use to solve another persistent analytical deficiency in the fair use determination. Taken together, this framework for assessing market effects bearing on fair use is robust and helps promote copyright law's goal of promoting the creation and dissemination of artistic and cultural works.

I. FAIR USE THROUGH *CAMPBELL*

American copyright law exists to promote the production and dissemination of valuable creative works. The fair use defense to copyright infringement serves this overarching goal. This Part provides an overview of copyright law and policy and then turns to how the Supreme Court has treated fair use, culminating in its decision in *Campbell*.

A. Copyright Law

American copyright law protects "original works of authorship fixed in any tangible medium of expression," including literary works, sound recordings, movies, and computer software code.[20] A copyright holder receives, among other things, the exclusive right to reproduce the work, distribute copies of it, and prepare derivative works[21] typically until seventy years after the author's death.[22] Copyright protection extends to the expression of particular ideas rather than to the ideas themselves.[23] Yet protection actually reaches well beyond the literal work to works

20. 17 U.S.C. § 102(a) (2012); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983) (clarifying that computer software code is a literary work under copyright law).

21. 17 U.S.C. § 106.

22. *Id.* § 302(a).

23. *See id.* § 102(b); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

that are copied and substantially similar,[24] "else a plagiarist would escape by immaterial variations."[25]

Utilitarianism, or instrumentalism, is the dominant purpose of American copyright law.[26] According to utilitarian theory, copyright law provides the incentive of exclusive rights for a limited duration to authors to motivate them to create culturally valuable works.[27] Without this incentive, the theory goes, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free-riders, eliminating authors' ability to profit from their works.[28]

Utilitarianism aligns fluently with (and is frequently justified by) the U.S. Constitution's grant of power to Congress "[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."[29] Pursuant to utilitarianism, the rights conferred by copyright laws are designed to be limited in time and scope.[30] The reason for providing copyright protection to creators is to encourage them to produce socially valuable works, thereby maximizing social welfare.[31] If the provided rights are exceedingly extensive, society would be hurt (and social welfare diminished).[32] For one thing, exclusive rights in intellectual property can prevent competition in

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24. Corwin v. Walt Disney Co., 475 F.3d 1239, 1253 (11th Cir. 2007); Whitehead v. Paramount Pictures Corp., 53 F. Supp. 2d 38, 45–46 (D.D.C. 1999).

25. *Nichols*, 45 F.2d at 121.

26. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

27. Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996) ("[C]opyright provides an incentive for authors to create and disseminate works of social value.").

28. *See* Alina Ng, *The Author's Rights in Literary and Artistic Works*, 9 J. MARSHALL REV. INTELL. PROP. L. 453, 453 (2009); Sterk, *supra* note 27, at 1197; Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 676 (2000) (statement of Wendy Gordon).

29. U.S. CONST. art. I, § 8, cl. 8. *See generally* Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014) (exploring, through the lens of information theory, the sort of progress that copyright law does and ought to encourage).

30. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997).

31. Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 592–96 (1985).

32. Lemley, *supra* note 30, at 996–97.

protected works, thereby allowing the rights-holder to charge a premium for access and ultimately limiting these valuable works' diffusion to society at large.[33] For another, given that knowledge is frequently cumulative, society benefits when subsequent creators are not prevented from building on previous artistic creations to generate new works.[34] For these reasons, copyright law ensures both that the works it protects fall into the public domain in due course and that third parties are free to use protected works for certain socially valuable purposes.[35] At bottom, a utilitarian theory of copyright law rests on the premise that the benefit to society of creators crafting valuable works offsets the costs to society of the incentives the law offers to creators.[36]

In furtherance of its overarching utilitarian goals, copyright law excuses some third-party uses that would otherwise be infringing by deeming them to be fair use.[37] Recognizing that most creative works in some way build on and borrow from pre-existing works,[38] a "fair use" carve-out has numerous instrumental justifications. Most relevantly, the fair use doctrine can stimulate the production of creative works for public consumption without undercutting the value of the original copyrighted work too much.[39] It does so by enabling third parties to create culturally valuable works that must borrow from the original work in some capacity in order to succeed, often transforming it.[40] As

33. *Id.*

34. *Id.* at 997–98.

35. *Id.* at 999.

36. *Id.* at 996–97. Despite the dominance of utilitarian thinking in American copyright law, scholars also proffer other theories to justify copyright protection. These theories are typically grounded in the notion of natural or moral rights that authors and inventors deserve by virtue of having created their works. *See, e.g.*, Balganesh, *supra* note 26, at 1576–77; Brown, *supra* note 31, at 589–90. Moral-rights theories typically come in two flavors: labor-desert and personhood. For more on the labor-desert theory, see ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 31–67 (2011); Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–83 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–330 (1988). For more on personhood theory, see Hughes, *supra*, at 330–65; Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). I argue in a prior work that these theories can form the basis of expressive incentives for creators in a utilitarian system. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

37. 17 U.S.C. § 107 (2012).

38. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–76 (1994).

39. *See id.* at 577 (noting that the fair use doctrine allows courts to avoid rigid application of copyright law which might stifle the creativity the law seeks to foster).

40. *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–16 (1990).

suggested by statutory directives on fair use[41] and elaborated in case law, some prototypical examples include news reporting, critical reviews, and parodies.[42] A second, partially related argument set forth by Wendy Gordon is that "fair use [ought] to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market."[43] Examples include parodies that might cast an unfavorable light on an original work or uses for which the transaction costs are too great for the copyright owner to agree to a licensing arrangement.[44]

Ushered into the common law in 1841 by Justice Story,[45] the fair use defense has been statutorily codified since 1976.[46] A set of (nonexclusive) statutory factors must be analyzed to determine whether a particular use is fair: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," "the nature of the copyrighted work," "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market for or value of the copyrighted work."[47] The copyright statute illustrates some such instances: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[48]

As congressional reports emphasized, the codification of the fair use defense

> endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in

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41. *See infra* text accompanying note 48.

42. *See Campbell*, 510 U.S. at 578–85 (parodies); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (news reporting); Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194, 206 (4th Cir. 1998) (critical review).

43. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982). A third argument—less relevant here—is grounded in technology, such as allowing the intermediate copying of copyrighted software code to make a program that is interoperable with a preexisting computer or gaming system. *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1513–14 (9th Cir. 1992).

44. *See* Gordon, *supra* note 43, at 1633.

45. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). Justice Story articulated fair use factors that have evolved into those currently encoded in statute: "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." *Id*. at 348.

46. 17 U.S.C. § 107 (2012); *see* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 669 (1993).

47. 17 U.S.C. § 107(1)–(4).

48. *Id.* § 107.

> the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[49]

In sum, copyright law's fair use defense aligns with its overarching utilitarian goals of encouraging the creation, distribution, and consumption of artistic and cultural works. It excuses third-party uses of copyrighted works that promote these aims and would otherwise constitute copyright infringement.

*B. Market Effects in Fair Use Pre-*Campbell

Since Justice Story's institution of the fair use defense, courts have been considering the question of precisely which market effects on the original copyrighted work or protected derivative works ought to qualify in evaluating whether to excuse what would otherwise be copyright infringement as a fair use.[50] One query is how broadly to define the copyright market (and potential markets), another is which effects on these markets ought to matter, and yet another is how concrete the effects ought to be before they are considered.[51] This Section reviews judicial evaluations of market effects bearing on fair use leading up to *Campbell*.

The Supreme Court's decisions leading up to *Campbell* invoke some of these complicated issues, but only rudimentarily. In a copyright infringement case against manufacturers of home video recorders, *Sony Corp. of America v. Universal City Studios*,[52] the Court held that the general television-viewing public's recording on videocassette recorders of copyrighted broadcast television programs for later viewing constituted fair use.[53]

Although the Court never stated as much outright, *Sony* might be read as hinting that market benefits to copyright holders ought to be evaluated in assessing market effects for fair use. With regard to the fourth factor—market effects—the Court explained the basic framework for evaluation: "[A] use that has no demonstrable effect upon the potential

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49. H.R. REP. NO. 94-1476, at 66 (1976); *see also* S. REP. NO. 94-473, at 62 (1975).

50. Patry & Perlmutter, *supra* note 46, at 687–89.

51. *See id.* (raising queries of how the potential market should be defined, the type of harm that should be considered, and how burdens of proof and production should be allocated).

52. 464 U.S. 417 (1984).

53. *Id.* at 454.

market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."[54] The Court asserted that relevant market effects need not constitute "[a]ctual present harm," but merely "*some* meaningful likelihood of future harm."[55]

The Court did not say much more about analyzing the market effects for fair use of viewers' so-called "time shifting" of its programs (recording broadcast programs to watch at a later time). It characterized most of the copyright holders' evidence of market effects of time shifting—with regard to whether viewers would now fast-forward through advertising, from which producers derived income, and whether time shifting would decrease the amount of television viewership—as speculative.[56] Yet the Court insinuated—without relying on this intimation for its legal ruling—that in addition to the harms that the copyright owners might suffer, they might also benefit from viewers' time shifting. First, the Court observed that "the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience" for a work.[57] The Court elaborated, in discussing copyright owners that authorize time shifting, that "[i]n the context of television programming, some producers evidently believe that permitting home viewers to make copies of their works off the air actually enhances the value of their copyrights."[58] The Court also alluded to a potential market in "pre-recorded videotapes," but did not factor that possibility into its analysis of market effects.[59] Finally, the Court highlighted the district court's finding that "[i]t is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the [video recorder] makes it possible for more persons to view their broadcasts."[60]

Justice Blackmun's dissent in *Sony* seemed to confirm that the *Sony* majority was hinting at the relevance of market benefits to copyright holders, because his dissent sought to refute such a rule:

> [A]n infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has

54. *Id.* at 450.

55. *Id.* at 451 (emphasis in original).

56. *Id.* at 451–54.

57. *Id.* at 443.

58. *Id.* at 446 n.28.

59. *Id.* at 450 n.33. It is unclear whether the Court did not factor in this possible market because it was too speculative or because viewers' time shifting was noncommercial, something on which it also placed emphasis. *Id.* at 451–54.

60. *Id.* at 454 (internal quotation marks omitted).

> resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work.[61]

All in all, the *Sony* Court did not issue anything close to a definitive framework on market effects bearing on fair use. There was some discussion that the copyright owners might suffer or benefit in different ways from the time shifting, and there was some mention of potential—but not yet actual—markets in pre-recorded videotapes. But there was little guidance to future courts as to assessing market effects bearing on fair use.

Less than one year later, the Supreme Court decided another blockbuster fair use case in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.[62] In that case, the Court decided that there was no fair use for a magazine pre-publishing critical aspects of President Gerald Ford's memoirs explaining Ford's pardon of Richard Nixon.[63] In coming to its decision, the Court discussed the market effects factor. In this case, there was direct evidence of an actual harm to the copyright owner's market as a result of the defendant's pre-publication. As the Court observed, the copyright owner was harmed by another magazine's "cancellation of its projected serialization [of the memoir] and its refusal to pay . . . $12,500."[64] The Court thus saw this harm as overwhelming and found little need to evaluate any potential effects, other than to emphasize that were it to condone the challenged use, such uses could become widespread and also cause market harms in the future.[65]

In sum, the Supreme Court's treatment of market effects bearing on fair use predating *Campbell* is tentative and embryonic.

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61. *Id.* at 485 (Blackmun, J., dissenting).

62. 471 U.S. 539 (1985).

63. *Id.* at 542.

64. *Id.* at 567.

65. *Id.* at 568. In issuing its ruling, the Court noted that "[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But Congress has not designed, and we see no warrant for judicially imposing, a 'compulsory license' permitting unfettered access to the unpublished copyrighted expression of public figures." *Id.* at 569 (citations omitted). The Court seemed to be saying nothing other than an isolated market benefit would not, without consideration of other relevant factors, sanction an excusal of copyright infringement. *But see* Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 789–90 (N.D. Ill. 1998) (reading this statement to disallow consideration of market benefits as part of the market effects bearing on fair use).

C. Campbell*'s Treatment of Fair Use*

Campbell followed *Sony* and *Harper & Row*. *Campbell* gave the U.S. Supreme Court an opportunity to consider the fair use defense for works parodying copyrighted creations. In *Campbell*, the Court was reviewing 2 Live Crew's rap version of Roy Orbison's song, "Oh, Pretty Woman," which "substitute[s] predictable lyrics with shocking ones that derisively demonstrate how bland and banal the Orbison song seems to them."[66] After working through the four-factor fair use analysis in this context, the Court ruled that "the nature of parody" deserves prominent consideration weighing in favor of fair use.[67]

The Court's analysis reflected its judgment that the defendant's parodic use permeates each of the four fair use factors. With regard to the nature and character of the defendant's use, the *Campbell* Court looked primarily to "whether the new work merely 'supersedes the objects' of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[68] The Court reasoned that the more transformative the new work, the more likely it would be to be a fair use, because creating transformative works fundamentally advances copyright's goals.[69] Parody, as per the Court, tends to be transformative: "Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[70] To work effectively, a parody must "use . . . some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[71] As evaluated in the context of 2 Live Crew's song, Justice Souter, writing for the Court, elaborated:

> 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the

66. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994) (original alternations omitted) (quoting Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991)).

67. *Id.* at 571–72.

68. *Id.* at 579 (citations omitted).

69. *Id.*

70. *Id.*

71. *Id.* at 580.

> ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.[72]

The Court thought that the parodic aspects of 2 Live Crew's work affected the second factor—the nature of the copyrighted work—as well. It indicated that though "the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes," generally weighing against fair use, "[t]his fact . . . is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."[73]

The Court also minimized the significance of the third fair use factor, the amount and substantiality of the portion used by the defendant in relation to the whole copyrighted work, in cases of parodies. It observed that:

> When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.[74]

Under the fourth fair use factor—the effect of use on the market for the copyrighted work—the Court sought to consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[75] It elaborated:

> [W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersedes the objects" of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for

72. *Id.* at 583.

73. *Id.* at 586.

74. *Id.* at 588 (original alternations omitted) (citations omitted).

75. *Id.* at 590 (alteration in original) (citations omitted).

> the original in a way cognizable under this factor, that is, by acting as a substitute for it ("superseding its objects"). This is so because the parody and the original usually serve different market functions.[76]

In these statements, the Court underscored that transformative works are less likely to cause market harm to a copyright owner than works that are copies and therefore substitutes in the marketplace. The Court thus linked the degree of transformativeness of the defendant's work with the weight of the fourth fair use factor.

The Court recognized that there could nonetheless be harms to a copyright owner's work from a scathing parody. Therefore, it continued on its analysis, separating out market harms cognizable under copyright law and harms that are irrelevant to copyright law:

> We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," the role of the courts is to distinguish between "biting criticism that merely suppresses demand and copyright infringement, which usurps it."[77]

In explicating which harms might bear on copyright infringement and fair use, the Court ruled that "there is no protectible derivative market for criticism."[78] It reasoned that copyright owners were unlikely to develop markets for criticism of their works, and thus there would be no actual or potential harm to that market by parodies that do not substitute for the copyrighted work but merely criticize it.[79]

Finally, in a general discussion of fair use, the Court in a footnote intimated that market benefits that accrue to copyright holders might be relevant to the fair use analysis:

> Even favorable evidence, without more, is no guarantee of fairness. Judge [Pierre] Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair. This factor, no less than the other three, may be addressed only

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76. *Id.* at 591 (original alterations omitted) (citations omitted) (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).

77. *Id.* at 591–92 (original alterations omitted) (citations omitted).

78. *Id.* at 592.

79. *Id.* at 592–93.

> through a "sensitive balancing of interests." Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.[80]

All in all, the Court concludes that some parodies might serve as a market substitute for the original copyrighted work, but most would not because of their transformativeness. Moreover, the Court hints that some parodies might even confer market benefits.

As dissected in greater detail in Parts II and III, the *Campbell* Court's analytical moves in its explication of the fourth factor opened the door, if only obliquely, to a defensible and robust examination of market effects bearing on fair use. This examination is one that accounts for a full-bodied sense of market effects—both market harms and benefits—beyond a specified degree of speculativeness and that are related to protected aspects of a copyrighted work. I now turn to building up that analytical framework.

II. CONSIDERING BOTH MARKET HARMS AND BENEFITS

The *Campbell* opinion did little with the notion of market benefits, other than to mention it in a footnote. Nonetheless, I argue that the opinion's overarching analysis, with its focus on how a transformative work affects the fair use examination, implied that market benefits ought to be considered as relevant market effects alongside market harms. Furthermore, an examination of market benefits and harms together, so long as they surpass a specified degree of speculativeness, solves a longstanding problem in fair use analysis. This full-bodied examination solves the problem of a circular and conclusory invocation of loss of licensing markets whenever a defendant invokes the fair use defense.

Consider first how *Campbell*'s analysis suggests that market harms and benefits ought to be considered together in evaluating market effects bearing on fair use. The *Campbell* Court places a heavy emphasis on the positive value contributed by transformative works when they borrow from a copyrighted work to comment on it in some way.[81] The Court also states that transformative works, like the parodies considered there, are unlikely to cause relevant market harm to a copyright owner, even if they can harm the market for the copyrighted work in unrelated ways.[82] The clear implication is that because transformative works take from the

80. *Id.* at 590 n.21 (citations omitted) (citing Leval, *supra* note 40, at 1124 n.84).

81. *See supra* text accompanying notes 67–76.

82. *See supra* text accompanying notes 75–77.

copyrighted work, they can have some impact on the market for the copyrighted work (be that impact relevant or irrelevant to fair use). As the Court's analysis of the third factor—the amount and substantiality of the copyrighted work that is borrowed—indicates, transformative works typically need to call to mind the copyrighted work to be effective.[83] Taken together with the Court's footnote implying that market benefits are part and parcel of the evaluation of market effects bearing on fair use,[84] these assertions suggest that works that transform existing material also are directly connected to the existing material, and as such, can draw attention to, enhance, or affirm the work's role in the marketplace.[85]

While *Sony* pointed out that market benefits might accrue to copyright holders from defendants' unauthorized uses,[86] it is only *Campbell*'s more sustained legal and policy analysis of the values and effects of transformative works that suggests a range of potential market benefits that copyright holders might generally experience from a third party's use of copyrighted material.[87] As *Campbell*'s analysis linking transformative works to the copyrighted works on which they are based implies, transformative works borrowing from a copyrighted work can readily call attention to the copyrighted work in ways that enhance it in the marketplace[88]: by influencing those exposed to the transformative work to buy the copyrighted work, by underscoring the value in the copyrighted work, or by whetting consumers' appetite for other derivative works.[89] Transformative works that can cause market benefits to the copyright holder may take many forms: for example, parodies commenting on an existing copyrighted work, reviews of the work, news items discussing the work, search engines containing the work, and

83. *See supra* text accompanying note 74.

84. *See supra* text accompanying note 80.

85. *Cf.* Fromer, *supra* note 29, at 113–17 (explaining through the lens of information theory why fair use ought to "sometimes allow for the reuse of key (or unimportant) pieces of knowledge encoded in others' copyrighted works").

86. *See supra* text accompanying notes 52–60.

87. *But cf.* Pasquale, *supra* note 3, at 781 (holding out *Sony*'s "elevation of a careful and detailed district court record finding no demonstrated negative effect on sales for the work" as a beacon for courts "to examine the full range of economic effects flowing from a given use").

88. *But cf.* David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 365 (2014) ("The Court did not, as it could reasonably have, contemplate the possibility that Campbell's recasting 'Oh Pretty Woman' in a modern medium may have reignited interest in the original work, boosting demand for record sales and for other licensing opportunities.").

89. *Cf. id.* at 378–85 (listing ways in which unauthorized uses can benefit the market for copyrighted works, by offering the works greater recognition, affirmation, or access).

devices allowing access to copyrighted works.[90]

An emphasis on both the market harms and benefits that a defendant's use makes for a copyrighted work is consistent with the statute and policies underlying copyright law and fair use, more so than merely looking to market harms suffered by the copyright owner.[91] This full-bodied look at market effects reflects how copyright owners are increasingly treating works that borrow from theirs. Moreover, building on *Campbell*'s fair use framework, courts are increasingly interpreting the market effects factor to look toward market benefits and harm in combination.

The fair use section in the copyright statute makes it clear that courts are to look to "the effect of the use upon the potential market for or value of the copyrighted work."[92] Nowhere does the statute indicate that courts should look just to the "negative effect" of the use.[93] By stating that courts should look to "the effect" generally, the statute is naturally read as requiring a look at all effects of the use on the potential market for the copyrighted work, both positive and negative.[94]

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90. *Cf.* Pasquale, *supra* note 3, at 805–09 (observing in reflecting on the *Sony* decision, that consumers are frequently more likely to know about and purchase copyrighted works when they can preview, browse, and consume reviews of these works).

91. For other scholarship exploring the possibility of market (as well as social) benefit playing a role in the market effects analysis, see, for example, Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665 (2004); Fagundes, *supra* note 88; Loren, *supra* note 3; Pasquale, *supra* note 3; *cf.* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1706 (1988) (advocating that courts "must determine the universe of activities vis-a-vis [the copyrighted work] that would violate the Copyright Act if not excused by [fair use]"); Fromer, *supra* note 29, at 113–17 (explaining the social benefits that can arise from permitting fair use of copyrighted material for journalism and news reporting, parody, criticism and commentary, and scholarship and research); Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 999 (2002) ("On one side of the balance, attention should be directed toward the extent to which prohibiting a particular use will lead to more and better works of authorship by asking: (1) whether the unauthorized use would otherwise reduce the revenue associated with the copyrighted work; *and* (2) if so, how, if at all, that reduction would likely affect the production of copyrighted works. On the other side of the balance, we must consider what the public stands to lose if the use is prohibited." (emphasis in original)).

92. 17 U.S.C. § 107(4) (2012).

93. Fagundes, *supra* note 88, at 361–62.

94. *Id.* The statute encodes fair use with the purpose of enshrining past cases on fair use as well as enabling courts to continue their common-law-making in this area. *See supra* text accompanying note 49. Though the many fair use cases that undergird the statutory encoding focused on, as David Fagundes puts it, "reduced demand for copy sales," Congress chose to enact into law a full-bodied effects factor. Fagundes, *supra* note 88, at 370–77. Even were the statute to be read to look only to market harms, Congress gave the courts license to change this examination through development of the common law, including the addition of other relevant factors into the fair use calculus. *See supra* text accompanying note 49.

A full-bodied assessment of market effects fits better with the policies underpinning copyright law and fair use than an assessment that looks to market harms alone. Recall that the goal of a utilitarian copyright law is to provide authors with sufficient incentive to make and distribute valuable creative works, but not so much incentive in terms of copyright protection as to interfere with the creation of valuable follow-on works (works that build on existing works).[95] The copyright incentive is specifically about encouraging authors to create when they otherwise might not out of fear of being copied and harmed in the marketplace.[96] As Mark Lemley and I have argued, intellectual property regimes, like copyright, should never allow an infringement claim to succeed absent market substitution, or harm, because "a use that does not interfere with the plaintiff's market in some way generally does no relevant harm."[97] When the benefits that accrue to a copyright holder from a defendant's use of the copyrighted work exceed its harms, there is typically no overall harm to the copyright holder and thus copyright law ought to remain unconcerned with aiding the copyright holder. An investigation of market harms in isolation misses this crucial connection to copyright policy's consideration of overall market effects.[98]

Of course, the net market benefits that a copyright holder might experience from a third party's unauthorized use might still be lower than those that the copyright holder would experience without such usage. Surely, lower overall benefits might diminish a copyright holder's incentive to create. Evaluation of market effects—benefits and harms—should compare the overall effect with the effects that would tend to exist absent a third party's unauthorized use to see how, if at all, the use might diminish copyright's incentive.

Copyright's fair use policy also confirms that one ought to look at market harms and benefits together. Recall that fair use exists to rescue from infringement uses that are socially beneficial.[99] When a copyright owner has forbidden a use that accrues to it market benefit—and to society's benefit as well—fair use theory would suggest permissiveness

95. *See supra* Part I.A.

96. *See supra* Part I.A.

97. Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1255 (2014).

98. In fact, if the market benefits to the copyright owner exceed the market harms, there ought to be no actual damages awardable in the copyright action. Duhl, *supra* note 91, at 673–74. Nonetheless, the possibility of awards of statutory damages in copyright infringement suits, 17 U.S.C. § 504(c) (2012), suggests that courts might not want to deem such beneficial uses to be anything other than fair.

99. *See supra* Part I.A.

toward that use. Societal benefit from a work is not the same as the copyright holder's own market benefits from a work. One can imagine works that society might benefit from having—such as three-dimensional sculptures of two-dimensional art or retellings of stories from a minor character's perspective—that might not benefit the copyright holder of the original work. Yet whenever there are market benefits to a copyright holder from a subsequent use of the copyrighted work, it is likely because some significant set of consumers is willing to pay for—and thus would benefit from—the existence of this subsequent use. That is, there may be societal benefits from a use without concomitant market benefits to the copyright owner, but when there are market benefits to the copyright owner, there tends also to be societal benefit. All in all, policies weighing in favor of fair use suggest that market benefits to the copyright holder offer a signal that there is a societal benefit favoring fair use, which might also benefit the copyright holder.

There is no solid countervailing reason for considering only market harms, and ignoring market benefits, in evaluating market effects bearing on fair use. One might reason that copyright holders get to choose whether or not to exploit a particular market within the scope of their protection.[100] But that objection does not hold water. For one thing, the whole purpose of fair use is to excuse infringement liability sometimes for socially valuable uses, even when the copyright holder has opted not to exploit the particular use at issue.[101] More generally, however, the reasoning underpinning this objection actually ought to be built into the calculus of market effects experienced by a copyright owner. That is, if copyright owners are experiencing potential harms to their copyright market from a defendant's use, which exploits a market the copyright owner chose not to enter, that ought to be a market harm weighed as part of the market effects bearing on fair use. As such, this objection merely speaks in favor of a full-bodied weighing of the harms and benefits to potential markets experienced by a copyright holder from a defendant's use.

Some copyright holders are ever more frequently acting on the

100. Courts frequently assert as much. *See, e.g.*, Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145–46 (2d Cir. 1998) ("Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on *Seinfeld*, such as by creating and publishing *Seinfeld* trivia books (or at least trivia books that endeavor to 'satisfy' the 'between-episode cravings' of *Seinfeld* lovers), the copyright law must respect that creative and economic choice."). *See generally* Fagundes, *supra* note 88, at 391–93 (recounting this possible objection).

101. *See supra* Part I.A.

realization that there are market benefits to them from tolerating uses of their works they would have battled in years past. Take Disney, which has been litigiously protective of its copyrighted material in the past. For example, in a prominent fair use case in 1978, Disney won a claim of copyright infringement by "an underground comic book . . . centered around a rather bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture."[102] There, the Ninth Circuit rejected the defendants' claim of fair use on the ground that they borrowed from Disney's copyrighted works more than was necessary to conjure up its characters.[103] Fast-forward to the present, and Disney has changed its tune, at least in some situations. For example, since it released its 2013 hit movie *Frozen*, it has not sought to rein in those who have covered, parodied, or built on the songs, characters, and other material from this movie.[104] It took no public action against a widely shared YouTube video of a father singing about the annoying ubiquity of the movie's "Let It Go" song to that song's tune[105] or a YouTube video singing a pro-cocaine song ("Do You Wanna Do Some Blow, Man?") set to another popular song from the movie,[106] let alone the thousands of other YouTube videos offering makeup tutorials to look like *Frozen*'s characters, covers of the movie's songs, parodies of the movie's scenes, and the like.[107] Although Disney has not officially stated its reasons for not pursuing copyright infringement claims against these video creators, many think the evidence points in favor of Disney realizing that "fan-created content—even in cases where that content is generating revenue that is not captured by Disney—is cross-promotional marketing that money can't buy."[108] As for Disney's bottom line, it is an

102. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978) (internal quotation marks omitted).

103. *Id*. at 756–58.

104. *See* Leonard, *supra* note 16.

105. Scott S. Kramer, *A Frozen Father ("Let It Go" Dad Parody)*, YOUTUBE (Mar. 2, 2014), https://www.youtube.com/watch?v=3Ud6B_NXoNc.

106. BREEesrig, *Do You Wanna Do Some Blow, Man? Frozen Parody*, YOUTUBE (July 22, 2014), http://www.youtube.com/watch?v=Ur43PZ2jYMo.

107. *See, e.g.*, jazzynice9, *Corpse Bride – "The Other Woman" Scene (Frozen Parody)*, YOUTUBE (May 17, 2014), https://www.youtube.com/watch?v=pu7Jsu4NJQk; dope2111, *Disney's Frozen Elsa Makeup Tutorial*, YOUTUBE (Feb. 12, 2014), https://www.youtube.com/watch?v=_V7iMAv0mY4; Malinda K. Reese, *"Let It Go" from Frozen According to Google Translate (Parody)*, YOUTUBE (Feb. 10, 2014), https://www.youtube.com/watch?v=2bVAoVlFYf0.

108. Leonard, *supra* note 16. As one piece of evidence, in 2014, Disney bought Maker Studios, which is a network of YouTube channels that helps generate and professionalize grassroots creative

understatement to say that *Frozen* does not seem to have been hurt by these parodies and related works. It has become the most profitable animated movie ever, making over one billion dollars,[109] not to mention the revenues Disney has made or expects from *Frozen* costumes, music sales, makeup, books, theme park experiences, and cruises.[110]

Disney's discovery of the possible market benefits from tolerating unauthorized—or even merely uncontrolled—uses of its copyrighted works is nothing new. For example, movie studios have long held press screenings of pending movie releases so that movie critics can prepare and publish movie reviews when the movie is released.[111] Studios generally hold these screenings even though they do not have control over the content of the reviews and know that the critics might use copyrightable expression from screened movies, in the hopes that good reviews and publicity will outweigh any negative attention and help promote these movies at the box office.[112] Similarly, the reappearance of an older song in new contexts—movies, television shows, advertisements, or as covers—can propel sales of the old song.[113] For example, a 2008 performance on *American Idol* by contestant Jason Castro of Jeff Buckley's 1994 cover of Leonard Cohen's song "Hallelujah" boosted the Buckley recording to the top digital song in the United States (and the top seller on iTunes, even as the Castro recording was also available for iTunes purchase).[114]

What is new is the confluence of low costs for creating,

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videos. *Id.*

109. Leon Lazaroff, *Disney's 'Frozen' Will Become the Biggest Franchise Ever*, THESTREET (Nov. 7, 2014, 7:07 AM), http://www.thestreet.com/story/12943710/1/disneys-frozen-will-become-the-biggest-franchise-ever.html.

110. *See* Michal Lev-Ram, *Frozen: Do You Wanna Build an Empire?*, FORTUNE (Dec. 22, 2014, 1:51 PM), http://fortune.com/2014/12/22/do-you-wanna-build-an-empire.

111. Amanda Mae Meyncke, *How Press Screenings Work*, FILM.COM (Oct. 28, 2010), http://www.film.com/movies/how-press-screenings-work.

112. *Cf.* Jonathan Bailey, *Copyright Tips for Review Sites*, PLAGIARISM TODAY (Jan. 6, 2010), https://www.plagiarismtoday.com/2010/01/06/copyright-tips-for-review-sites (providing advice for how to use copyrighted content in reviews without infringing copyrights). Studios sometimes choose not to hold any press screenings of an upcoming movie if they think the movie is likely to be poorly reviewed and suffer at the box office. *See* Tim Ryan, *Breaking News: Movies Not Screened for Critics Aren't Very Good*, ROTTEN TOMATOES (Apr. 5, 2006), http://www.rottentomatoes.com/m/benchwarmers/news/1646591/breaking_news_movies_not_screened_for_critics_arent_very_good.

113. Chris Molanphy, *The Slow Hit Movement: Year-Old Songs on the Pop Charts*, NPR MUSIC (June 29, 2013, 7:00 AM), http://www.npr.org/blogs/therecord/2013/06/28/196678642/the-slow-hit-movement-year-old-songs-on-the-pop-charts.

114. *See* Chris Molanphy, *Bonkers for Buckley: America's Dead Idol*, IDOLATOR (Mar. 14, 2008), http://www.idolator.com/368015/bonkers-for-buckley-americas-dead-idol.

disseminating, and indexing user-generated content.[115] Now that consumers and artists can easily make and share content that borrows from copyrighted works in ways that might comment on it, there are yet more opportunities for market benefits to accrue to the copyright holders from this secondary content.[116] Consider Gotye's song, "Somebody That I Used To Know," the top song on Billboard's Hot 100 chart for 2012.[117] Many fans freely recorded covers of the song and made them available on YouTube.[118] Gotye responded to these videos not with a copyright infringement suit, but by stitching together under one hundred of these videos into a mashup of his song he called "Somebodies, A YouTube Orchestra," which he shared freely on YouTube.[119] Gotye must have thought that these user-generated covers of his popular song helped the song's popularity yet further by showing how "people seem to really respond to the song," and his "orchestra" generated further attention for him and his song.[120] In essence, Gotye took one step further Disney's realization that fan videos can, by referencing the underlying copyrighted work from which it takes, call attention to the work and gain it exposure. As Sarah Trombley explains, "far from substituting for the original, [fan videos] often demand that the original be consumed *as well* in order to be understood, just as most of the impact of *Rosencrantz and Guildenstern Are Dead* would be lost if the reader were unfamiliar with *Hamlet*."[121]

Courts vary in their inclusion of market benefits as a component of the market effects bearing on fair use. Some courts do not give credence

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115. *See generally* Edward Lee, *Warming up to User-Generated Content*, 2008 U. ILL. L. REV. 1459.

116. These greater opportunities for market benefits might arrive hand in hand with more chance for market harms by such secondary content as well.

117. *Hot 100 Songs: Year End 2012*, BILLBOARD, http://www.billboard.com/charts/year-end/2012/hot-100-songs (last visited Feb. 2, 2015).

118. Evan Schlansky, *Gotye Gets Meta with "Somebodies, a YouTube Orchestra,"* AM. SONGWRITER, (Aug. 14, 2012, 2:02 PM), http://www.americansongwriter.com/2012/08/gotye-gets-meta-with-somebodies-a-youtube-orchestra.

119. gotyemusic, *Gotye - Somebodies: A YouTube Orchestra*, YOUTUBE (Aug. 12, 2012), https://www.youtube.com/watch?v=opg4VGvyi3M; *see also* Wally, *Original Videos Used in Somebodies: A YouTube Orchestra*, GOTYE.COM (Aug. 4, 2012, 1:45 PM), http://gotye.com/reader/items/original-videos-used-in-somebodies-a-youtube-orchestra.html#blog.html (listing the videos incorporated into the mashup).

120. Schlansky, *supra* note 118; *see also Gotye Makes Supercut Remix of 'Somebody That I Used to Know' Covers*, ROLLING STONE (Aug. 13, 2012), http://www.rollingstone.com/music/videos/gotye-makes-supercut-remix-of-somebody-that-i-used-to-know-covers-20120813. As of February 2, 2015, this video was viewed 4,338,436 times. gotyemusic, *supra* note 119.

121. Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 669 (2007) (arguing that such fan videos should qualify as fair use).

to any market benefits even when they are readily apparent. For example, the Eleventh Circuit held in 2001 that *The Wind Done Gone*—a reinterpretation of the story in *Gone with the Wind* from the view of Scarlett O'Hara's half-sister Cynara, a bi-racial slave on Scarlett's plantation—would likely be fair use due to its transformative nature.[122] It made this determination without recognizing any potential market benefits to *Gone with the Wind*'s copyright holder.[123] Yet *The Wind Done Gone* might have caused more sales of *Gone with the Wind*, by placing it front and center back in the news and other discussions.[124]

Similarly, consider a Honda car commercial featuring a well-dressed young couple being chased by a grotesque villain who jumps on the car's roof and is then dispatched by the male driver's effortless release of the car's detachable roof.[125] A district court held in 1995 that this commercial likely infringed the copyrightable James Bond character and was also not a fair use of it.[126] In ruling against the probability of fair use, the court stated that "it is likely that James Bond's association with a low-end Honda model will threaten [James Bond's] value in the eyes of future upscale licensees."[127] The court did not consider that viewers of the car commercial might have been stimulated to see James Bond movies, a potential market benefit bearing on fair use.[128]

Likewise, the Second Circuit, in 1998, refused to recognize any market benefits to the copyright owner of the *Seinfeld* television series from the publication of a book of *Seinfeld* trivia questions—such as whetting fans' appetites—and dwelled only on harms to the copyright owner's potential derivative markets.[129] Its reasoning was similar to that articulated by a district court two years later in a copyright infringement suit brought by musical recording copyright owners against MP3.com,

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122. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277 (11th Cir. 2001).

123. *Id.* at 1275–76.

124. *See, e.g.*, David D. Kirkpatrick, *A Writer's Tough Lesson in Birthin' a Parody*, N.Y. TIMES, Apr. 26, 2001, at E1, *available at* http://www.nytimes.com/2001/04/26/books/a-writer-s-tough-lesson-in-birthin-a-parody.html (denoting one example of the prominent coverage of *The Wind Done Gone*, which also discussed *Gone with the Wind*).

125. ibpimin, *Honda Del Sol Commercial*, YOUTUBE (June 27, 2006), https://www.youtube.com/watch?v=gqa-b3assCA.

126. Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1297–1301 (C.D. Cal. 1995).

127. *Id.* at 1300.

128. *See id.* There are many other such examples. *See, e.g.*, Jackson v. Warner Bros., Inc., 993 F. Supp. 585, 590–92 (E.D. Mich. 1997) (not considering that sales for an artist's two lithographs that appeared in two scenes of a movie might have increased in ascertaining fair use).

129. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 143–46 (2d Cir. 1998).

an Internet company that made MP3 files of recordings available to subscribers: In response to the defendant's argument that it enhanced sales of recordings because subscribers could get an MP3 file only if they had already bought a corresponding CD copy of the recording, the court noted that "[a]ny allegedly positive impact of [the] defendant's activities on [the] plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."[130] This reasoning is merely a variant of the argument against considering market benefits rejected above.[131]

Other courts, often prominently, have begun to take market benefits, along with market harms, into account in considering market effects bearing on fair use. In 2013, the Southern District of New York ruled that Google's unauthorized use of short snippets from millions of copyrighted book in its book search engine is a fair use.[132] The plaintiffs had argued that "Google Books will negatively impact the market for books and that Google's scans will serve as a 'market replacement' for books."[133] Not only did the court think this result was unlikely because of how Google Books operates, but that the opposite was true:

> To the contrary, a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders. An important factor in the success of an individual title is whether it is discovered—whether potential readers learn of its existence. Google Books provides a way for authors' works to become noticed, much like traditional in-store book displays. Indeed, both librarians and their patrons use Google Books to identify books to purchase. Many authors have noted that online browsing in general and Google Books in particular helps readers find their work, thus increasing their audiences. Further, Google provides convenient links to booksellers to make it easy for a reader to order a book. In this day and age of on-line shopping, there can be no doubt but that Google Books improves books sales.[134]

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130. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000); *cf.* DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) ("Since one of the benefits of ownership of copyrighted material is the right to license its use for a fee, even a speculated increase in DC [Comic]'s comic book sales as a consequence of [the defendant's] infringement would not call the fair use defense into play as a matter of law. The owner of the copyright is in the best position to balance the prospect of increased sales against revenue from a license.").

131. *See supra* text accompanying notes 100–101.

132. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 284 (S.D.N.Y. 2013).

133. *Id.* at 292.

134. *Id.* at 293 (citations omitted).

In other cases, courts similarly reason that rather than cause market harm, a defendant's incorporation of an obscure copyrighted work into its work may shine a light on the copyrighted work and lead to "newfound interest" in it.[135] Courts have found market benefit outweighing market harm in a variety of contexts, such as a documentary movie about a nineteenth-century Yiddish author using clips from copyrighted Yiddish films as "background for scholarly commentary,"[136] a children's television program using hand puppets,[137] and a film displaying artwork consisting of pastel-colored teddy bears on a hanging mobile.[138] Other courts have considered market benefits alongside market harms but have determined that the harms outweigh the benefits—such as for a television network's copying and broadcast of portions of a student-produced film biography of a champion wrestler—thus weighing against fair use.[139]

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135. Nat'l Ctr. for Jewish Film v. Riverside Films LLC, No. 5:12-cv-000044-ODW(DTBx), 2012 WL 4052111, at *5 (C.D. Cal. Sept. 14, 2012).

136. *Id.*

137. Mura v. Columbia Broad. Sys., Inc., 245 F. Supp. 587, 590 (S.D.N.Y. 1965).

138. Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044, 1045, 1049 (S.D.N.Y. 1994). For other court rulings emphasizing the relevance of market benefits in assessing the market effects bearing on fair use, see, for example, Bond v. Blum, 317 F.3d 385, 390, 396–97 (4th Cir. 2003) (recognizing fair use and market benefits to the copyright holder from the use of his manuscript in a child custody lawsuit for evidentiary value of its content insofar as it contained admissions that the copyright holder may have made against his interest when he bragged about his conduct in murdering his father, in taking advantage of the juvenile justice system, and in benefiting from his father's estate); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1370, 1377 (2d Cir. 1993) (ruling for the copyright owner for the *Twin Peaks* television show on the market effects bearing on fair use in a suit against the author and publisher of a guide to the show, even as it recognized and weighed that "works like theirs provide helpful publicity and thereby tend to confer an economic benefit on the copyright holder"); Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1256–57, 1264 (2d Cir. 1986) (reasoning that "it is not beyond the realm of possibility that [the defendant's] book [of essays on abortion that quoted from the plaintiff's book of interviews of women discussing their experiences with abortion and unwanted pregnancy] might stimulate further interest in" the plaintiff's earlier work); Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001) (recognizing possible market benefits to the copyright owner of monster movies and still photographs in its suit against the producers of a television documentary on the monster-movie genre's development, in the sense that "the Documentary may increase market demand for plaintiff's copyrighted works and make more people aware of the influence that [it] had in developing the 'B' movie genre. Moreover, defendants' brief display of the photographs, poster, and model monsters at issue should only increase consumer demand as well as the value of those items after the Documentary heightens public awareness of [the plaintiff's] role in shaping Hollywood productions"); and compare Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 549–51 (S.D.N.Y. 2008) (suggesting that an encyclopedia for the *Harry Potter* book series would not harm the series' book sales because other publishers sometimes sell encyclopedias as companions to their book series and readers consume both types of works for different purposes).

139. *See* Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 58, 62 (S.D.N.Y. 1980).

It makes sense as a legal, policy, and business matter to consider market benefits together with market harms to yield a well-rounded consideration of the market effects bearing on fair use, as some courts have been doing. A consideration of market benefits alongside market harms also solves a longstanding concern with circular and short-circuited reasoning in consideration of the fourth fair use factor. Some courts hold that the mere possibility that a licensing market does or could exist for a copyrighted work is enough to weigh against finding fair use, because it signifies market harm.[140] This reasoning, however, is conclusory, because as Second Circuit Judge Pierre Leval recognizes in his foundational article on fair use, "every fair use involves some loss of royalty revenue because the secondary user has not paid royalties."[141] It is on that basis that other courts have been skeptical that the mere glimmer or even the full-fledged development of a licensing market is enough to damn a defendant's use.[142] Yet this reasoning is problematic as well because it ignores the possibility that the copyright owner could realistically be harmed in its licensing market.

As a way out of this reasoning, Judge Leval suggests that the possibility of a licensing market ought to weigh against fair use only "[w]hen the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication."[143] Recall that copyright theory suggests that this impairment of incentives would happen when a creator experiences market harms that exceed his or her market benefits—that is, when the net market effects experienced by the creator are negative (or are substantially lower than they would be without a particular unauthorized use).[144] By contrast, this incentive—whether as to a particular licensing market or writ large over all copyright-possible markets—would not be substantially impaired when

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140. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929–31 (2d Cir. 1994) (weighing against fair use the potential licensing revenues academic journal publishers lost from Texaco employees photocopying journal articles for no additional cost).

141. Leval, *supra* note 40, at 1124; *accord* Patry & Perlmutter, *supra* note 46, at 688 ("Too broad an interpretation of the potential market, however, presents its own dangers. If taken to a logical extreme, the fourth factor would always weigh against fair use, since there is always a *potential* market that the copyright owner could in theory license. By definition, once the affirmative defense of fair use is invoked, there has already been a finding of infringement. Accordingly, the defendant's use necessarily falls within the area of the copyright owner's exclusive rights and therefore could have been licensed.").

142. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613–15 (2d Cir. 2006) (refusing to consider a loss of licensing revenues for Grateful Dead concert posters that were published in smaller form in an illustrated history of the band).

143. Leval, *supra* note 40, at 1125.

144. *See supra* Part I.A.

there is a market harm, so long as there is a greater market benefit.

More generally speaking, so long as a court assesses all market harms and benefits that surpass a particular threshold of speculativeness, it is entirely germane that a court factor the harms the copyright owner might experience in a licensing market for that use into the market effects bearing on fair use.[145] As long as the court is evaluating a comprehensive set of market effects, the court will be able to assess whether there is overall market harm that would interfere with a copyright holder's incentive to create valuable works. Surely harm to the licensing market for the defendant's use is relevant. But it is only relevant and non-conclusory if the court is similarly assessing just-as-likely market benefits.[146]

In sum, *Campbell*'s fair use analysis ought to be read to require consideration of both market harms and benefits—so long as these harms and benefits surpass a certain degree of speculativeness—to determine the market effects bearing on fair use. The statute, copyright policy, and business realities justify this understanding of the fourth fair use factor. Moreover, this understanding alleviates conclusory reasoning that is often present in assessing market effects bearing on fair use, by not merely including or excluding licensing harms a copyright holder always might suffer from the defendant's use. I now turn to consider why *Campbell* takes a further step to exclude certain market effects from bearing on fair use and how that generally ought to shape fair use analysis.

III. CONSIDERING ONLY POTENTIAL AND COPYRIGHT-RELEVANT MARKET EFFECTS

Recall that in *Campbell* the Court sought to recognize that

145. Some market effects are too speculative to include, and some market effects are outweighed by others that are likely to co-occur. For example, William F. Patry and Shira Perlmutter write that "a copyright owner could theoretically . . . license book reviews as well as serializations. But while a serialization may satisfy some readers' desire to purchase the book, few interested in reading a novel are likely to be satisfied by a review. Including in the potential market uses such as book reviews is therefore inappropriate." Patry & Perlmutter, *supra* note 46, at 688.

146. *Cf.* Pasquale, *supra* note 3, at 810–11 (indicating that the widespread circular analyses of fair use would be undermined by a more comprehensive analysis of the fourth fair use factor). In order for the court to assess market effects, only harms and benefits that exceed a certain degree of speculativeness can be considered. If the court were to consider any harm, no matter how speculative, but only more certain market benefits, the court would be weighing the market effects unrealistically and unfairly, by putting a heavy thumb on the scale for market harm. Alternatively, courts could take into account all market effects, no matter how speculative, but weigh each effect based on its degree of speculativeness.

transformative works, such as parodies, are unlikely to cause overall market harm to a copyright owner.[147] Yet this recognition alone, the Court must have realized, was insufficient to assess the full effect of a parody on the market for a copyrighted work (and derivative markets). A complete picture might show the copyrighted work suffering from criticism—and thus harm—due to a successful parody. In conducting its analysis, the Court stated that there are market effects that are irrelevant to a fair use determination. In this vein, the *Campbell* Court ruled that there is "no protectible derivative market for criticism."[148] Thus, market harms to the copyrighted work due to scathing criticism are not true copyright harms and are thus irrelevant market effects.[149]

Without further justification, a rule excluding derivative markets for criticism as irrelevant to the fair use analysis merely parrots the conclusion that criticism ought to qualify as a fair use because any market harms that flow from it are irrelevant. Because many fair use cases are about critical uses, this rule should be probed further.

There are two justifiable ways to understand the Court's ruling that there is "no protectible derivative market for criticism."[150] Each offers up a rule of guidance for courts in deciding which market effects are relevant to the fair use analysis: Market effects are irrelevant if they are empirically implausible, and market effects ought to be excluded unless they are copyright-relevant. I explore each in turn.

A. Empirically Plausible Markets

First, the *Campbell* analysis seems to be, at least loosely, empirically grounded. The Court reasoned that "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."[151] So long as there is no conceivable potential market that a copyright owner would exploit in the original or derivative work, it is irrelevant to the analysis of the fourth fair use factor, the effect on the market.[152]

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147. *See supra* text accompanying note 76.

148. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

149. *See supra* text accompanying notes 77–79.

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

151. *Id.*

152. This exclusion does not solve another problem in fair use reasoning: that risk-averse users pay for copyright licenses for uses that might reasonably be considered fair to avoid the cost of copyright litigation, which then creates an unneeded license for copyrighted works, which then weighs against fair use as a relevant market harm. *See, e.g.*, Gibson, *supra* note 8, at 887–906.

So understood, the exclusion of inconceivable potential markets from the analysis is sensible. Recall that the statute asks courts to evaluate "the effect of the use upon the potential market for or value of the copyrighted work."[153] Truly inconceivable potential markets are not potential in any relevant way. Copyright policy suggests they have no place in analysis of this fair use factor: They are not likely to affect the copyright holder's incentive to produce valuable works in the first place, so they are irrelevant costs in the cost-benefit calculus of copyright infringement and fair use.[154] This understanding of *Campbell* suggests that courts ruling on fair use should exclude all inconceivable markets from consideration in the fourth fair use factor.[155]

Some courts appear to follow this rule and refuse to consider empirically dubious market effects in its calculus of market effects bearing on fair use. For example, a photographer sued the Associated Press for copyright infringement for a press report it made on a new business venture by Oliver North, which included a photo of the business's sale brochure cover.[156] In assessing fair use, the court rejected the photographer's claims of market harm in the market for his photos as too speculative because there was absolutely no evidence of any interest in these photos other than for the sales brochure itself.[157] In another case, Richard Wright's widow sued a biographer for use of Wright's journal

153. 17 U.S.C. § 107(4) (2012).

154. *Cf.* Fromer & Lemley, *supra* note 97, at 1300–01 ("While the line between infringement and fair use is murky, certain categories of works tend to be favored as fair: parodies or other uses that transform the original work into one with a new meaning, uses of copyrighted works in news reporting or historical research, and uses in comparative advertising, to name a few. The four traditional fair-use factors often point in favor of these works in these classes of cases, principally because they do not compete in the market with the copyrighted work and because they are valuable in promoting the progress of culture and knowledge.").

155. Another possibility would be, as Bill Patry suggests, to "include only those uses that the copyright owner has actually licensed or is negotiating to license." PATRY, *supra* note 4, § 6:8, at 556. A concern with this approach, however, is one Patry readily emphasizes: It "puts copyright owners at risk from third parties who rush to exploit conventional markets before the copyright owner does." *Id.* Moreover, it is inconsistent with granting copyright owners rights in derivative works. *Cf.* Patry & Perlmutter, *supra* note 46, at 689–90. Patry thus adds nuance to this possibility by suggesting that delay in entering a market or lack of interest in a market could be used as a basis to exclude consideration of effects in that particular market in the fourth factor. PATRY, *supra* note 4, § 6:8, at 557.

156. Mathieson v. Associated Press, No. 90 Civ. 6945 (LMM), 1992 WL 164447, at *1 (S.D.N.Y. June 25, 1992).

157. *Id.* at *8–9. Similarly, in an infringement suit by the photographer Annie Leibovitz over a movie poster parodying Leibovitz's notorious photograph of a nude pregnant actress, Demi Moore, the court found no market harm because Leibovitz had "not identified any market for a derivative work that might be harmed by" the poster. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 n.6 (2d Cir. 1998).

entries and letters.[158] The court refused to weigh as a market harm the possibility of a separately published Wright collection of letters, because such a project had been negotiated decades earlier but had stalled for a variety of reasons and was unlikely to materialize.[159] Consider similarly the First Circuit's decision on the use of semi-nude modeling photographs of Miss Puerto Rico Universe in a news story about a scandal concerning those photographs' propriety.[160] The court held the use to be fair, and in doing so, it excluded from its consideration of market effects bearing on fair use "the potential market for the photographs [for] the sale to newspapers for . . . illustrating controversy."[161] The court did so because "[s]urely the market for professional photographs of models publishable only due to the controversy of the photograph itself is small or nonexistent."[162] By contrast, the Third Circuit was willing to consider a market in movie previews as part of its fair use assessment of a video clip compiler's previews from copyrighted movies precisely because there was an extant marketplace for these previews among various websites, over the compiler's objections that there is no such marketplace because consumers do not pay for movie previews.[163]

A focus on truly potential markets underscores the need for more evidence-based decision-making with regard to intellectual property and less conjecture. Empirical research bearing on intellectual property laws is beginning to grow,[164] and for good reason.[165] Justice Souter's

158. Wright v. Warner Books, Inc., 953 F.2d 731, 734 (2d Cir. 1991).

159. *Id.* at 739.

160. Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 21 (1st Cir. 2000).

161. *Id.* at 25.

162. *Id.*

163. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 202 (3d Cir. 2003).

164. This body of scholarship uses different methodologies, including social-science experiments and statistical studies of natural data to start answering important questions about innovation policy. *See, e.g.*, David S. Abrams & R. Polk Wagner, *Poisoning the Next Apple?: The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 517–18 (2013) (predicting from a study of natural data in the United States and Canada that recent changes to American patent law will negatively affect individual inventors); Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921, 1946–72 (2014) (reporting four original experiments designed to measure the effects of different thresholds, much like intellectual property laws', on creativity); C. Scott Hemphill & Bhaven N. Sampat, *When Do Generics Challenge Drug Patents?*, 8 J. EMPIRICAL L. STUD. 613, 613 (2011) (applying econometric techniques to study the effects of brand-name drug sales on the likelihood of generic drug companies' patent challenges); Mark A. Lemley, Su Li, & Jennifer M. Urban, *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1121 (2014) (studying the statistical relationship between district court judges' experience and patent case outcomes, and finding that more experienced judges are less likely to

reasoning in *Campbell* that markets for criticism are not plausibly potential ought to serve as an appeal to determine sturdy methodologies for separating out plausibly potential markets from implausible ones and to assess the scope of truly potential markets in important copyright industries. More robust research on methodologies and industries would promote more accurate and just fair use determinations.

It cannot go unsaid, however, that in important ways, *Campbell*'s specific conclusion about the unlikelihood of licensing markets in criticism is empirically dubious. Be it moviemakers' general desire to have critics review their movies, warts and all,[166] copyright holders' grants of permission to Weird Al Yankovic to lampoon their songs,[167] or Disney's tolerance of parodies of songs from its movie *Frozen* criticizing how addictive the movie is, copyright owners sometimes do seek out a licensing market of sorts in criticism.[168] Granted, many copyright owners likely have no interest in crafting a market for criticism of their works. Yet even *Campbell*'s particular conclusion, that there is no plausible potential market that copyright owners would create for criticism, ought to be open to empirical examination, particularly in light of doubts about its accuracy.[169]

In sum, this section demonstrates that one way to understand *Campbell*'s exclusion of criticism as a relevant market effect is to see it as an empirically unlikely market. On that reading and for reasons consonant with copyright policy, empirically unlikely market effects ought to be excluded from consideration of the fourth fair use factor.

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rule for the patentee).

165. We know too little about the validity of various assumptions underlying intellectual property laws and the implications of these laws. John Golden, Rob Merges, and Pam Samuelson express a hope of "ever greater commitment to more systematic and sophisticated studies of intellectual property's normative justifications, empirical context, and actual and potential practical performance." John M. Golden, Robert P. Merges & Pamela Samuelson, *The Path of IP Studies: Growth, Diversification, and Hope*, 92 TEX. L. REV. 1757, 1759 (2014).

166. *See supra* text accompanying notes 111–112 (discussing why movie studios hold press screenings before movie releases); *cf. Studios Trying to Keep Critics from Bad Movies*, TODAY.COM (Apr. 12, 2006, 10:37 AM), http://www.today.com/id/12154435#.VMhqz_7F9h4.

167. *'Weird' Al Yankovic Says Prince Is the Only Artist Ever to Turn Down One of His Parodies*, NME (July 24, 2014, 1:40 PM), http://www.nme.com/news/various-artists/78754.

168. *See* Kramer, *supra* note 105; Leonard, *supra* note 16. *See generally supra* text accompanying notes 102–116 (analyzing Disney's market decisions with regard to *Frozen*).

169. Whether these markets are ones that exist merely to cater to risk-averse users with otherwise strong fair use claims is another issue, *see supra* note 152, which is beyond the scope of this Article.

B. Copyright-Relevant Markets

There is another understanding of *Campbell*'s exclusion of a market for criticism from the market effects bearing on fair use. When discussing markets for criticism, *Campbell* contrasts them with "protectible markets for derivative works."[170] The contrast is striking, as it implies that criticism is outside the scope of a copyright owner's rights in his or her work and derivative works. *Campbell* seeks to emphasize that market harms to the original work that come from scathing criticism are not true copyright harms. Such harms from criticism are, by likely inference, harms to unprotectable aspects of the original work, such as its ideas or how highly regarded society finds it.[171] Benjamin Kaplan long ago alluded to such a rule in his writings on copyright law: A "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically."[172] More generally, *Campbell*'s distinction suggests that before considering a market effect of a use on a copyright owner, the effect must both stem from the defendant's use of protectable material and cause an effect that also falls within the scope of defendant's copyright (in both the original work and derivative works).

Consider the first of these copyright-relevant requirements. This rule would exclude market effects that stem from a defendant's use of material that copyright law does not protect, regardless of the negative effect on the copyright owner. As Bill Patry elaborates in his treatise on fair use, "even though the taking of unprotectable material such as important ideas, laboriously researched facts, or the copying of the work's overall style may cause lower sales, such losses should not be considered. The harm must be caused by the use of expression."[173] Applying this rule to the situation in *Campbell* would exclude all market effects that arise from 2 Live Crew's borrowing of ideas, expression that is not sufficiently creative, and other unprotected material from Roy Orbison's song. Given that 2 Live Crew's use of material from

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170. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

171. *See supra* text accompanying note 77.

172. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967); *accord* Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986) ("[T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can have that effect—but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable." (emphasis in original)).

173. PATRY, *supra* note 4, § 6:7 at 548.

Orbison's song was done to criticize the original, some of the borrowed aspects are likely to be its ideas. Market effects stemming from taking these would be improper to consider in the fair use calculus because they are irrelevant to copyright law and are free for the taking as unprotected material. By contrast, only the market effects of 2 Live Crew's use of protected expression from Orbison's song (such as its characteristic riff and some of its lyrics) ought to be considered.

That rule alone is not enough to consider only copyright-relevant market effects. Courts must also exclude market effects that stem from borrowing material protected by copyright law but whose repercussions are only to copyright owners in ways that are irrelevant to or unprotected by copyright law. Taking the *Campbell* example, only the copyright-relevant market effects of 2 Live Crew's use of protected expression from Orbison's song ought to be considered. These are effects to the copyright owner's interests in the original song's expression and expression in derivative markets, such as the rap music market. Thus, for example, as *Campbell* itself spelled out, quite relevant and necessary for consideration are the "the parody's effect on a market for a rap version of the original, either of the music alone or of the music with its lyrics."[174] On the other hand, harm that befalls the copyright owner due to the defendant's use of copyrightable expression with regard to the idea motivating the song or the social value of the song, both outside the scope of the copyright, is irrelevant.[175]

Some courts attempt to tease apart copyright-relevant market effects from irrelevant ones. For example, one district court excluded as copyright-irrelevant market effects harms to a copyright owner's business services unrelated to copyright law, namely, a jet manufacturer's maintenance-tracking services, which it claimed had been harmed by a competitor's copying of its jet maintenance manuals.[176] Similarly, consider a movie poster parodying photographer Annie Leibovitz's notorious photograph of a nude pregnant actress, Demi Moore.[177] The Second Circuit refused to give credence to

174. *Campbell*, 510 U.S. at 593.

175. *Cf.* Leval, *supra* note 40, at 1125 ("Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute . . . . Only to that extent are the purposes of copyright implicated.").

176. Gulfstream Aerospace Corp. v. Camp Sys. Int'l, Inc., 428 F. Supp. 2d 1369, 1379–80 (S.D. Ga. 2006).

177. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 111 (2d Cir. 1998).

Leibovitz's worry, in her copyright infringement suit over the poster, about "the effect that the parody could have on her 'special relationships' with the celebrities whom she has made a living photographing."[178] The court reasoned that "[t]he possibility of criticism or comment—whether or not parodic—is a risk artists and their subjects must accept."[179] In another suit by the publisher of *Consumer Reports* magazine against a vacuum cleaner company for using a quote from its review in television commercials, the Second Circuit refused to recognize any harm that might befall the magazine from appearing biased due to its quotes appearing in product advertisements, because any harm of bias has nothing to do with copyright law.[180]

More generally, the Seventh Circuit has observed that copyright law ought not to give a business a monopoly over a business interest that is not within the scope of the business's copyrighted works or its possible derivative works.[181] This rule has applications in a number of different contexts in which courts decide fair use: Copyright-irrelevant effects include those about ideas and criticism of them,[182] the societal value attributed to a work,[183] reverse engineering of copyrighted software to derive unprotectable aspects of the program—functionality and interface concerns—to use in compatible software,[184] and other harms to businesses having nothing to do with copyright.[185]

All in all, *Campbell* ought to be read to exclude certain market effects as irrelevant: those that are not truly potential, and those that are not copyright-relevant. This boundary line comports with copyright law and policy by allowing third parties to use copyrighted works in ways that copyright law does not seek to protect and in ways that are unlikely to harm the copyright owner in the market. Allowing these uses does not

178. *Id.* at 116 n.7.

179. *Id.*

180. *See* Consumers Union of U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1046, 1050–51 (2d Cir. 1983).

181. Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 521 (7th Cir. 2002) (observing in a copyright infringement suit by the makers of Beanie Babies against the publisher of Beanie Babies collector guides: "Given that Ty can license (in fact has licensed) the publication of collectors' guides that contain photos of all the Beanie Babies, how could a competitor forbidden to publish photos of the complete line compete? And if it couldn't compete, the result would be to deliver into Ty's hands a monopoly of Beanie Baby collectors' guides even though Ty acknowledges that such guides are not derivative works and do not become such by being licensed by it.").

182. *See supra* text accompanying notes 173–175 (discussing this exclusion in the context of *Campbell*).

183. *See id.*

184. *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1514–17 (9th Cir. 1992).

185. *See supra* text accompanying notes 176–181.

interfere with copyright owners' plausible incentives to create copyrightable works and also benefits society by making further works available to them.

CONCLUSION

In conclusion, when *Campbell* was decided twenty-one years ago it set the stage for a more robust fair use framework. It offered up, albeit tersely, key ingredients for a robust and defensible consideration of the market effects bearing on fair use: a full-bodied consideration of the market effects a use inflicts on a copyrighted work—both the market harms and benefits—but an exclusion of any effects that are neither plausibly potential nor copyright-relevant. With this framework, courts can move to evaluate the fourth fair use factor on its own terms, as an evidentiary-laden analysis of the effects a use has on a copyright holder's market.

In this way, fair use evaluations can help copyright law strike a proper balance between incentives to initial creators and access and subsequent creation by the public and later creators. It does so in a number of ways. First, this analysis emphasizes that market benefits should be taken into account alongside market harms in assessing market effects bearing on fair use. Otherwise, infringement—and no fair use—can be found too readily, even in cases in which copyright owners benefit from a third party's use of protected works. Second, this analytical framework underscores that copyright law will protect rights-holders only from plausible harms to them in the marketplace from copying of their works. Harms that are not plausible are unlikely to affect creators' incentives to create and ought to be irrelevant from consideration. Finally, harms that a copyright owner experiences in the marketplace that are unrelated either to a defendant's use of protected aspects of a copyrighted work or that cause harm to the owner in ways other than to its copyright ought to be irrelevant in considering the market effects bearing on fair use. These rules help protect both copyright incentives to create and subsequent creations, all to the overall benefit of society.