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An Amended Doctrine that Will Silence the NFL: The Demise of the Existing Fair Use Doctrine as it Relates to Uses of Digital Sports Entertainment Media

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AN AMENDED DOCTRINE THAT WILL SILENCE THE NFL: THE DEMISE OF THE EXISTING FAIR USE DOCTRINE AS IT RELATES TO USES OF DIGITAL SPORTS ENTERTAINMENT MEDIA

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I. INTRODUCTION

In 2005, the National Football League (NFL) generated $5.8 billion dollars in profit.[1] Every year, the NFL generates $3.7 billion in television revenue alone.[2] Of that revenue, each team receives approximately $87.5 million per year, which the teams then use to pay their players in salaries, which are annually capped at roughly $85.5 million.[3] To protect its incredibly valuable commodity, the NFL states during all of its broadcasts that, "[t]his telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited."[4]

The Computer & Communications Industry Association (CCIA)[5] has filed a complaint with the Federal Trade Commission (FTC)[6] against the NFL because CCIA believes that the league's copyright claim "casts a

1. John Gallagher, *The NFL Means (Big) Business*, http://www.wzzm13.com/news/news_article.aspx?storyid=49761 (last visited Mar. 26, 2009).

2. *Id.*

3. *Id.*

4. Eric Bangeman, *FTC Complaint Flags NFL, MLB, Studios for Overstating Copyright Claims*, http://arstechnica.com/ tech-policy/news/2007/08/ftc-complaint-flags-nfl-mlb-studios-for-overstating-copyright-claims.ars (last visited Mar. 19, 2009).

5. CCIA is a trade group that consists of Google, Microsoft, Yahoo, Redhat, and others. *Id.*

6. The Federal Trade Commission, an independent agency of the U.S. government, executes its mission of promoting consumer protection, and eliminating and preventing what regulators perceive to be anticompetitive business practices. A Guide to the Federal Trade Commission, http://www.ftc.gov/bcp/edu/pubs/ consumer/general/ger03.shtm.

pall"[7] over the entire tech industry.[8] CCIA's complaint accuses the NFL of systematically misrepresenting the rights of consumers to lawfully use copyrighted material.[9] A CCIA spokesperson stated that the NFL's dire warning is not only a misrepresentation of the law, but that it is also a violation of consumers' rights.[10] According to the complaint, fair use is given short shrift, and consumers are left with the erroneous impression that any use not expressly permitted by the NFL is illegal.[11]

The NFL states that any description or account of the game without the NFL's express consent is prohibited.[12] This can be interpreted to mean that everyone who sees the game is not permitted to discuss that game in any way whatsoever. The NFL's fans should be able to discuss and share parts about the game afterwards. The ideas, conversations, theories, and general discourse that stem from the games are extremely beneficial to American society. Not only is the NFL infringing upon consumers' free speech rights, but it is also blatantly violating consumers' fair use rights.

Youtube.com (Youtube) is a video sharing website where users can upload, view, and share video clips.[13] Many Youtube users extract NFL clips from previously recorded telecasts and post them on Youtube for others to enjoy. One user received unwarranted attention from the NFL concerning her posted clip that contained the NFL's aforementioned copyright message.[14] The NFL immediately sent Youtube a takedown notice, to which the user responded that the clip did not infringe on the NFL's rights.[15] The NFL, instead of following the required DMCA[16] provisions, issued another takedown notice.[17] The user then sent another message to Youtube stating that she was within her rights to post it.[18]

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7. Bangeman, *supra* note 4. A "pall" is anything that covers, shrouds, or overspreads with darkness or gloom. *See* Dictionary.com, Pall, http://dictionary.reference.com/browse/pall (last visisted Mar. 19, 2009).

8. Bangeman, *supra* note 4.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Wendy.Seltzer.Org, Wendy's Blog: Legal Tags, http://wendy.seltzer.org/blog/archives/2007/02/08/my_first_youtube_super_bowl_highlights_or_ lowlights.html (last visited Mar. 19, 2008).

13. *See YouTube*, http://www.youtube.com (last visited Mar. 19, 2009).

14. *See* Bangeman, *supra* note 4.

15. *Id.*

16. The DMCA has specific provisions for sending takedown notices. 17 U.S.C. § 512 (2006).

17. Bangeman, *supra* note 4.

18. *Id.*

Despite the NFL's efforts to have the video clip removed, the clip remains posted as of March 26, 2009.[19]

CCIA is seeking an injunction that will bar the NFL from using its overly-broad warning.[20] Unfortunately for CCIA, this is only a temporary solution. The fact remains that the existing fair use doctrine does not correspond with rapid advances in technology and information sharing. Part II of this Article will examine the background of the fair use doctrine. Part III will examine two leading Supreme Court decisions concerning the fair use doctrine: *Sony Corporation of America v. Universal City Studios*[21] found fair use, while *Harper & Row Publishers, Inc. v. Nation Enterprises*[22] did not. Part IV will examine the individual elements of the existing doctrine, and it will discuss why the doctrine does not harmonize with America's growing technological society. Part V will discuss where the Ninth Circuit Court of Appeals is headed in terms of its fair use doctrinal analysis. Part VI will present an amended fair use doctrine for digital sports entertainment media. Finally, Part VII will conclude the Article and reiterate its major points.

II. THE BACKGROUND AND PURPOSE OF THE FAIR USE DOCTRINE

The U.S. Constitution states that, "Congress shall have power . . . [t]o promote the [p]rogress of [s]cience and useful arts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries."[23] The dual purpose of copyright law is to promote creativity and innovation, while simultaneously protecting authors' rights.[24] The Copyright Act grants to owners the exclusive right to reproduce, distribute, make derivative works of, publicly perform, and display their works.[25] While there is no requirement that an owner must prove harm or damages, he is required to prove the following two elements in establishing a case of copyright infringement: 1) his ownership of a

19. *See* Wendy.Seltzer.Org, *supra* note 12.

20. Bangeman, *supra* note 4.

21. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420-21 (1984).

22. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 541 (1985).

23. U.S. CONST. art. 1, § 8, cl. 8.

24. Nari Na, *Testing the Boundaries of Copyright Protection: The Google Books Library Project and the Fair Use Doctrine*, 16 CORNELL J.L. & PUB. POL'Y 417, 429 (2007).

25. 17 U.S.C. § 106 (2006).

valid copyright; and 2) the unauthorized copying of *essential elements*[26] *of* his original work.[27]

The Copyright Act's fair use limitation states that the copying of a creative work for purposes of comment, criticism, or news reporting does not constitute copyright infringement.[28] Factors presently considered by courts in determining whether there is fair use include the following: 1) the purpose and character of the use, and whether that use is for nonprofit educational purposes, or is of a commercial nature; 2) the nature of the copyrighted work; 3) the substantiality and amount of the part used in relation to the whole copyrighted work; and 4) the effect that the use has on the copyrighted work's value or potential market.[29]

Courts are free to make such determinations on a case-by-case basis.[30] Moreover, these four factors must not be treated singularly, but rather, they must be both explored and weighed together.[31] This flexibility of interpretation engenders uncertainty, and the courts' resolutions depend on their individual interpretations of the doctrine.[32] The Supreme Court instructs the lower courts to be cautious in expanding copyright protection's scope, and it emphasizes regard for the overall public good.[33] Thus, one can infer that the Court seems to be pushing more in favor of increased availability of original works for the public, rather than expanded protection for authors.[34]

III. TWO CASES COMPARED: *SONY* AND *HARPER & ROW*

A. Sony Corporation of America v. Universal City Studios

1. Facts

Universal City Studios (Universal) sued Sony Corporation of America (Sony) for Sony's manufacture and distribution of home video tape

26. The Court has sometimes referred to this as the "heart" of the author's work. *See Harper*, 471 U.S. at 565.

27. Na, *supra* note 24.

28. *Id.* at 432.

29. *Id.*

30. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

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

32. Na, *supra* note 24, at 433.

33. *Id. See Sony*, 464 U.S. at 432 (stating that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

34. *See Sony*, 464 U.S. at 432.

recorders.[35] Members of the general public were able to take these machines and record some of the copyrighted television broadcasts[36] transmitted over the public airwaves.[37] Universal claimed that Sony's sales of the recorders to the general public violated Universal's rights conferred by the Copyright Act[38] because the television broadcasts were copyrighted, and all rights pertaining to those broadcasts were owned exclusively by Universal.[39]

2. Procedural History

The trial court found in Sony's favor by holding that noncommercial home recording of publicly available broadcasts did not constitute copyright infringement because it was a fair use of Universal's copyrighted works.[40] The court further stated that Sony was not a contributory infringer, even if the general public's use of the recorders were infringing ones.[41] The Court of Appeals reversed, holding that Sony was liable for contributory infringement.[42] The Supreme Court granted certiorari, and in holding that the sale of home video tape recorders to the general public did not constitute contributory copyright infringement, it reversed the Court of Appeals' decision in favor of Sony.[43]

3. Decision

Justice Stevens, writing the opinion of the Court, began by stating that Universal has both the ability and the right to exploit its works by authorizing theatrical exhibitions, by licensing limited cable and network television showings, by selling syndication rights to television stations for future airings, and by marketing their work on prerecorded media.[44] He further stated that a survey conducted showed that 80% of home video tape

35. The home video tape recorders at issue in this case were Betamax machines. Betamax machines were very similar to the then up-and-coming video cassette recorder (i.e., VCR). *Id.* at 419.

36. The copyrighted broadcasts at issue were owned by Universal. *Id.* at 422.

37. *Id.* at 419-20.

38. 17 U.S.C. § 501 of the Copyright Act states that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author."

39. *Sony*, 464 U.S. at 420.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 421, 456.

44. *Id.* at 421-22.

recorder owners watched just as much television as they had before they owned one.[45]

Justice Stevens' opening statements indicate where the Court was headed in its decision. Justice Stevens suggested that Universal's lack of evidence as to its likelihood of future harm was paramount in the district court's finding of fair use.[46] He then criticized the Court of Appeals for not requiring a show of harm to the potential market, then concluding that the potential market would be harmed in this case.[47] He further suggested that the Court of Appeals was too assumptive in concluding that "the cumulative effect of mass reproduction made possible" by home video tape recorders would diminish Universal's potential market.[48]

Justice Stevens then pointed to the Constitution which states that, "Congress shall have Power . . . to [secure] *for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[49] He explained that the term "limited" means that an essential public purpose can be achieved.[50] Moreover, the term is intended not only to motivate authors' creative activity, but to allow the public to access the work after the limited period of exclusive control has expired.[51] It seems that the Court, at a time of an emerging technological explosion, was wary of allowing copyright owners to use the fair use doctrine as a means of hoarding absolute control over their copyrighted works.[52]

Despite his cautionary approach, Justice Stevens still recognized a need for authors to have an initial monopoly over their works.[53] Nevertheless, he noted that this monopoly could not exist for long.[54] Justice Stevens explained that the task of determining how long a monopoly should last involves a complex balance between: 1) the interests of authors in the control and exploitation of their work, against 2) society's competing interest in the free flow of ideas, information, and commerce.[55] Justice Stevens suggested that the Constitution, being a document for the people,

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45. *Id.* at 423-24.

46. *Id.* at 425.

47. *Id.* at 427.

48. *Id.*

49. *Id.* at 428 (citing U.S. CONST. art. I, § 8, cl. 8).

50. *Id.* at 429.

51. *Id.*

52. *See id.* (quoting Chief Justice Hughes who stated that "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.").

53. *See id.*

54. *Id.*

55. *Id.*

directs not only the service of the public welfare, but also the progress of useful arts and sciences by securing only limited periods of exclusive rights to copyright owners.[56]

Justice Stevens spoke favorably as to the district court's determination that the harm presented by time-shifting[57] is both speculative and minimal.[58] He recognized that time-shifting yields societal benefits by expanding the public's access to freely broadcast television programs.[59] Justice Stevens then said that time-shifting at home is fair use, and that copyright holders must demonstrate a likelihood of harm before they condemn private acts of time-shifting as federal law violations.[60]

The *Sony* decision ensured that the Constitution's objectives were served.[61] In concluding the Court's opinion, Justice Stevens emphasized that it was for Congress, and not the Court, to apply laws that adapt to new and emerging technological innovations.[62] Justice Stevens, foreseeing a thicket of future fair use complications, appeared to be subtly asking Congress to do so.

B. Harper & Row Publishers, Inc. v. Nation Enterprises

1. Facts

In 1977, President Gerald Ford and Harper & Row Publishers, Inc. (Harper) entered a publication contract for Ford's unwritten memoirs.[63] Two years later, Time Magazine (Time) entered into an agreement with Harper that Time could publish a 7,500 word portion of Ford's manuscript detailing his presidential pardon for former President Richard M. Nixon.[64] However, before the Time issue was released, an unauthorized source provided Nation Enterprises (Nation) with the yet unpublished Ford manuscript.[65] A Nation reporter then wrote an article on the manuscript using up to 400 words of verbatim quoted material from the manuscript.[66]

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56. *See id.* n.10.

57. Time-shifting means that the user shifts the time of when he uses the work from when the copyright owner made it available to a later time of the citizen's choosing.

58. *Id.* at 454.

59. *Id.*

60. *Id.*

61. *See id.* at 431.

62. *Id.* at 456.

63. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 542 (1985).

64. *Id.* at 542-43.

65. *Id.* at 543.

66. *Id.*

Nation timed its article's release in front of Time's.[67] As a result, Time cancelled its article and refused to pay Harper the remaining money owed on the contract.[68] Harper then brought suit against Nation alleging that Nation had violated the Copyright Act.[69]

2. Procedural History

The trial court ruled that Ford's memoirs were protected by copyright at the time that Nation's article was released.[70] The court, in finding that Nation infringed Harper's copyright, awarded Harper $12,500 in actual damages.[71] The Court of Appeals reversed and held that Nation's publication of the words pulled from Ford's manuscript was a fair use of Harper's copyrighted material.[72] The Supreme Court reversed the Court of Appeals' decision and held that Nation's use of the manuscript was not fair.[73]

3. Decision

Justice O'Connor began the Court's opinion by stating that copyright is intended to increase and not to impede the harvest of knowledge.[74] However, she followed by saying that the Court of Appeals did not give enough deference to protecting the "original works that provide the seed and substance of this harvest."[75] Moreover, she said that those who contribute to the "store of knowledge" should receive good return for their labors.[76]

Justice O'Connor made reference to *Sony*'s statement that fair use is intended to motivate authors' creative activity, while simultaneously allowing public access to the works created after the time of exclusive control has lapsed.[77] As to articles being written *about* Ford's memoirs,

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67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 539.
71. *Id.* at 543
72. *Id.*
73. *Id.* at 540.
74. *Id.* at 545.
75. *Id.* at 545-46.
76. *Id.* at 546.
77. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that fair use's "limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

Justice O'Connor said that it was apparent that the memoir's copyright monopoly was serving its intended purpose of stimulating the creation of new material.[78]

Though Justice O'Connor seemed to favor the idea of new material being stimulated from the original article, she took issue with the fact that Nation had "arrogated to itself the right of first publication" by lifting large chunks of verbatim quotes from Ford's memoirs and inserting them into its own article.[79] She stated that authors' consent to the use of their works have historically been implied as necessary to promoting the progress of the arts, and a restriction of such use would frustrate subsequent writers from attempting to improve their prior works.[80] Here, Justice O'Connor was inferring that the relationship between creators and future users is reciprocal.[81]

Justice O'Connor then said that the fair use doctrine has always precluded use that supercedes the use of the original.[82] She recognized that an indispensable element of copyright protection is the right of first publication, and copyright owners should always have the right to control the first public distribution of their work.[83] The right of first publication involves an author's decision as to when and how the work will be released.[84] Justice O'Connor concluded her discussion on this issue by stating that the unpublished nature of a work is a crucial factor that tends to undo a fair use defense.[85]

Nation argued that the public's interest in learning things as fast as possible outweighed the owner's right to fully control his first publication.[86] Justice O'Connor rejected this argument by saying that, despite the public's thirst for knowledge, owners have the right to fully and freely market their original expression as compensation for their investment.[87] She went on to say that if the Court adopted Nation's expansion on fair use, there would be very little incentive for authors to

78. *Harper*, 471 U.S. at 546.

79. *Id.* at 548.

80. *Id.* at 549.

81. The reciprocal relationship consists of the users benefiting from the use of the creators' works, in exchange for the authors benefiting from rewards, exposure, and acclaim that they receive as a result of the use. *See id.* at 546-47.

82. *Id.* at 550.

83. *Id.* at 552.

84. *Id.* at 553.

85. *Id.* at 554. *See also id.* at 555 (stating that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.").

86. *Id.* at 556.

87. *Id.* at 557.

create new material.[88] Thus, the public would be denied the fruits of those authors' labors.[89] Justice O'Connor then again suggested that the doctrine of fair use benefits both users and owners alike.[90] She explained that if the doctrine was expanded too much, it would unravel not only the intentions of Article I, but it would also frustrate the efforts of future authors; thereby depriving the public of useful knowledge.[91]

Justice O'Connor concluded her opinion by stating that the Court of Appeals was mistaken in assuming that Nation's use of the memoirs was excused by society's interest in it.[92] She went on to say that any copyright infringer could claim to benefit society by increasing its access to the copyrighted work.[93] Justice O'Connor stated that Congress did not design, nor would the Court judicially impose, a "compulsory license" allowing unregulated access to unpublished copyrighted expression.[94] The Court held that because Nation conceded that its copying of Ford's memoirs would constitute copyright infringement unless excused as fair use, Nation did indeed infringe the owner's copyright.[95] Based on this, the Court reversed the Court of Appeals' decision in favor of Harper.[96]

IV. ANALYSIS OF THE FOUR ELEMENTS OF THE EXISTING FAIR USE DOCTRINE

A. *The Purpose and Character of the Use, and Whether That Use is for Nonprofit Educational Purposes, or is of a Commercial Nature*

The central purpose of this investigation is to determine whether the new work supersedes the original one, or whether it adds something to the work – thereby giving it a different character or further purpose.[97] If the new work alters the original work with a new meaning, expression, or message, that new work is considered to be transformative in nature.[98]

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88. *Id.*
89. *Id.*
90. *Id.*
91. *See id.* at 560.
92. *Id.* at 569.
93. *Id.*
94. *Id.* This statement is antithetical to *Sony*'s statement regarding its warning to the lower courts to not favor expanded protection for owners over the public's increased availability to the work.
95. *Id.*
96. *Id.*
97. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
98. *Id.*

Although transformative use is not necessary for a finding of fair use, the goal of promoting science and the arts is furthered by the transformation of original material.[99] The more transformative the new work is, the less significant the remaining three factors become.[100] However, to determine if a work has been sufficiently transformed, it must be ascertained that the transformation can be reasonably perceived.[101]

The fact that a work is used merely for nonprofit educational purposes does not insulate it from a finding of infringement, any more than a use's commercial character bars a finding of fair use.[102] If a use's commercial character *did* bar a finding of fair use, that presumption would unfairly affect news reporting, comment, criticism, teaching, scholarship, and research, since all of those activities are generally conducted for profit.[103]

This factor is opaque, as it suggests two distinctly separate inquiries: one inquiry suggests that purpose and character are synonymous, while the other inquiry suggests that purpose is one question, and character is the other.[104] Most courts mistakenly quote purpose and character as a single criterion.[105] The phrase that follows, of whether the use is of a commercial or nonprofit educational nature, is similarly unclear because it suggests that these phrases oppose one another. This phrase also suggests that it defines the scope of the kinds of purpose and character to which this factor applies.[106] Equally problematic are unclear distinctions such as commercial versus noncommercial use, educational versus non-educational use, transformative versus non-transformative use, and productive versus non-productive use.[107] The Supreme Court has been inconsistent with its analysis and application of this factor's converging principles.[108] This has ultimately led to confusion amongst ordinary citizens who want to understand and remain within the confines of the law.

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99. *Id.*

100. *Id.*

101. *Id.* at 582.

102. *Id.* at 584.

103. *Id.*

104. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1557 (2004).

105. *Id.*

106. *Id.* at 1557-58.

107. *Id.* at 1558.

108. *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (applying the commercial versus noncommercial distinction), *with Campbell*, 510 U.S. at 569 (partially retreating from this argument).

B. *The Nature of the Copyrighted Work*

To properly analyze this factor, the work's inherent creativity and overall availability must be evaluated.[109] Copies of "published works are more likely to qualify as fair use than unpublished works."[110] Published works receive less protection because the author has already exercised his right of first publication.[111] A copy may also be likely to qualify as fair use if the original work is not available for purchase through normal channels.[112] *Sony v. Universal City Studios, Inc.* found that television was something that people are invited to enjoy free of charge.[113] Thus, if a user can show that he would have been able to view the television show without downloading it, he will likely succeed under this factor.[114] However, a user will have a more difficult time if the original broadcast was not free.[115]

Overall, this factor remains unhelpful in evaluating whether or not an activity is protected by the fair use doctrine because it is overwhelmed by the remaining factors.[116] Generally, this factor favors copyright owners because most works are considered creative.[117] Thus, this factor does little to guide a court if it finds creativity in the work.[118]

C. *The Substantiality and Amount of the Part Used in Relation to the Whole Copyrighted Work*

This factor requires both a quantitative and a qualitative analysis.[119] The quantitative aspect of this factor may seem to be unproblematic, but the courts have not investigated this factor in detail.[120] Generally, the more of a work that an individual takes, the less likely it is that the use will

109. Na, *supra* note 24, at 441.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Sony*, 464 U.S. at 449.

114. Charles B. Vincent, *Bittorrent, Grokster, and Why Entertainment and Internet Lawyers Need to Prepare for the Fair Use Argument for Downloading TV Shows*, 1 J. INTERNET L. 1, 12 (2007).

115. *Id.* NFL broadcasts *are* free. If a specific game cannot be viewed from a person's home, it can be viewed at a local sports bar. Most U.S. cities have an individual team bar for every team in the NFL. NFL Team Bars, Las Vegas at Its Best, http://lasvegasatitsbest.com/NFLTEAMBARS.html.

116. Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 390 (2005).

117. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1103 (2007).

118. *Id.*

119. Na, *supra* note 24, at 442.

120. Madison, *supra* note 104, at 1561.

qualify as fair.[121] The nature of television allows for copying the copyrighted work entirely.[122] While this factor does provide a convenient platform for strengthening existing conclusions, it provides little guidance for the future.[123] This factor does not rely on perfunctory quantification of the amount of the copyrighted work used, but rather it asks how much of the original work's value is present in the later use.[124] Both the third and fourth factor requires a determination of the work's overall value.[125] However, that value can be determined only with reference to scope of the owner's right of exclusion.[126]

D. *The Effect That the Use Has on the Copyrighted Work's Value or Potential Market*

This factor, considered to be the most important of the four, asks what detrimental market effects the original work experiences as a result of the unauthorized use.[127] This factor weighs heavily in favor of fair use for the end user, and against fair use for the commercial distributor.[128] An analysis of market effect must include not only the effect on the copyright owner's present exploitation of markets, but also his potential *future* exploitation of markets.[129] Though this approach is necessary, it does raise the problem that copyright owners can claim almost any new use of their work is part of an unexplored market.[130]

If the intended use is for a *noncommercial* gain, the copyright holder must demonstrate by a preponderance of the evidence that there is a meaningful likelihood of future harm.[131] The Supreme Court has stated that a challenge to a noncommercial use of a copyrighted work must require proof that the use is harmful, or that if the use becomes widespread, it will negatively affect the copyrighted work's potential market.[132] Under current law, evidence that numerous people have engaged in unauthorized reproduction and distribution of a copyrighted work will likely count against fair use.[133]

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121. *Id.* at 1560.
122. Vincent, *supra* note 114, at 12.
123. Sag, *supra* note 116, at 391.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Vincent, *supra* note 114, at 13.
129. Sag, *supra* note 116, at 392.
130. *Id.*
131. Vincent, *supra* note 114, at 13.
132. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).
133. Madison, *supra* note 104, at 1562.

Overall, the reasoning of this factor is circular because although the fair use question determines the extent of the market, the extent of the market also determines the outcome.[134] Thus, this factor is conceptually incomplete.[135] In order to determine market effect, courts must decide whether the market is reasonable, traditional, or likely to develop.[136] The resulting problem courts face in analyzing the existing doctrine is that instead of focusing on the boundaries of copyright protection, they focus on second order questions. This leads courts to gloss over the general basis for their rulings.[137]

The terms "market" and "value" are unclear.[138] According to economists, values of things do decline over time, but both "markets" and "potential" markets are eternal.[139] Moreover, these terms do not specifically address whether the owner's sales are affected, or merely the anticipated royalties.[140] The degree of harm or effect is also not explicitly articulated by the courts. Thus, this balance is determined on a sliding scale basis.[141] This factor makes the courts too autonomous in determining whether or not fair use is met. The fair use doctrine is not an analytic framework, but instead, this facially empty and useless statutory language merely structures evidence that courts feel are relevant for their conclusions.[142]

V. WHERE THE NINTH CIRCUIT IS HEADED IN ITS FAIR USE ANALYSES

As *Sony* noted, copyright law has always responded to major changes in technology.[143] The Court explained that as new technological developments have occurred, Congress has had to fashion new rules made necessary by new technology.[144] Throughout many fair use decisions, the courts have repeatedly referred back to the Constitution for guidance, and specifically interpreted the framers' intentions in regards to copyright.[145]

134. Sag, *supra* note 116, at 392.

135. *Id.* at 395.

136. *Id.*

137. *Id.*

138. Madison, *supra* note 104, at 1562.

139. *Id.* at 1562-63.

140. *Id.* at 1563.

141. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 560 (1985).

142. *Id.*

143. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

144. *Id.* at 430-31.

145. *See Harper & Row*, 471 U.S. at 539; *Sony*, 464 U.S. at 417; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

One thing that the Supreme Court makes repeatedly clear is that Congress must ensure that the progress of science and useful arts are promoted.[146]

Numerous courts, following the direction of the Supreme Court, have been attempting to interpret fair use cases according to what the Constitution demands.[147] Recently, in *Perfect 10, Inc. v. Amazon, Inc.*,[148] the Ninth Circuit expanded the definition of transformation by stating that the copying of an original work is transformative provided that the copy serves a different function than the original work.[149] The court then stated that a fair use analysis must be flexible because "it 'is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.'"[150]

In *Perfect 10, Inc.*, the plaintiff brought a suit against defendant Amazon for Amazon's operation of a search engine.[151] The Ninth Circuit Court of Appeals held that so long as Amazon's search engine was transformative in nature, the public was benefited by the use, and the owner's market was not harmed, fair use is found.[152] The court then elaborated that a copy is transformative if the use of the work is changed from artistic expression to improving the public's access to it.[153] It seems that *Perfect 10* was another step towards making information on the Internet more readily available to the public.

The study of the "arts and sciences[154]" is the study of literature, philosophy, art, science, and human culture.[155] Use of the Internet for the dissemination of entertainment and ideas is now embedded in American culture. The courts are increasingly understanding the need to nurture this culture as the technological age goes on.

As the Supreme Court has no legislative power, it can only interpret its cases according to the doctrine that Congress provides. Part VI will now present an amended fair use doctrine that comports with constitutional requirements, and continues to promote the useful arts and sciences. Each

146. U.S. CONST. art. 1, § 8, cl. 8.

147. *See generally* Perfect 10, Inc. v. Amazon, Inc., 487 F.3d 701 (9th Cir. 2007).

148. *Id.*

149. *Id.* at 721-22.

150. *Id.* at 720 (quoting *Campbell*, 510 U.S. at 577-78).

151. *Id.* at 713.

152. *See id.* at 720.

153. *See id.* at 721.

154. The branch of humanities that the Constitution seeks to promote. U.S. CONST. art. 1, § 8, cl. 8.

155. *See* Dictionary.com, Humanities, http://dictionary.reference.com/browse/humanities (last visited Mar. 21, 2009).

factor of this new doctrine will be applied to the aforementioned dispute that has arisen between the NFL and CCIA.[156]

VI. A PROPOSED AMENDED FAIR USE DOCTRINE GOVERNING THE USES OF DIGITAL SPORTS ENTERTAINMENT MEDIA

The present fair use doctrine as it relates to uses of digital sports entertainment media is not practical. The courts have done what they can to ensure that the doctrine coincides with today's technology. However, with society having boundless technological potential at its fingertips, a clearer, more codified doctrine is desperately needed. Society should know what the law does and does not allow in regards to copyright. There are hundreds of Internet discussion boards addressing what the law is in regards to Internet copyright issues. The vast majority of replies and responses regarding various posted legal questions are inconsistent and erroneous.

For this reason, this Article presents an amended fair use doctrine which will not only alleviate confusion, but will also give citizens explicit and proper notice as to what is not permitted. Below are suggested amendments to the present fair use doctrine that are to be applied to uses of digital sports entertainment media. Just as the *Harper* court previously articulated in regards to the present fair use doctrine, the amended doctrine's factors are not meant to be exclusive because the doctrine is "an equitable rule of reason."[157] Thus, no general definition is possible and all fair use disputes must be decided on a case-by-case basis.[158]

A. *Whether the Use is Transformative in Nature*

The statutory fair use doctrine has never explicitly included transformation into any factor. Rather, courts have incorporated this principle into the first factor.[159] In its discussion of that factor, the Court in *Campbell v. Acuff-Rose Music, Inc.* stated that if the copy alters the original work with a new meaning, expression, message, or purpose, that copy is considered to be transformative in nature.[160] The NFL broadcasts'

156. CCIA is a trade group consisting of Microsoft, Google, Yahoo, Redhat, and others. Bangeman, *supra* note 4.

157. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 560 (1985).

158. *Id.*

159. *Id.* The first factor of the present fair use doctrine is, "the purpose and character of the use, including whether such use is of a commercial nature, or is for nonprofit education purposes" (quoting 17 U.S.C. § 107 (2006)).

160. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

purpose is furthered by the postings of Youtube's users because clips of the broadcasts are disseminated to a wider audience at no monetary charge to the NFL.[161] Not only has the purpose been transformed, but the broadcasts' expression has changed as the focus has shifted from full-length high-quality television broadcasts to short low-quality Internet video clips.[162] Thus, not only are the NFL's broadcasts furthered in their dissemination to a wider audience, but their expression is also transformed from high-quality televised sporting events to lower quality informative video clips. In order for transformation to be found, the public must be able to reasonably perceive it.[163] It is not difficult for American society to reasonably perceive a media shift from a live television broadcast to a downloadable Internet clip.

Transformation of a work is crucial in determining whether the user is making a good faith attempt to use the work fairly, or whether the user is merely trying to use an exact copy for his own financial gain. The Ninth Circuit expanded the definition of transformation by stating that a copy is transformative if the nature of the work is changed from artistic expression to improving the public's access to the work.[164] Both the lower federal courts and the Supreme Court include discussions of transformation in their fair use analyses.[165] Though no mention of it is made within the actual text of the existing fair use doctrine, the Court has practiced judicial activism by making transformation a substantial part of the first factor's analysis. Because of the weight that the Court has given the issue of transformation throughout its fair use cases, it should be given its own factor.

Following the precedent made by the Ninth Circuit,[166] it is likely that a court will find that Youtube's users have sufficiently transformed the NFL's original broadcasts from high quality full-length television broadcasts to lower quality NFL broadcast clips over the Internet. The users are sufficiently transforming the NFL's work by doing the following: 1) they are changing the NFL's artistic impression; 2) they are increasing the public's access to the work so that the public is benefited; and 3) they

161. A search on YouTube.com can reveal a number of video clips from Past NFL games. *YouTube.com*, *supra* note 13.

162. *Id.*

163. *Campbell*, 510 U.S. at 582.

164. Perfect 10, Inc. v. Amazon, Inc., 487 F.3d 701, 721 (9th Cir. 2007).

165. *See Campbell*, 510 U.S. at 569; *Perfect 10*, 487 F.3d at 701.

166. The Ninth Circuit Court of Appeals is considered to be the trailblazer in regards to technology law. Thomas E. Baker, *On Redrawing Circuit Boundaries – Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 932 (1990).

are making copies that serve a different function than are demonstrated in the NFL's original broadcasts.

First, the NFL's artistic impression is significantly transformed because its original broadcasts are meant to be watched in their entirety. Moreover, these broadcasts contain both pre-game and mid-game commentary that does not always relate directly to the game being aired. Thus, one can infer that the NFL intends its audience to enjoy the original full-length broadcast, which contains the game, commentary and analysis on both the game at hand and on other unrelated NFL stories, promotions, advertisements, and endorsements sponsored by the NFL. Youtube's users are merely taking short segments of the previously aired NFL broadcasts. These clips do not contain any of the aforementioned staples that are customarily found in the NFL's original broadcasts.

Secondly, Youtube's users are increasing overall access to the NFL's work so that the public is benefited by taking short segments of previously aired broadcasts and making them available on the Internet. Historically, societies have long benefited from the entertainment it receives.[167] People in both their personal and professional lives engage in discussion and communication regarding various forms of the arts and sciences to which they are exposed. This not only brings people together, but it also serves to encourage the growth and evolution of both of these fields. The production of an NFL broadcasts can be viewed as artistic works both because they provide lasting benefit to society, and because they reward the NFL for their creation.[168] The NFL's broadcasts provide lasting benefit to society because they are artistic expressions that capture important moments of sports history. The broadcasts reward the NFL for their creation because they help to make the NFL the biggest moneymaker in the American sports entertainment industry.[169]

The *Sony* Court stated that by securing exclusive rights for authors for limited times, essential public purposes are achieved.[170] Under the proposed amended doctrine, until the time of exclusive rights has passed, the NFL will be fully compensated for its labor and creativity. However, once the game has been aired, it has been released into the market. When a work has been released into the market, the owner has lost exclusive

167. *See* Kennedy Center, ARTSEDGE: *The National Standards for Art Education*, http://artsedge.kennedy-center.org/teach/standards/introduction. cfm (stating that society is benefited by the cultivation, expression, and communication that the arts make possible) (last visited Mar. 21, 2008).

168. Mazer v. Stein, 347 U.S. 201, 219 (1954) (Artistic work provides "lasting benefit to the world.").

169. *See* Bangeman, *supra* note 4.

170. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

control over it.[171] Thus, the NFL has no right in telling its audience what can be done with its work after the right of first publication has already been exercised.

Lastly, Youtube's users are making copies that serve a different function than the NFL's original broadcasts. The NFL's original broadcasts serve the function of providing its audience with a constant live update on both the televised games, and on other games being played throughout the league. The NFL reaps advertising revenue in exchange for companies' ability to advertise their products and services to the NFL's massive audience. Conversely, Youtube's users are taking historical events and making them available for society's edification. Thus, the NFL broadcasts function to make money, while Youtube's broadcasts function to satisfy society's appreciation and demand for monumental sports events.

The NFL clips posted on Youtube can serve numerous different functions than originally intended by the NFL. Many NFL clips posted contain an individual athlete's complete performance from a game. For example, after Adrian Peterson's recent record-setting 296 rushing yard performance,[172] one user extracted the clip of every yard that Peterson rushed for, and compiled these mini-clips into a two-minute montage focused solely on *that* performance.[173] While the NFL's original broadcast of that game served the function of covering the game in its entirety, this user transformed that function to focusing solely on the yards that Peterson rushed for. Similarly, a user can transform the function of a broadcast by taking an NFL kickoff return that is rife with blundered tackles, and set that clip to the Keystone Kops' theme music.[174] The Court in *Campbell v. Acuff-Rose Music, Inc.* held that parody of an original work was a significantly transformative in nature.[175] As the Court found in *Campbell*, it is very likely that the lower courts will find these two aforementioned methods of altering the function of a work as sufficiently transformative in nature for purposes of fair use analyses.

Youtube's videos have file formats that differ from the original NFL broadcasts. This altered format changes the quality of the image to that of a lower quality than originally found on the broadcast. It can be inferred

171. *See generally* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985).

172. As a rookie, the Minnesota Vikings' Adrian Peterson set a new NFL single-game rushing record when he ran for 296 yards on 30 carries on November 4, 2007. Minnesota Vikings, *Adrian Peterson*, http://www.vikings.com/teamplayerprofile_adrian_peterson.aspx (last visited Feb. 3, 2009).

173. *See* Youtube, Broadcast Yourself, http://www.youtube. com/watch?v=qeeF6pJ610I.

174. The Keystone Kops were a collection of silent film actors who performed entertaining stunts during comical chase scenes. Britannica Online Encyclopedia, *Keystone Kops*, http://www.britannica.com/EBchecked/topic/315973/Keystone-Kops (last visited Feb. 3, 2009).

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

that the Ninth Circuit's finding that the changing from high quality images to lower quality thumbnails constituted transformation would support a future finding that the Youtube users' posting of lower quality Internet video clips from the original full-length high-quality television broadcasts are also transformative in nature.

One may argue that the Youtube use is not transformative in nature because the *Perfect 10* defendants' posting of thumbnail images actually served as a path to the original. Thus, the *Perfect 10* thumbnails were used to get the user to the original image, while the purpose of the Youtube video clips is to bypass the original. However, this argument will likely fail as, unlike with internet image sites, the NFL does not make its original broadcasts available anywhere except in its original airing. Thus, since the NFL's clips are unavailable, they cannot be bypassed. Since Youtube's users have transformed the clips drawn from the NFL's broadcasts, and since the clips are not available through any semi-immediate means, a court will likely strike down the argument that the Youtube users' changing of the file format is not transformative in nature.

B. *The Nature of the Copyrighted Work*[176]

As this amended factor remains unchanged from the existing factor, what must first be evaluated is the work's overall creativity and availability.[177] The existing factor need not be amended because the creativity and availability of a work should always be considered in a fair use analysis. First, the NFL's broadcasts are very creative in nature. Its logo, theme music, game commentary, and analysis all possess the inherent creativity required. Secondly, the NFL's work has limited availability since its broadcasts are only aired once on network television. Unlike the existing doctrine, where this factor is besieged by the remaining factors, this factor is benefited and bolstered by the amended doctrine's expanded clarity.

Since the NFL's broadcasts are not readily available to its audiences, the reciprocal relationship that the *Harper* Court discusses is nonexistent. Rather, the relationship is one-sided in favor of the NFL because the NFL wants to continue reaping its financial compensation, while its audiences are forbidden to do what the Copyright Act allows them to do. The public is denied the fruit of the NFL's labors, and their rights are violated. Though there are other means of viewing these broadcasts after the game

176. Unchanged from the present fair use doctrine's factor #2.

177. Na, *supra* note 24, at 441.

is over, those alternative options usually involve a cost to the potential viewer.[178]

C. *Whether the Use is for Nonprofit Entertainment Purposes, or Rather is Used for a Profit-Making Venture*[179]

If the user is copying the author's work for the sole purpose of making profit, courts weigh this factor against a finding of fair use. The Supreme Court has expressed concern with the commercial versus nonprofit educational distinction because it says it may be difficult to determine whether or not these phrases are in opposition to one another.[180] However, the distinction between the two is obvious because the nature of each has to do directly with whether or not profit is made.

The NFL produces its broadcasts solely for commercial purposes, whereas the Youtube users' dissemination of clips is for nonprofit educational, informative, and entertainment purposes. While Youtube *does* derive revenue from advertisers paying for space on its page, the users do not obtain any of that money. The users' sole purpose in posting NFL clips is to share important, exciting, and interesting sports events with others. As the courts lean against findings of fair use when the use is for a commercial profit-making nature, a court will likely find that the Youtube users' copying of NFL clips for nonprofit educational, informative, and entertainment purposes satisfies fair use under this amended factor.

D. *The Substantiality and Amount of the Part Used in Relation to the Whole Copyrighted Work*[181]

As the Supreme Court has previously articulated in regards to this issue, the more of a work that an individual takes, the less likely it is that the use will qualify as fair.[182] Courts frown upon one's copying of another's original work in full. However, if a user takes only what he needs, and does not take out the "heart" of the work, a court will likely find that this factor is satisfied. While this Article is pushing for a more lenient fair use analysis in regards to uses of digital sports entertainment

178. The NFL sells a few DVDs with important historical games. It also has its own network where other games can be viewed. However, it is presently impossible for the NFL's audience to have subsequent access to all of the games. *See* http://www.nfl.com/videos (last visited Mar. 21, 2009).

179. Amended from "The purpose and character of the use, and whether that use is for nonprofit educational purposes." 17 U.S.C. § 107 (2006).

180. *See* Madison, *supra* note 104, at 1557-58.

181. Awarded from "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107 (2006).

182. Madison, *supra* note 104, at 1561.

media, it still recognizes the need for authors to be protected from the plundering of their work by future users.

The Court has said that the heart of a work lies in the most expressive elements of it.[183] The Court then expounded upon this by saying that fair use should not be found if the copies qualitatively embody the author's distinctive expression.[184] Thus, it follows that the heart of the NFL's broadcasts lies in its distinctive expressive elements. These expressive elements can be seen through the NFL's use of graphics, camerawork, commentary, promotion, and anything else that goes into producing their broadcasts.

Youtube's users are not posting full NFL broadcasts. Rather, they are taking short clips that capture the expression of their copy. The user has not transferred the NFL's overall heart and expression into a video clip because that clip is merely a segment of the NFL broadcast's heart and expression. For example, if a user wants to post a clip of a record touchdown thrown by a veteran NFL quarterback, he will post only that play, and not the plays preceding or following it. His intention is to celebrate and make others aware of this play. The heart of this play is distinctly different from the heart of the entire broadcast. In conclusion, when a user posts a game clip, he has not taken the heart out of the original broadcast because the original broadcast's heart lies in its overall expression, and not in the record-breaking play of an experienced quarterback.

E. *The Effect That the Use Has on Either the Copyrighted Work's Immediate Value, or on the Work's Ascertained Future Market*

The present fourth factor of the fair use doctrine[185] is both unclear and overbroad. The Court takes issue with the present fair use factors' terms "market" and "value," and says that both are unclear.[186] The amended factor takes care of this issue by narrowing the definition and application of both terms. As the Court has stated, despite the right of an author to release his work when he wants, there is a reciprocal relationship between the author and the user.[187] The Court also opined that copyright is intended to increase the harvest of knowledge, and that it is not intended to impede

183. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 564 (1985).

184. *Id.* at 565.

185. The fourth factor is "the effect that the use has upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2006); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

186. Madison, *supra* note 104, at 1562.

187. *See Harper*, 471 U.S. at 549.

it.[188] Thus, while the Court did recognize a compelling need to preserve the authors' rights of first publication, it simultaneously recognized a need to ensure that the public benefits from a consistent flow of knowledge. If an author is able to consistently prohibit users from copying his work because of some "potential" market, society will be deterred from gaining useful information from *any* of that author's work.

Thus, it follows from the Court's previous verbiage in regards to the present factor that more clarification is needed in regards to the terms "market" and "value." To protect the author's right of first publication, and also his right to gain revenue from his work, users should be prohibited from using the author's work if it impedes its *immediate* value. Further, an author should be able to reap the benefits from the work's *ascertained* future market. As the Court has said, "[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."[189]

Why does the NFL seek to prohibit its audience from disseminating its product to a wider audience? Not everyone watches football, and not everyone utilizes the benefits of the Internet. However, there is a cross-section of society that does not watch football, but *does* use the Internet. It makes sense that the NFL would *want* to expose this untapped demographic to its product. For example, a person who has been forwarded a notable play may want to start tuning in to future live NFL broadcasts. Even if he is *not* a fan, the buzz around the office may spark his interest enough to make him even an occasional viewer. It seems that allowing the users to distribute game clips would help the NFL's business, and *not* evince any meaningful future harm. The NFL cannot claim any type of meaningful future harm because despite people's posting NFL clips on the Internet for a number of years, this activity has not even slightly disturbed the NFL's unwavering multi-billion dollar annual revenue.[190]

The NFL's works have immediate value on the day that they are broadcast to the public. Hypothetically, if a Youtube user hijacked a live NFL game feed, and transmitted that feed through Youtube, he would be impeding the NFL's immediate value. The NFL puts great effort into obtaining advertisers for promotional spots during its broadcasts' commercial breaks. The user that circumvents the television market and makes the clip directly available to the public on the Internet has significantly affected the NFL broadcast's immediate value.

188. *Id.* at 545.

189. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447 (1984).

190. *See* Gallagher, *supra* note 1.

The NFL's broadcasts have an ascertained future market as thousands of DVDs containing past NFL broadcasts are, and will continue to be, sold. However, contrary to the hijack of a live feed, the Youtube users' posting of clips does not affect this future ascertained market because the quality of the posted clips are not anywhere near the quality that would be available on future DVDs. Moreover, users do not take from the heart of the original broadcasts while future DVDs often capture the game in its entirety. The NFL may claim that some future uses will directly affect its unexplored future market. However, as the Court has previously articulated, if the NFL does claim harm from a resulting use, it must prove by a preponderance of the evidence a meaningful likelihood of future harm. Since the NFL cannot predict, let alone prove, the likelihood of future events, this is an insurmountable task. This amended factor makes the courts' analysis easier, and it also permits the NFL to prove a meaningful likelihood of harm to its ascertained future market.

The NFL's ascertained future market is reasonable, traditional, and likely to develop. The NFL's present market is merchandise, television documentaries, television syndication, DVDs, and other forms of home playable media. The NFL's future market should not be drastically different from what it is now. Though, if there is a presently unascertained market that is not realized, once it *is* realized, that market *will* be ascertained. Thus, that previously unknown market will be subject to this amended factor.

The Court recognizes that the dissemination of news as fundamentally important under the fair use doctrine.[191] Moreover, the Copyright Act states that fair use of a protected work for purposes of comment, criticism, or new reporting, does not constitute copyright infringement.[192] The Court has also stated that, in order for news to be copyrightable, the substance of the information must be distinguished from the particular form in which the writer has communicated it.[193]

Here, the NFL has a strong argument that the substance of its broadcasts can be distinguished from the way in which the broadcasts are communicated. For the NFL to call its broadcasts artistic expression of news (i.e., property), the substance of its broadcasts must be considered as such. The results of every NFL game are posted in every notable American newspaper's sports section. Thus, users of NFL video clips could say that because the games are reported both in newspapers and on news channels, they are obviously news. However, distinguishing the live broadcast, one may argue that because the NFL broadcasts the games live, they are not

191. *See* Int'l. News Serv. v. Ass. Press, 248 U.S. 215, 234 (1918).

192. 17 U.S.C. § 107 (2006).

193. *Int'l. News Serv.*, 248 U.S. at 234.

technically news *yet*. However, this argument falls short because they are, as the news media regularly covers live events as news.[194]

Instead, the NFL may lay its claim over the clips as copyrightable property on the fact that the manner in which it broadcasts its games is both artistic and unique. Certainly, far more artistic creativity is found in the NFL's broadcasts then can be found in someone's amateur recording of the game from the bleachers with a handheld video camera. Thus, the NFL's argument that the broadcasts are artistic expressions that they have ownership over is not only plausible, but valid. However, despite the NFL's ownership of the artistic expression of the news, it cannot lay claim to an unregulated monopoly. For example, the NFL cannot possibly claim a property right in the commentary and criticism that is spurned from the results of the games. As *Sony* stated, society has an important interest in the free flow of ideas. The online commentary and responses that follow the majority of the NFL videos posted on Youtube contain the type of intellectual discourse that courts are growing increasingly protective of.[195]

Youtube's users may argue that, according to the rhetoric of both the Copyright Act and the *Sony* court, users' commentary, analysis, and remarks that accompany posted videos comprise a package of immunity from copyright infringement. Thus, a fair use analysis may be misplaced here as the law dictates that such use is presumed to be fair.[196] This counterargument given by the users states that the discussion and discourse on Youtube regarding the posted clips should provide an absolute blanket of protection for all use of the NFL's property. However, this argument will likely fail as the NFL may claim that its broadcasts, while they are news, still contain forms of artistic expression. The NFL will prevail on this argument because though courts have determined news reporting to be considered fair use, it is the actual news that is permitted to be used, not the overall expression of that news.

As the Court has previously stated, fair use is intended to allow the public access to created works after the time of the authors' exclusive control has lapsed.[197] The NFL's exclusive control lasts only as long as the

194. Various other news broadcasts covered live are the State of the Union address, California car chases, and awards shows.

195. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

196. *See* 17 U.S.C.A. § 107 (2006).

197. *See Sony*, 464 U.S. at 429. The Court stated that fair use's

> limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

live event is being broadcast. After the game has expired, the resulting coverage, commentary, and analysis of the game are no longer within the exclusive control of the NFL. The NFL's copyright statement[198] is paradoxically overbroad because its specific language seeks to force the audience to obtain explicit permission from the NFL before even *talking* about the game. This requirement goes directly against the Court's repeated articulation that there is a need to ensure that the public benefits from a consistent flow of knowledge. Though the NFL is correct that it has exclusive control over the broadcast while the game is in progress, it is decidedly wrong that it maintains such control after the game has ended.

The NFL's broadcasts have an immediate and significant value to it as long as the game is actually being played. Once the game is declared final, the NFL loses exclusive control of the telecast. Users, so long as they have satisfied the other amended factors, are then free to disseminate clips of that game at their leisure. However, just because the NFL has lost exclusive control over its previously aired telecast does not mean that they have lost *all* control. The NFL still has an ascertained future market in DVDs[199] and future syndications with television networks. Thus, anyone other than the NFL disseminating full-length previously aired broadcasts may be liable for copyright infringement. It is likely that a court, in applying this amended fair use doctrine to the conflict between the NFL and Youtube's users, will find that users' posting of the NFL's clips is a fair use.

VI. CONCLUSION

American society has made the NFL the country's most lucrative sports league.[200] It is wrong that the NFL purposely misstates the fair use rights that belong to the very same audience that has made this league so enormously successful. One can infer that the NFL is doing this out of greed, and this goes directly against what the Supreme Court has declared the fair use doctrine's purpose to be. As Part IV of this Article made clear, the fair use doctrine is intended to be a two-way street. Though the NFL reaps the benefits of its live broadcasts, it illegally continues to reap

198. Bangeman, *supra* note 4 (quoting NFL's copyright statement which says, "[t]his telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited.").

199. The NFL also has an ascertained future market on any other future forms or means of displaying the original broadcast that have not yet come to be.

200. *See* Gallagher, *supra* note 1.

benefits after the period of exclusive control has expired by prohibiting *any* use of its works.

But the Court, in its effort to even the playing field, has stated that the progress of science and the useful arts must be promoted.[201] Thus, while the author's right of first publication is to be protected, the public's thirst for both entertainment and historical knowledge must also be quenched. On considering all issues brought before it, the Supreme Court once stated, "[W]e must never forget it is a *constitution* we are expounding."[202]

The previously discussed amended fair use doctrine will adhere to Constitutional requirements, it will make the public more aware of what use is permitted under copyright law, it will nurture the reciprocal relationship that exists between authors and users, and it will make the lower courts more consistent with its application and understanding of the doctrine.

As to the dispute between CCIA and the NFL, this amended doctrine will help to promote the useful arts and sciences, it will help to disseminate the NFL's work to a broader audience, it will meet society's need for information, it will preserve the NFL's right of first publication, and it will stimulate new creative material spurned from the NFL's creative works.

Following the holding of the Ninth Circuit, so long as the Youtube users' clips are transformative in nature, the public is benefited by the clips, and the NFL's market is not harmed, fair use will probably be found.[203] Technological advancements and methods of disseminating information will continue to evolve at the alarming rate that they have been thus far. The amended doctrine will not only correlate with existing and future uses of digital sports entertainment media, but it will also thwart the NFL from habitually boasting its flawed copyright statement.

Unfortunately, the NFL's copyright claim is neither valid under the existing fair use doctrine, nor under the amended one just presented. The NFL will have to amend this statement eventually. However, until that happens, the NFL is likely to continue its dominance as America's sports entertainment juggernaut.

201. U.S. CONST. art. 1, § 8, cl. 8.

202. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

203. *See* Perfect 10, Inc. v. Amazon, Inc., 487 F.3d 701, 720 (9th Cir. 2007).