

## CONSENT, USER RELIANCE, AND FAIR USE

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### ABSTRACT

*This Article examines the underappreciated role of consent and refusal in copyright law's fair use inquiry. As a matter of black letter law, the nature and circumstances of a copyright holder's refusal to consent to a use are irrelevant to whether a particular use is fair. This "standard view" effectively treats all situations short of affirmative consent—such as silence or acquiescence from a copyright holder—as equivalent to an express refusal. Despite the standard view, a close analysis of the case law reveals that some courts implicitly consider consent-based factors in fair use decisions. Other courts, however, adhere strictly to the standard view and disregard consent across the board. Is there a principled basis to consider the nature of consent and refusal in the fair use analysis?*

*This Article argues that consent, properly conceived, has an important role to play in certain categories of fair use cases. In particular, consent-based considerations should not be disregarded when they are relevant to the traditional fair use factors and fair use's underlying goal of promoting socially-valuable uses. To make this argument, the Article creates and analyzes a model of the consent-seeking interactions between copyright holders and users. It concludes that a literal application of the standard view neglects important user reliance interests and fails to deter costly opportunistic behavior. The nature of the copyright holder's consent or refusal, therefore, has a critical role to play in situations involving user reliance interests, such as cases of "partial consent," bad faith strategic behavior, and digital opt-out systems. In these cases, consideration of consent and refusal accords with the traditional fair use factors and the*

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## CONSENT, USER RELIANCE, AND FAIR USE

*doctrine's history as an "equitable rule of reason," and operates to creates a broader scope for fair use.*

INTRODUCTION .....	398
I. FAIR USE BASICS .....	405
II. THE STANDARD VIEW: CONSENT IS IRRELEVANT .....	410
<i>A. The Seeming Logic of the Standard View</i> .....	410
<i>B. Critiques of the Standard View</i> .....	412
III. THE CASE FOR CONSENT AS A FAIR USE FACTOR .....	415
<i>A. Efficiency and Incentives</i> .....	415
<i>B. The Equitable Component of Fair Use</i> .....	424
<i>C. Summary</i> .....	427
IV. A TYPOLOGY OF CONSENT AND REFUSAL.....	428
<i>A. Quantitative Dimension</i> .....	428
<i>B. Qualitative Dimension</i> .....	430
V. CASE STUDIES.....	432
<i>A. Opt Out Systems and Information Aggregation</i> .....	432
<i>B. Partial Consent and User Reliance Interests</i> .....	437
<i>C. Impossibility and Orphan Works</i> .....	439
<i>D. "Purloined" Copies and Bad Faith</i> .....	442
VI. COSTS AND CONCERNS .....	445
<i>A. Unpredictability in Application</i> .....	445
<i>B. Judicial and Evidentiary Costs</i> .....	447
<i>C. Inhibiting "Tolerated Uses"</i> .....	448
<i>D. Interaction with Implied License and Other Doctrines</i> .....	451
CONCLUSION.....	453

## INTRODUCTION

Copyright law's fair use doctrine relies on what might be termed a binary notion of consent and refusal. If a copyright holder has given affirmative consent to a use of her work, then the use is permitted as authorized. All other cases short of affirmative consent are treated equivalently—as a refusal. As a formal matter, the fair use inquiry thus ignores the qualitative difference between, say, an express rejection of a proposed use on the one hand, and mere silence from a copyright holder on the other. This deficiency is odd given that fair use was historically described as premised on the "implied consent" of the copyright owner to reasonable uses.<sup>1</sup> As fair use doctrine has evolved, however, this notion has

<sup>1</sup> See Alan Latman, *Study No. 14: Fair Use of Copyrighted Works* (1958), reprinted in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES

been discarded as a legal fiction.<sup>2</sup> Instead, judicial attention has focused on a mechanical application of the four statutory fair use factors.<sup>3</sup> Under the prevailing view of fair use, unless a copyright holder gives actual consent to a use, her prior conduct indicating approval or disapproval, and the reasons for her ultimate refusal, are irrelevant.<sup>4</sup>

Two examples may help illustrate the state of the law. Consider first the pending legal challenge to the Google Books project.<sup>5</sup> That case presents the question of whether Google Books—which makes the text of millions of books digitally searchable—should be permitted as a fair use, or enjoined as an infringement of authors’ copyrights.<sup>6</sup> In constructing this massive information aggregation system, Google takes some care to accommodate differing levels of consent from copyright holders. Books in the public domain are available for download in their entirety. For in-copyright works, the default is to allow a “snippet” view: The full text is searchable, but only a line or two of text around the search term is displayed in response to a search query.<sup>7</sup> If the copyright holder allows it, Google will show more of the work, perhaps a “preview” of several pages from the

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NO. 14–16, at 7 (Comm. Print 1960); Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. 43, 50 (1955) (“Frequently the courts speak of the ‘implied consent’ of the author to a reasonable use.”); *see also* Harper & Row, Pub., Inc. v. Nation Enters., 471 U.S. 539, 550 (1985).

<sup>2</sup> DAVID NIMMER ET AL., NIMMER ON COPYRIGHT § 13.05, 13-157 (2005) (“It is sometimes suggested that fair use is predicated on the implied or tacit consent of the author. This is manifestly a fiction, for a restrictive legend on a work prohibiting copying in whole or in part gives no greater protection than the copyright notice standing alone.”). Professor Nimmer is undoubtedly correct, of course, that implied consent is literally a “fiction”; a true fair use is permitted even in the face of strong disapproval of the copyright holder. However, the issue is whether that fiction is, nonetheless, a useful concept. *See generally* LON L. FULLER, LEGAL FICTIONS 113–19 (1967).

<sup>3</sup> *See* 17 U.S.C. § 106 (2011) (listing the fair use factors); *infra* Part I.

<sup>4</sup> *See* Peter Letterese & Assocs. v. World Inst. of Scientology, 533 F.3d 1287, 1308 (11th Cir. 2008) (rejecting the copyright holder’s past conduct indicating assent an additional fair use factor); John S. Sieman, *Using the Implied License to Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 918 (2007) (“Fair use does not take the intent of the copyright owner into consideration . . .”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128–29 (1990) (rejecting notion that “the conduct and intentions of the plaintiff copyright holder” should be a factor in the fair analysis).

<sup>5</sup> *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013) (holding reproduction of millions of books for use in the Google Books project was a fair use). The district court’s ruling is currently on appeal. *See* Notice of Appeal, Authors Guild, Inc. v. Google Inc., Dkt. No. 1092, No. 05 CIV. 8136 DC (S.D.N.Y. Dec. 23, 2013).

<sup>6</sup> *Authors Guild*, 954 F. Supp. at 282.

<sup>7</sup> *See* James Grimmelman, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC’Y U.S.A. 701, 703 (2011).

## CONSENT, USER RELIANCE, AND FAIR USE

book.<sup>8</sup> In contrast, if the copyright holder specifically objects, Google will not display even the snippets.<sup>9</sup>

The significance of this “opt out” structure presents something of a puzzle. Intuitively, if the fair use inquiry reflects an assessment of the social value of a use, the opt out functionality seems relevant. It provides a way to realize the benefits of the Google Books project while still allowing objecting rightsholders to easily choose not to participate. But if Google Books’ snippets are a fair use, Google is free to override the wishes of the copyright holder. It should not matter whether a given author objects, or had an earlier opportunity to opt out of the project. On the standard view of fair use, Google’s good-faith attempt to accommodate competing interests by providing an opt out is irrelevant to whether its use is fair.<sup>10</sup> Indeed, in reaching its conclusion that Google Books was a fair use, a recent court decision completely ignored this opt out structure.<sup>11</sup>

For a more analog example, consider the facts of *Peter Letterese & Associates v. World Institute of Scientology Enterprises*.<sup>12</sup> In that case, the user—the Church of Scientology—had adapted aspects of a copyrighted sales manual into its training manuals.<sup>13</sup> This use was arguably fair—very little expression was taken—but in any event, it was made with the participation and involvement of both the original author and the copyright holder, and continued for decades without objection.<sup>14</sup> After a falling out between the copyright holder and user, however, an infringement action followed. The district court thought that consent was relevant to the fairness of the use.<sup>15</sup> The user, after all, relied on the apparent permission from the copyright holder in initially making the use, and because aspects of

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<sup>8</sup> See Google Books, Partner Program Tour, *available at* <http://www.google.com/googlebooks/partners/tour.html>; *Authors Guild*, 954 F. Supp. at 282.

<sup>9</sup> Grimmelman, *supra* note 7, at 703; About Google Books, Information for Publishers and Authors about the Library Project, *available at* [http://books.google.com/intl/en-US/googlebooks/publisher\\_library.html](http://books.google.com/intl/en-US/googlebooks/publisher_library.html) (“We’re happy to remove your book from our search results at any time . . .”).

<sup>10</sup> See John Sieman, *supra* note 4, at 908–09 (“Google chooses to be a ‘polite’ search engine that respects the wishes of [copyright holders]. . . . Whether [choosing to opt out] has any legal force at all is extremely unclear . . .”); *supra* note 4 and accompanying text. *But see* Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 30–31 (arguing that “the opt-out provision” should make Google’s fair use arguments stronger under the “purpose of the use” factor).

<sup>11</sup> See *Authors Guild*, 954 F. Supp. at 282.

<sup>12</sup> 533 F.3d 1287 (11th Cir. 2008)

<sup>13</sup> *Id.* at 1294.

<sup>14</sup> *Id.* at 1295–97.

<sup>15</sup> *Id.* at 1308.

the original work were now incorporated into a larger whole, “undoing” the use decades later could be difficult and costly. The Eleventh Circuit, however, relied on the standard view of consent in fair use to disregard this context.<sup>16</sup>

This Article challenges the standard view of the role of consent in fair use cases. It argues that the form and nature of a copyright holder’s refusal to consent should not always be ignored in the fair use analysis. This Article claims that consideration of consent, in certain classes of cases, is normatively desirable and encourages efficient communication between users and copyright holders. Accordingly, it urges courts to make the nature of the copyright holder’s consent an explicit consideration.

To be clear, consent should not be the sole consideration in the fair use analysis, or even a factor at all in many cases. In the usual case, where there is an express, good-faith refusal from a copyright holder, the user’s failure to obtain consent is not of any relevance. Fair use is designed, after all, to define the types of uses that should be permitted in spite of the copyright holder’s refusal. But this does not foreclose the converse possibility—that a copyright holder’s apparent consent ought to weigh *in favor* of fair use. As this Article argues, the nature of the copyright holder’s refusal to consent has a critical role to play in some fair use cases. In particular, consent need not be ignored when it would be otherwise relevant to the traditional fair use factors. The wide-ranging, fact-sensitive fair use inquiry can readily accommodate this additional consideration.

Applying this proposal to the examples above, the fact that Google Books provides copyright holders with low-cost mechanisms to opt out—and that a copyright holder neglected to opt out despite awareness of the option—should tend to weigh in favor of fair use. Similarly, in the *Letterese* case, the fact that the use was created in reliance on apparent consent from the rightsholder should permit a broader scope for fair use. *Ex ante*, applying fair use doctrine in this matter will enable potential users to rely on external appearances of consent, even if they fall short of the exacting requirements for a binding implied license.<sup>17</sup> It will operate, in effect, to put a somewhat greater burden on copyright holders to affirmatively assert their rights, which are granted by default.<sup>18</sup>

<sup>16</sup> *Id.* (“The district court explicitly adopted a ‘fifth’ [fair use] factor, which it described as ‘the copyright owner’s actual consent to the use’ . . . . This was incorrect . . . .”).

<sup>17</sup> Because copyright law requires a written agreement for transfer of ownership, 17 U.S.C. § 204, licenses are implied by conduct only in “narrow circumstances.” *Estate of Roberto Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010).

<sup>18</sup> Current U.S. law grants copyright automatically to original works once they are fixed in a tangible medium—that is, written down. No other affirmative action—such as affixing a © symbol or registering the work—is required. See *infra* note 89 and accompanying text.

## CONSENT, USER RELIANCE, AND FAIR USE

Despite its normative appeal, the role of consent and refusal has largely gone unrecognized in the extensive commentary on the fair use doctrine.<sup>19</sup> Two interrelated reasons may explain why. First, as discussed above, the reasons for the user's failure to obtain consent, and the copyright holder's reasons for his refusal, are irrelevant as a matter of black letter law.<sup>20</sup> Second, the fair use inquiry primarily takes the perspective of the copyright *user* in evaluating the fairness of the use at issue: Was the alleged infringer's use "transformative"? Was the unauthorized use made for a commercial, noncommercial, or educational purpose? How much of the original work was used?<sup>21</sup> By contrast, the perspective taken in this Article focuses part of the inquiry on the copyright holder's actions: Why is

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<sup>19</sup> There are a few exceptions. John Sieman has examined the importance of opt out systems in digital copyright cases, but ultimately rejects their relevance to fair use inquiry, instead arguing that the presence of an opt out creates an implied nonexclusive license from the website owner. See Sieman, *supra* note 4, at 886–87. Professor Matthew Mattioli has advanced the notion that the presence of an "opt out" system should be considered as an additional fair use factor, but his analysis is limited to the digital copyright context and he does not consider this Article's broader claim that the nature of the copyright holder's nonconsent have relevance outside of digital "opt out" systems. See Matthew Mattioli, *Opting Out: Procedural Fair Use*, 12 VA. J. L. & TECH. 1 (2007). Professor Wendy Gordon touches upon the notion of "apparent consent" in her classic study of transaction costs in fair use, though she addresses only the specific case of when a user mistakenly believes the author consented, and offers a different economic justification. See 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, 1641–43 (1982). Professor Randal C. Picker has discussed the historical and continuing use of technological protection measures to coerce a user's consent and contribute to the "propertization of copyright," such as the use of encryption to limit the place and manner one can listen to purchased music. See Randal C. Picker, *From Edison To The Broadcast Flag: Mechanisms Of Consent And Refusal And The Propertization Of Copyright*, 70 U. CHI. L. REV. 281, 283 (2003).

<sup>20</sup> See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 n.18 (1994) ("[W]e reject Acuff-Rose's argument that 2 Live Crew's request for permission to use the original should be weighed against a finding of fair use."); *Peter Letterese & Assocs. v. World Inst. of Scientology*, 533 F.3d 1297, 1308 (11th Cir. 2008) (rejecting "the copyright holder's actual consent" as a fifth fair use factor); see generally NIMMER, *supra* note 2, at § 13.05 (2005). However, as discussed *infra* in Part V, some courts have implicitly been sensitive to these considerations despite their formal irrelevance. See, e.g., *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 564 (1985) (noting *The Nation's* "clandestine" conduct in obtaining manuscript in finding against fair use).

<sup>21</sup> See *infra* note 49 and accompanying text. While one of the four fair use factors addresses the "nature of the copyrighted work," this factor is typically summarily treated, and, empirically, has been found to have the least impact on case outcomes. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584 ("[F]actor two correlated weakly, if at all, with the outcome of the [fair use] test.").

she not consenting to the use? Did the alleged infringer ask her? Did she have an opportunity to object to the use beforehand?

The remainder of this Article will proceed as follows. Part I provides the necessary background on copyright's fair use defense, presenting the four statutory "fair use factors" and the significant judicial interpretations of the same. Part II critiques the standard view that the nature of the user's failure to obtain consent is irrelevant to the fair use inquiry. The standard view maintains that consent cannot be a fair use factor because the user's failure to obtain consent is, by definition, present in *every* fair use case. But this logic holds only if consent is a binary notion: either the user has affirmatively obtained consent, or he has not. As this Article argues, this binary elides a wide variety of significantly distinct conduct. Mere silence from a copyright holder, for example, is qualitatively different from an affirmative expression of approval or disapproval. A user may fail to obtain consent prior to his use because he is unable to identify the copyright owner, because he believes his use to be fair in good faith, or because he chose not to ask permission in order to avoid detection. There is no reason that the fair use inquiry should treat all these situations identically. Moreover, the standard view fails to appreciate the ways in which these intermediate varieties of consent may be relevant to the traditional fair use factors. The standard view has therefore contributed to confusion in the case law, with some courts implicitly considering consent despite its formal irrelevance.

Part III turns to the affirmative case that the nature of consent and refusal should be considered as a fair use factor in some cases. The argument has two key components. The first sounds in efficiency: consideration of the nature of consent encourages *ex ante* preference revelation by copyright holders and avoids costly *ex post* disputes. Current doctrine creates incentives for both users and copyright holders to act strategically in their consent-seeking interactions. For example, a copyright owner may fail to express his nonconsent early on, despite an opportunity to do so, springing up only later when the use has proven valuable and the user is locked in. Consideration of consent as a fair use factor punishes the copyright holder for failing to make her preferences known—in effect, her silence is treated as an implied assent—and thus encourages her to object when she has the opportunity. Similarly, a user who knows his use to be unfair should be discouraged from failing to request permission in order to avoid detection of that use. Considering consent can therefore operate as a preference-revealing mechanism that deters strategic conduct and limits costly *ex post* disputes by encouraging resolution of the status of the copyright holder's preferences prior to the use.

## CONSENT, USER RELIANCE, AND FAIR USE

The second argument in favor of the proposal is based on history and the normative purposes of fair use. In short, consideration of the nature of the copyright holder's refusal, when relevant, is more faithful than the current rule to fair use's nature as an "equitable rule of reason."<sup>22</sup> That is, while fair use analysis is primarily concerned with factors relating to the nature of the use itself, that should not necessarily end the inquiry. Reliance, good faith, and other equitable factors relating more to the *litigants* than to the *use* can also be important in deciding what is "fair." In other words, while transaction costs, a just intellectual culture, transformative uses, and the spillover social benefits of the use are important,<sup>23</sup> courts should not neglect the fact that fair use is also about courts deciding cases in an equitable manner. One of fair use's virtues is its flexible, contextual, and fact-sensitive nature.<sup>24</sup> It is thus a feature, and not a flaw, of this Article's proposal that an identical use may be permitted in one context (e.g., when the use was made in reliance on the acquiescence of the copyright holder), but not another (when that same use was made, but no permission was sought in order to avoid detection).

Turning from theory to application, Part IV makes the proposal more concrete by developing a typology of the consent-seeking interactions between the copyright owner and potential users. Part V applies this typology to examine the role that consent plays in a variety of fair use cases.

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<sup>22</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984).

<sup>23</sup> See generally Gordon, *supra* note 19 (arguing that fair use plays a key role in cases when an efficient market transaction is prohibited by transaction costs and other market failures); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1774 (1988) (arguing that fair use should operate to promote a "just and attractive intellectual culture"); Leval, *supra* note 4 (arguing for increased focus on whether the new work "transforms" the original); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 286–89 (2007) (arguing that the spillover benefits of the use to third parties should play critical role in fair use).

<sup>24</sup> See generally H.R. REP. NO. 94-1476, at 65–66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678–80 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts"). Of course, many commentators consider this flexibility to be a flaw, criticizing fair use for its "unpredictable" nature. See, e.g., Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 ("Fair use therefore remains fairly unpredictable and uncertain in many settings."); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1485–86 (2007) ("[T]he case law is characterized by widely divergent interpretations of fair use, divided courts, and frequent reversals. . . . The ambiguity of the fair use doctrine works as a one-way ratchet that will in many cases lead to the underuse of copyrighted works").



It builds on recent work by Pamela Samuelson and Michael Madison that considers fair use cases in common patterns of “policy-relevant clusters.”<sup>25</sup> Looking to categories of fair use cases involving user reliance and strategic behaviors, this Part critiques those courts that have ignored the nature of the copyright holder’s consent. It also reveals that some courts have implicitly considered the nature of consent in their fair use analysis, despite the black letter law to the contrary. In those cases, the proposed consent framework offers a satisfying explanation of otherwise-perplexing features of fair use doctrine.

Part VI addresses potential criticisms of this Article’s proposal. The Article concludes that consistency in judicial decisionmaking, as well as sound policy, would be better served by considering the nature of the copyright holder’s consent or refusal in cases involving user reliance interests and strategic behavior.

## I. FAIR USE BASICS

As many scholars have observed, the basic design of the Copyright Act favors protection of works: the Act pairs broad statements of the copyright owner’s exclusive rights with narrow, detailed exceptions to those broad rights.<sup>26</sup> In this sense, the Copyright Act’s default rule may be said to favor the copyright holder—once a user, for example, makes a derivative work based upon a preexisting copyrighted work, he must usually satisfy the elements of a specific statutory exception to avoid liability.<sup>27</sup>

The fair use doctrine, as a broad limitation on copyright’s reach, is the principal exception to that general structure. Fair use was initially developed in a common law fashion by the courts as an implied exception for “reasonable” and “customary” uses;<sup>28</sup> it was not codified until the 1976 general Copyright Act revision. The main debate surrounding the 1976 codification of fair use centered less on the precise statutory language, and more on whether the Act should avoid congressional interference with the

<sup>25</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

<sup>26</sup> See, e.g., JESSICA LITMAN, DIGITAL COPYRIGHT 17–19, 54–63 (2d ed. 2006); Beebe, *supra* note 21, at 557–58. See also 17 U.S.C. § 106 (1)–(6) (2011) (granting copyright owners the exclusive right “to reproduce the copyrighted work in copies,” “to prepare derivative works based upon the copyrighted work,” “to distribute copies,” et al.).

<sup>27</sup> Such specific exceptions include, for example, 17 U.S.C. Sections 108 (limitation for certain “reproductions by libraries and archives”) and 111 (limitation for certain “secondary transmissions of broadcast recordings by cable systems”).

<sup>28</sup> See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841) (Story, J.); see generally Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371 (2011).

## CONSENT, USER RELIANCE, AND FAIR USE

doctrine and decline to reference fair use at all.<sup>29</sup> Section 107 of the Copyright Act split the difference by codifying the fair use doctrine in general terms, but expressly stating that Congress did not intend to “freeze” the judicial development of fair use.<sup>30</sup> The provision reads in full:

Notwithstanding the [exclusive rights of copyright holders], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>31</sup>

Despite the explicit congressional intention that this codification not disrupt the judicial development of the doctrine, the four “fair use factors” have nevertheless become the core of modern fair use doctrine, with many courts mechanically applying statutory considerations as a four factor test.<sup>32</sup>

<sup>29</sup> See H.R. REP. NO. 94-1476, at 66; Latman, *supra* note 1, at 32–44.

<sup>30</sup> H.R. REP. NO. 94-1476, at 66 (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine . . . . Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”).

<sup>31</sup> 17 U.S.C. § 107 (2011). The only substantive amendment since the 1976 codification was the addition of the final sentence regarding unpublished works. See Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107). This was a congressional response to a line of Second Circuit decisions that had suggested that uses of unpublished works were presumptively unfair. See generally Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens Of Proof and the Integrity Of Copyright*, 31 ARIZ. ST. L.J. 1, 12–52 (1999) (reviewing case law and legislative history of the 1992 amendment).

<sup>32</sup> See Beebe, *supra* note 21, at 561–64.

While a detailed discussion of each of the four factors and the judicial interpretations of them is beyond the scope of this Article and may be found elsewhere,<sup>33</sup> an overview of the key considerations for each factor is in order:

*Factor One: The Purpose and Character of the Use.* This broad and important consideration captures the intended aim of the use, with educational, newsreporting, critical, and noncommercial uses favored over commercial ones. The first factor also addresses whether a use is “transformative,” i.e., whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>34</sup> Courts have generally afforded “transformativeness” a broad purview beyond literal transformations such as criticisms and parodies.<sup>35</sup> Uses will be considered transformative if they are made for a sufficiently distinct purpose or function—such as a search engine<sup>36</sup> or anti-plagiarism database<sup>37</sup>—even though the content of the original work is not itself altered. Transformative uses, like noncommercial uses, are favored under the first fair use factor.

*Factor Two: The Nature of the Copyrighted Work.* The second factor relates to the type of copyrighted work at issue. It has essentially two components: whether a work is published or unpublished, and whether a work is creative, as opposed to factual or informational. Unpublished works are afforded broader copyright protection and a narrower fair use defense;<sup>38</sup> in fact, at common law, the use of unpublished works was *never* fair.<sup>39</sup> In the case of informational works, such as a newspaper article, the fair use defense is broader vis-à-vis creative works like a novel or a

<sup>33</sup> Readers interested in the doctrinal details are directed to William Patry’s thorough treatise, PATRY ON FAIR USE (2012).

<sup>34</sup> *Campbell*, 510 U.S. at 579 (citing *Leval*, *supra* note 4, at 1111).

<sup>35</sup> *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270–71 (11th Cir. 2001) (criticisms are a transformative use); *Campbell*, 510 U.S. at 579–83 (parodies are a transformative use).

<sup>36</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164–68 (9th Cir. 2007).

<sup>37</sup> *See A.V. ex rel. Vanderhye v. iParadigms*, 562 F.3d 630, 639–40 (4th Cir. 2009).

<sup>38</sup> *Harper & Row*, 471 U.S. at 551 (“[I]t has never been seriously disputed that ‘the fact that the plaintiff’s work is unpublished . . . is a factor tending to negate the defense of fair use.’”) (citation omitted).

<sup>39</sup> *See e.g.*, *Prince Albert v. Strange*, (1849) 64 Eng. Rep. 293, 311 (V.C.); *Salinger v. Random House*, 811 F.2d 90, 95 (2d Cir. 1987) (“[C]ommon law, especially as developed in England, appears to have denied the defense of fair use to unpublished works . . .”). The fair use statute now makes clear that while the published or unpublished nature of a work is a factor in the fair use, it is not a determinative one. *See* 17 U.S.C. § 107 (2011) (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of [the statutory] factors.”).

## CONSENT, USER RELIANCE, AND FAIR USE

painting.<sup>40</sup> Indeed, factual works are generally afforded weaker copyright protection because of the fundamental copyright principle that unoriginal facts are not themselves copyrightable.<sup>41</sup> In short, the second fair use factor disfavors the use of unpublished works and creative works.

*Factor Three: The Amount and Substantiality of the Portion Used.* Factor three captures the notion that, other things being equal, a use is more likely to be fair if it copies only a small amount from the original. Copying an entire book verbatim is obviously quite different than just quoting a sentence or two. Though intuitively straightforward, two glosses on this factor complicate the analysis. First, how much was copied may be assessed on a qualitative level: its “substantiality.” In other words, copying of the “heart of the work”—the main source of its economic value—may be unfair even though only a small amount of actual expression is taken.<sup>42</sup> For example, in *Harper & Row v. Nation Enterprises*, though the number of words copied from President Ford’s memoir was “insubstantial,” the third factor favored the copyright holder because the small part that was taken was the primary matter that readers were interested in: why Ford had pardoned Richard Nixon.<sup>43</sup> The second complication is that even literal copying of an *entire work* may be fair if the amount taken is necessary for a legitimate purpose, such as a sufficiently transformative use.<sup>44</sup> The third fair use factor thus disfavors excessive copying, unless necessary for a privileged use.

*Factor Four: The Effect of the Use on the Potential Market for the Copyrighted Work.* The final factor, sometimes considered the most important,<sup>45</sup> relates to whether the use detrimentally impacts the market for

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<sup>40</sup> See, e.g., *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1993) (“Works of fiction receive greater protection than works that have strong factual elements . . .”).

<sup>41</sup> *Feist Pubs., Inc. v. Rural Tele. Serv.*, 499 U.S. 340, 344 (1991).

<sup>42</sup> See *Harper & Row*, 471 U.S. at 564–66.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820–21 (9th Cir. 2002) (“[T]he extent of permissible copying varies with the purpose and character of the use. If the secondary user only copies as much as is necessary for his or her intended use, then [factor three] will not weigh against him or her.”); *Field v. Google*, 412 F. Supp. 2d 1106, 1120–21 (D. Nev. 2006) (wholesale copying of entire websites for search engine purposes was found to be fair because of its highly transformative nature).

<sup>45</sup> This perception is due to the Supreme Court’s remark in *Harper & Row* that the fourth factor was “undoubtedly the single most important element of fair use.” 471 U.S. at 566. The Court later walked back this sweeping statement. See *Campbell*, 510 U.S. at 577–78 (“The [fair use test] is not to be simplified with bright-line rules for the statute . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together. . .”).

the copyright owner's original work. If it has a substantial effect on the market, the use undermines the copyright owner's incentives to create the original and will tend to be found unfair.<sup>46</sup> This principle is subject to some important limitations. First, there is the danger of circularity in considering lost licensing revenue as a market harm: by determining whether a use is fair or unfair, the court is essentially deciding *whether* a licensing market should exist for this use.<sup>47</sup> The focus, then, should primarily be on whether the use functions as an economic substitute for the original. Second, not all economic harms are properly weighed under this factor. A dismissive book review or biting parody may undermine the market for the original, but they do not create harms that are cognizable under the Copyright Act.<sup>48</sup> The fourth factor only disfavors uses that diminish demand because they serve as substitutes for the original work.

Two features of these statutory factors are noteworthy for present purposes. First, the statutory factors focus primarily on the perspective of the user, not of the copyright holder. Two of the four factors—the purpose and character of the use, and the amount of the original work that was used—are wholly devoted to examining what the copyright user has done. The fourth factor—the effect of the use upon the potential market for the copyrighted work—necessarily relates both to the original and to the use, as it captures an economic interaction between the use and the original. Only one factor of the four—the nature of the copyrighted work—wholly examines the issue from the perspective of the copyright holder. This factor, notably, is considered to be the least important fair use factor, and has been found to exert almost no influence on the actual outcomes of fair use cases.<sup>49</sup>

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<sup>46</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450–51 (1984).

<sup>47</sup> See Fisher, *supra* note 23, at 1671–72.

<sup>48</sup> See Leval, *supra* note 4, at 1125; Campbell, 471 U.S. at 591–92.

<sup>49</sup> See Beebe, *supra* note 21, at 584–85; Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 77 (2012). Instead, it is the first and fourth factors that tend to dictate case outcomes. Beebe, *supra* note 21, at 586 (“It is certainly interesting to observe, now based on empirical evidence, that the outcome of the fourth factor appears to drive the outcome of the test, and that the outcome of the first factor also appears to be highly influential.”). This is not to say that the second factor is never important, of course. For example, it can be seen to weigh heavily in “reverse engineering” fair use cases, where copies of a computer program are disassembled to achieve interoperability or other ends. There, the highly factual nature of the work—“computer programs are, in essence, utilitarian articles”—appears to influence the outcome. See, e.g., Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1524–27 (9th Cir. 1992); Samuelson, *supra* note 25, at 2605–10; Madison, *supra* note 25, at 1656–59.

## CONSENT, USER RELIANCE, AND FAIR USE

Second, the four statutory factors are nonexclusive by design.<sup>50</sup> Courts have discretion to consider a variety of other factors, and they often do so. For example, courts sometimes look to whether the user attributed the original author—as opposed to passing off copied material as his own—finding that proper attribution tends to favor fair use.<sup>51</sup> Similarly, deliberate distortions or errors that misrepresent the original may disfavor fair use.<sup>52</sup> In general, bad faith by the defendant will weigh against fair use, though this consideration is controversial.<sup>53</sup> The key point is that courts are entitled to extend the fair use inquiry beyond the four statutory factors. In fact, Congress has explicitly endorsed this practice.<sup>54</sup>

## II. THE STANDARD VIEW: CONSENT IS IRRELEVANT

As the preceding section demonstrates, fair use is a flexible and wide-ranging inquiry. Despite the capacious nature of fair use, the circumstances surrounding a user's failure to obtain consent from the copyright holder are generally *not* considered as a matter of black letter law. This section explains and critiques the standard view that rejects the copyright holder's consent as a fair use factor.

### A. *The Seeming Logic of the Standard View*

The logic of the standard view rests on a conflation of all conduct that falls short of actual consent. The argument runs roughly thus: The fair use defense is needed only when the use is unauthorized, for if the user has actual permission for her use, there is no infringement of the copyright and

<sup>50</sup> See generally *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 at 549–50 (1985) (describing “nonexclusive” nature of statutory fair use factors).

<sup>51</sup> See, e.g., *Williamson v. Pearson Educ., Inc.*, 2001 WL 1262964, at \*5 (S.D.N.Y. 2001).

<sup>52</sup> See, e.g., *Maxtone–Graham v. Burtchaeil*, 803 F.2d 1253, 1261 (2d Cir. 1986).

<sup>53</sup> Compare *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 479 (2d Cir. 2004) (considering bad faith as a nondispositive subfactor of the “purpose and character of the use”) *with id.* at 483–487 (Jacobs, J., concurring) (“[T]he secondary user's good or bad faith in gaining access to the original copyrighted material ought to have no bearing on the availability of a fair use defense.”) and *Leval*, *supra* note 4, at 1125–28 (arguing that “good faith” should not be considered as a fair use factor). See also Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009) (arguing that recognition of moral rights such as attribution and integrity is undesirable because it “fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist”).

<sup>54</sup> See 17 U.S.C. § 107 (“the factors to be considered shall include . . .”); H.R. Rep. No. 102-836, at 9 (1992) (“[T]he courts, in their discretion, may weigh factors in addition to those set forth in the statute.”).

no need for the fair use defense.<sup>55</sup> In *every* fair use case, then, the user has failed to obtain consent from the copyright holder. How, then, could consent be a factor? It would appear to always cut the same way.

The Eleventh Circuit's opinion in *Peter Letterese & Associates v. World Institute of Scientology* provides an example of the standard view.<sup>56</sup> The work at issue in *Letterese* was a 1971 book by Les Dane called *Big League Sales*, which described sales closing techniques.<sup>57</sup> With Dane's knowledge and participation, Church of Scientology founder L. Ron Hubbard incorporated aspects of *Big League Sales* into Church seminars and teaching materials in the 1970s and 80s.<sup>58</sup> Peter Letterese, a member of the Church who had learned Dane's techniques at such seminars, acquired the copyright to *Big League Sales* with the intention of "making [his] own use" of the book as well as "keeping it available to the Church."<sup>59</sup> Mr. Letterese, however, was later excommunicated from the Church, and eventually brought a suit in 2004 against several Scientology entities for copyright infringement when they continued to use their adaptations of material from Dane's book.<sup>60</sup>

The district court in *Letterese* thought that this course of conduct was relevant to the fair use inquiry and considered "the copyright owner's actual consent" as a fair use factor. The lower court relied the evidence that "both [the author and the copyright owner] knew of, assented to, and participated in Defendants' use for decades," along with the four traditional fair use factors, to conclude that the Church's use was fair.<sup>61</sup> The Eleventh Circuit rejected the consent consideration:

The district court explicitly adopted a "fifth" [fair use] factor, which it described as "the copyright owner's actual consent to the use" . . . This was incorrect, both in terms of logic and precedent. As the district court itself recognized, the existence of actual consent negates the necessity of conducting a fair use analysis in the first place, as the existence of a license is an independent affirmative defense to a claim of copyright infringement. *See Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 144 n. 2 (2d Cir.1998)

<sup>55</sup> 17 U.S.C. § 106 ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize [reproductions, derivative works, et al.]").

<sup>56</sup> 533 F.3d 1287, 1308 (11th Cir. 2008).

<sup>57</sup> *Id.* at 1294.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1295–96.

<sup>60</sup> *Id.* at 1295, 1297.

<sup>61</sup> *Id.* at 1308.

## CONSENT, USER RELIANCE, AND FAIR USE

(“The doctrine of ‘fair use’ allows the appropriation of a copyrighted work *without consent* under certain circumstances.”) (emphasis added). Actual consent therefore is not properly a factor in fair use analysis.<sup>62</sup>

Courts like *Letterese* thus reason that because actual consent from the copyright owner negates the need for a fair use analysis, actions falling short of effective consent are irrelevant to fair use.

### ***B. Critiques of the Standard View***

#### *1. Consent Is Not a Binary Concept*

The first response to this reasoning is that the conclusion simply does not follow: The fact that actual consent negates the need for fair use does not imply that the past conduct of the copyright owner indicating consent is necessarily irrelevant. In some cases, like *Letterese*, there is a course of dealing that comes very close to actual consent, even though that conduct may fall short of what is necessary for an express or implied license.<sup>63</sup> There is no reason that this sort of “partial consent” must be treated the same as an express refusal. In fact, as this Article argues, there are reasons to consider such gradations of consent as a fair use factor in some cases.<sup>64</sup>

The Supreme Court has not directly addressed the issue of whether the nature of the copyright holder’s refusal is properly considered as a fair use factor, but it touched on the matter in its leading fair use decision, *Campbell v. Acuff-Rose Music*.<sup>65</sup> *Campbell* addressed whether the rap group 2 Live Crew’s parody of Roy Orbison’s famous song “Oh, Pretty Woman” was a fair use.<sup>66</sup> Before the parody was released for sale, 2 Live Crew’s manager approached Acuff-Rose Music (the copyright holder) and offered to pay them a fee for the use. Acuff-Rose categorically refused to

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<sup>62</sup> *Id.*

<sup>63</sup> *Letterese* does not appear to have raised this issue directly. *See id.* at 1298 (only “affirmative defenses” raised were “fair use” and “laches”). Copyright law requires a written agreement for transfer of ownership, 17 U.S.C. § 204, so only nonexclusive licenses may be implied from conduct. It is not always easy to prove an implied copyright license, as some courts require that the work be created at the request of the putative licensee. *See, e.g.,* *Nelson-Salabes, Inc. v. Morningside Dev.*, 284 F.3d 505, 514 (4th Cir. 2002); *Sieman, supra* note 4, at 899.

<sup>64</sup> *See infra* Part III.

<sup>65</sup> 510 U.S. 569 (1994).

<sup>66</sup> *Id.* at 571–72.



license, but 2 Live Crew released the record nonetheless.<sup>67</sup> While the bulk of the *Campbell* decision addressed other issues,<sup>68</sup> a footnote asked whether 2 Live Crew's request for a license evinced bad faith that should weigh against fair use:

[R]egardless of the weight one might place on the alleged infringer's state of mind . . . we reject Acuff-Rose's argument that 2 Live Crew's request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew's actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use.<sup>69</sup>

The Court in *Campbell* thus rejected the notion that a copyright user's request for permission to make a use should be held against him. But this does not foreclose the converse proposition: that an *ex ante* request for permission should weigh *in favor* of the user. This equivocal footnote may explain, however, the persistence of the standard view that the nature of the copyright holder's refusal is irrelevant.<sup>70</sup>

In sum, the logic underlying the standard view rests on a conflation of all conduct short of actual consent by the copyright holder. There is no necessary reason, however, that the fair use doctrine must conceptualize consent and refusal in this way. Instead, one may conceive of consent and refusal as a continuum, with equivocal conduct—such as silence from a copyright holder, or actions indicating but not explicitly granting consent—lying between the extremes of express approval and disapproval. Once this conceptualization is made, there is no *a priori* reason that such intermediate varieties of consent may not be considered in appropriate cases.

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<sup>67</sup> *Id.* at 572–73.

<sup>68</sup> The principal motivation for the opinion was to decide whether a parody's commercial nature creates a presumption against fair use. *Id.* at 573–74, 583–85.

<sup>69</sup> *Id.* at 585 n.18 (citations omitted).

<sup>70</sup> *Cf.* Beebe, *supra* note 21, at 612–13 (describing “unintended consequence[s]” of Supreme Court fair use dicta in the context of whether uses of unpublished works are presumptively unfair).

## CONSENT, USER RELIANCE, AND FAIR USE

2. *Consent's Relevance to the Traditional Fair Use Factors*

The standard view is also flawed in that it fails to consider the possibility that intermediate varieties of consent may be relevant to the traditional statutory fair use factors. Consider the cases of “partial consent,” where the copyright holder has implicitly indicated that she approves the use, or silence from a copyright holder despite awareness of a use. In either case, the copyright holder’s failure to object to a known use would tend to indicate that, at least in her view, there is little market harm resulting from the use under the fourth fair use factor, which should weigh in favor of fair use. Similarly, if the copyright holder’s failure to object was motivated by strategic considerations, this would tend to indicate bad faith, which is sometimes considered under the first fair use factor.

For this reason, perhaps, some courts appear to consider aspects of consent in fair use despite its formal irrelevance. One example is *Field v. Google*,<sup>71</sup> which challenged Google’s caching functionality as a massive copyright infringement. In the process of indexing the Internet’s websites for its search engine, Google creates a copy of the material on each website that it temporarily archives, or “caches.”<sup>72</sup> This cached version serves several purposes, such as improving the speed of searches and allowing users to access a website that is inaccessible due to heavy traffic or server issues.<sup>73</sup>

Google’s caching was alleged to infringe website owners’ copyrights because it creates unauthorized, wholesale reproductions of websites.<sup>74</sup> However, the *Field* court permitted it as a fair use.<sup>75</sup> In reaching that conclusion, the decision noted that Google provides simple mechanisms through which any website owner may easily “opt out” of caching, or of being indexed by Google entirely.<sup>76</sup> *Field*, the plaintiff, was aware of how to opt out of caching, but chose to make his works publicly available online with the specific intent of filing a copyright action against Google.<sup>77</sup>

On the standard understanding of fair use, as noted above, Google’s opt out functionality is irrelevant.<sup>78</sup> Nonetheless, *Field*’s knowing failure to

<sup>71</sup> 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>72</sup> *See id.* at 1110–11.

<sup>73</sup> *Id.* at 1111–12; *see generally* Wikipedia, Web Cache, [https://en.wikipedia.org/wiki/Web\\_cache](https://en.wikipedia.org/wiki/Web_cache) (last accessed July 10, 2014).

<sup>74</sup> *Field*, 412 F. Supp. 2d at 1110–11.

<sup>75</sup> *See id.* at 1123.

<sup>76</sup> *See id.* at 1112–13, 1119.

<sup>77</sup> *See id.* at 1113–14.

<sup>78</sup> *See supra* notes 5–11 and accompanying text.

opt out appears to inform the court's analysis in the *Field* case. This is likely because Field, the plaintiff, acted with obvious bad faith.<sup>79</sup> Though the court mentions opt out functionality only briefly in its discussion of the fair use factors,<sup>80</sup> Field's disingenuous conduct colors its analysis. Similarly, Field's failure to opt out tends to indicate that Google's caching did not cause any harm to the market for his website.<sup>81</sup> *Field v. Google* thus demonstrates that courts sometimes intuitively consider consent despite the standard view that consent is always irrelevant.

### III. THE CASE FOR CONSENT AS A FAIR USE FACTOR

Having disposed of the standard view's notion that consent cannot, as a matter of logic, be considered as a fair use factor, this Part argues that the circumstances surrounding the user's failure to obtain consent from the copyright holder *should* be considered in fair use analysis. The first Section relies on an economic model of author-user interactions to argue that consideration of the copyright holder's consent or refusal deters costly strategic behavior, and encourages good faith dealing between authors and users. The second Section argues that considering consent accords with fair use's nature as a flexible "equitable rule of reason" that should rightly concern itself with good faith and the reliance interests of the user and copyright holder.

#### A. *Efficiency and Incentives*

##### 1. *A Model of Author-User Interaction*

In abstract terms, a typical fair use case proceeds as follows: The author creates an original work. (For simplicity, the model will presume that no transfer of copyright has occurred, i.e., the original author retains the copyright.<sup>82</sup>) At some later time, the purported fair user wishes to make

<sup>79</sup> Indeed, the court separately held that Field's claim was independently barred on the basis of estoppel. *Id.* at 1117.

<sup>80</sup> *See id.* at 1119 ("Fifth, Google ensures that any site owner can disable the cache functionality for any of the pages on its site in a matter of seconds. . . . Thus, site owners, and not Google, control whether "Cached" links will appear for their pages.") (citation omitted).

<sup>81</sup> *See id.* at 1122 ("Notwithstanding Google's long-standing display of 'Cached' links and the well-known industry standard protocols for instructing search engines not to display them, the owners of literally billions of Web pages choose to permit such links to be displayed.")

<sup>82</sup> Copyright generally initially vests in a work's author, 17 U.S.C. § 201(a)–(b) (2011), but the author is free to transfer his rights in whole or in part, *id.* § 201(d), and it is common to

## CONSENT, USER RELIANCE, AND FAIR USE

some use of the original, e.g., to quote from it or incorporate aspects into a different work.

In thinking through the model, it may be helpful to envision the situation as a close fair use case—that is, evaluation of the four traditional fair use factors (and any additional non-consent considerations) leaves the balancing test roughly in equipoise. In other words, there are reasonable arguments that use is fair under the standard factors, and roughly equally reasonable arguments that it is not.

As a concrete example, consider the facts of *Harper & Row*, a fair use case that divided the Supreme Court six to three against fair use.<sup>83</sup> *Harper & Row* addressed whether *The Nation* magazine’s “scoop” of President Ford’s unpublished memoir was a fair use.<sup>84</sup> Having received a prepublication copy from an unidentified source, the magazine quoted and paraphrased from the forthcoming memoir to produce an article detailing Ford’s pardon of former President Richard Nixon.<sup>85</sup> Evaluation of the traditional fair use factors yields an inconclusive result in *Harper & Row*. On the one hand, *The Nation*’s purpose is newsreporting (privileged under the first factor), the underlying work is factual, and the amount of actual expression taken was very small—by the dissent’s count, only 300 words from a 200,000 word manuscript.<sup>86</sup> On the other hand, the memoir was unpublished, the scoop directly harmed the market for the memoir, and those 300 words were arguably the “heart of the work.”<sup>87</sup> In a close case like *Harper & Row*, the consent consideration may make the difference.<sup>88</sup>

In contrast, the model’s conclusions will tend not to be critical to cases when the use is obviously fair (e.g., a brief quote for educational purposes) or obviously unfair (e.g., commercial pirating of identical copies). Because evaluation of the traditional factors is one-sided, consent is unlikely to be decisive in those contexts.

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do so. The model presented in this Part will presume no transfer has occurred and use the term “author” to refer to the copyright-holding plaintiff, for clarity and because the term “author” is less unwieldy than “copyright holder.”

<sup>83</sup> *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985); *see id.* at 594 (Brennan, J., dissenting) (“Whether the quotation [in *Harper & Row*] was an infringement or a fair use . . . is a close question that has produced sharp division in both this Court and the Court of Appeals.”).

<sup>84</sup> *Id.* at 542–43.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 579, 590–602 (Brennan, J., dissenting).

<sup>87</sup> *Id.* at 561–68 (O’Connor, J., for the majority).

<sup>88</sup> *See infra* Part V.D. (analyzing the role of the consent in *Harper & Row*).

## i. Stage One: Prior to the Use

First, consider the situation prior to the user's decision to proceed with his contemplated use. At this point, the user may or may not know something of the author's preferences regarding uses of her work. If there is some preexisting relationship between the user and author, the author may have already communicated her preferences directly, or implicitly through her conduct. Conversely, there may be no relationship between the author and user, in which case the author can communicate her preferences only generally through a legend on the work, or—more commonly—not at all.<sup>89</sup>

The first decision falls to the user: Should he ask permission of the author before making his use? The benefits of asking permission are obvious. If permission is granted, the user may proceed with the use without fear of later litigation, though of course he will have to pay any agreed-upon licensing fee. The decision not to ask permission may be made for several reasons. The user may believe, based on indications from the author or otherwise, that the author approves of the use. The user may have a good faith belief that his use is fair, and that therefore no permission from the author is needed. He may not be willing to pay, or be unable to afford, the expected licensing fee. As asking permission alerts the copyright owner to the intended use, the user may decline to ask permission in order to avoid detection of his potential infringement.

Importantly, *communication costs* will enter into the permission-seeking calculus. In cases where the user and the author have a preexisting relationship, these costs will tend to be low—the time to make a phone call or send an email—and thus unlikely to play a significant role in the decision.<sup>90</sup> In a more typical case, communication costs can be significant,

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<sup>89</sup> Contrary to the older system requiring that a copyright notice—the © symbol—be placed on a work in order to claim a copyright, American law no longer requires formalities for a work to receive copyright protection. Instead, all literary works, visual works, musical works, and the like are copyrighted *automatically* once they are “fixed in any tangible medium or expression.” See 17 U.S.C. §§ 102(a) & 401(a) (2012). As a result, a massive quantity of expression receives copyrights upon the instant of creation—“every e-mail, every note to your spouse, every doodle”—and the vast majority of these are presumably bereft of any legend or the like. See *generally* LAWRENCE LESSIG, *FREE CULTURE* 137–39 (2004) (describing expansion in copyright scope due to elimination of formalities such as the copyright notice).

<sup>90</sup> Of course, if the user believes the intended use will offend or anger the author, there may be costs in alerting the author to the use despite the preexisting relationship. Indeed, the proposed use could sour their relationship. However, this is not strictly speaking a communication cost as I intend to use the term. The cost incurred is not in the effort of communicating itself, but in its secondary effects.

## CONSENT, USER RELIANCE, AND FAIR USE

as it can be very difficult to ascertain who the copyright holder is and to contact that person.<sup>91</sup> In the extreme case, the user may be entirely unable to determine the current rightsholder, and permission seeking is a practical impossibility.<sup>92</sup>

When the author is aware of the intended use, she, too, has a choice to make at the pre-use stage: Should she let the user know that she approves or disapproves of the anticipated use? The decision to announce preferences or not may also be made for several reasons. The author may think that her wishes are already clear. She may not care about the anticipated use, and thus have little incentive to say anything. On the strategic side of the ledger, the author may wait to object because her bargaining position will be improved after the use is made. Communication costs are, of course, important here as well. If it is costly to contact the user, the author may not get enough benefits—either in deterring unwanted uses or in generating licensing revenue from agreed-upon uses—to make it worth her while.

If the user decides to ask permission or the author decides to announce her preferences, then some sort of negotiation will ensue. The author may demand a licensing fee for the use, which the user can agree to, refuse, or attempt to bargain down. Or the author's refusal may be categorical: a refusal to permit the use regardless of the compensation offered. If the negotiation results in an effective agreement, of course, then the use is authorized and no fair use case will ensue.

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<sup>91</sup> See Gordon, *supra* note 19, at 1627–30 (discussing cases where high transaction costs create “difficulty achieving a market bargain” and therefore “may justify a grant of fair use”).

<sup>92</sup> See Jerry Brito and Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, 12 MICH. TELECOMM. & TECH. L. REV. 75, 77–81 (2005) (describing the “orphans works problem” where the “rightsholder is unknown or cannot be located”).

**Summary Chart of Consent-Seeking Interactions Model**

<b>Decisionmaker</b>	<b>Decision</b>	<b>Expected Benefits</b>	<b>Expected Costs</b>
<b>User</b>	To Ask Permission	Avoids risk of liability Can change course	Licensing fee Communication costs Alerts author to use
<b>Author</b>	To Announce Preferences	Deters unwanted uses Licensing fee	Communication costs User can change course

*Figure 1.* This chart summarizes the basic cost-benefit tradeoffs faced by authors and users in their consent-seeking interactions.

ii. Stage Two: After the Use

Next, consider the situation after the use is made, i.e., once the user has appropriated expression from the original work. If the author and user communicated beforehand, the dynamics of the situation have not changed appreciably. The author is aware of the use, and its potentially infringing nature. As the original negotiation broke down, the remaining decisions are whether either party will choose to reopen negotiations, and whether the author will bring or threaten suit.

In the situation where the author and the user have not yet communicated, the dynamics are more interesting. There are three possible scenarios. The first and simplest case is when the author never becomes aware of the use. This may arise intentionally—e.g., when the user’s “avoid detection” strategy has succeeded—or unintentionally. In this situation, there will never be any author-user communication, nor any fair use suit. The second possibility is when the author was initially unaware of the use, but later gains knowledge of the use. There, the author never had an opportunity to announce her preferences earlier, and the author’s decision whether to announce her preferences will take place at this stage. The author, however, will now have the additional leverage of threatening suit.

In the third case, the author has been aware of the use all along, but declined to announce preferences at stage one. It is this final category that is ripe for strategic behavior by the author. In particular, the author can “lie

## CONSENT, USER RELIANCE, AND FAIR USE

in wait” to take advantage of an improved post-use bargaining position.<sup>93</sup> The author has increased negotiating leverage after the use because the user can no longer change his course of action. Before the use is made, the user can credibly threaten to make an alternative use (e.g., relying on a different work), or to make no use at all (e.g., by excluding the portion that relied on the author’s original work). After the use is made, the user’s only leverage is to force the author to sue and to take his chances on a fair use defense. Simply by making the new work, the user has already infringed: contrary to popular misconception, there is no requirement that the user sell or publish the infringing work in order to be liable.<sup>94</sup> Indeed, the user is liable for heavy statutory damages—up to \$150,000 per work infringed—even if his use caused little or no actual economic harm to the author.<sup>95</sup> Unable to change course, and faced with the threat of super-compensatory damages, the user has dramatically decreased leverage in a post-use negotiation.

## 2. *Deterring Strategic Behavior and Ex Post Disputes*

Given this idealized setup, we can now ask the critical question: What sorts of consent-seeking interactions do we, as a social matter, wish to encourage, and which actions do we wish to discourage?

Two assumptions necessary for the conclusions that follow should be made be made clear at the outset. First, in order for the benefits of the consent factor to be realized, communication costs must be sufficiently low such that the costs of communication do not exceed the expected social benefits. Second, the conclusions will presume that the non-consent elements of current fair use doctrine work roughly as intended—to wit, to

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<sup>93</sup> The author will have an improved bargaining position in the other cases as well, but only in this final case is it a result of her intentional behavior.

<sup>94</sup> See 17 U.S.C. §§ 106(1) & 501(a) (2011); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

<sup>95</sup> See 17 U.S.C. § 504(c)(1)–(2) (2011) (providing that copyright holder may, in lieu of proving actual damages, opt to receive statutory damages of \$750–\$30,000 per work infringed, or up to \$150,000 per work when the infringement is “willful”). Even though such damages may be orders of magnitude larger than any actual damages suffered by the copyright holder, most courts have held that they do not violate due process. See, e.g., *Sony BMG Music Entm’t v. Tenenbaum*, 17 F.3d 67, 68 (1st Cir. 2013) (award of \$675,000 in damages for downloading 30 songs does not violate due process). Moreover, a colorable claim of fair use will not necessarily preclude a finding that a defendant’s conduct was “willful” for damages purposes. See, e.g., *Rogers v. Koons*, 96 F.2d 301, 313 (2d Cir. 1992) (characterizing appropriation artist as a willful infringer despite arguable fair use claim).



permit uses only when doing so is socially beneficial.<sup>96</sup> Although the assumption is of course artificial, it will enable us to isolate the effects of the standard view of consent and the role that consent ought to play in the fair use analysis.

Turning to the conclusions, identifying the first class of cases that our fair use law should want to discourage is relatively easy. At the least, it should seek to prevent opportunism by both the author and user. As used here, “opportunism” means strategic, bad faith behavior by an author or user. Specifically, opportunism includes intentional misrepresentations, in actions or words, regarding whether one believes a use to be fair or unfair, or whether one objects to a use. In these instances, the argument to consider the character of authorial refusal in fair use reduces to the economic justifications of equitable doctrines such as laches and unclean hands: “Equity in private law is . . . aimed at preventing opportunism.”<sup>97</sup>

An author who could easily object to a known use, but chooses not to, may be rightly penalized for a lack of diligence in asserting a claim that

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<sup>96</sup> Although the details of the various accounts differ, there is widespread agreement in the economic accounts of fair use law—indeed, of welfare economics more generally—that it should operate to maximize net social utility. *See, e.g.*, Gordon, *supra* note 19, at 1615, 1657 (fair use should operate to permit uses when “the market cannot be relied upon to allow socially desirable access to, and use of, copyrighted works” and “the use is more valuable in the defendant’s hands [than in the copyright owner’s]”); William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law* 18 J. LEGAL STUD. 325, 358 (1989) (“Only if the benefits of the use exceed the costs of copyrighted protection . . . is the no right/no liability solution of fair use defensible . . .”). On this utilitarian account, an ideal fair use law would permit uses when the social value of the use, broadly conceived, exceeds its social costs, including downstream effects on authors’ incentives to create. In this sense, fair use is simply a special case of copyright’s overriding goal of achieving the ideal balance between providing incentives for authors to create valuable works without unduly hindering their dissemination. *See generally* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750–52 (2012). Of course, in practice, many doubt that fair use law approaches this ideal. *See, e.g.*, LESSIG, *supra* note 89, at 187 (“Judges and lawyers tell themselves that fair use provides adequate ‘breathing room’ between regulation by the law and the access that the law should allow. But it is a measure of how out of touch our legal system has become that anyone actually believes this.”); Parchomovsky & Goldman, *supra* note 24, at 1485 (“In theory, fair use should be a significant limitation on the rights of authors. . . . In reality, however, it is more bark than bite: fair use’s ability to shield unauthorized users is greatly undermined by the uncertainty that has become the hallmark of the doctrine.”).

<sup>97</sup> *See* Henry E. Smith, *An Economic Analysis of Law versus Equity*, at \*3 (2010), available at [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf), (describing equitable doctrines as motivated “by one overriding goal: preventing opportunism”).

## CONSENT, USER RELIANCE, AND FAIR USE

prejudiced the user—much like the equitable doctrine of laches.<sup>98</sup> After a use is made, the user has little leverage as he is “locked in” to the use, and the author can threaten to sue for statutory damages far in excess of any actual damages suffered.<sup>99</sup> Such a threat would likely deter users even when the social value of their planned use exceeds the true costs to the author. In other words, the author’s opportunism creates a social cost.<sup>100</sup> An opportunistic author seeks to exploit the dynamics of the consent-seeking interaction to extract additional value from users; *ex ante*, this possibility may deter some socially-valuable uses.

Similarly, a user who avoids asking permission to avoid detection, knowing his use to be unfair, invokes the fair use defense with unclean hands.<sup>101</sup> (Of course, there may be good faith reasons to avoid detection—for example, when a user honestly believes a use to be fair but simply seeks to avoid costly litigation. This is not “opportunism” as used here, which only includes users who believe their uses to be unfair, yet act otherwise.) If we assume that current fair use doctrine works as intended to permit uses only when they are socially valuable, the possibility of escaping detection skews the user’s incentives such that he may engage in socially-harmful uses, i.e., uses that cost the author more than the net social benefit.<sup>102</sup> One way to discourage these opportunistic behaviors is to penalize bad faith actors in the fair use analysis.<sup>103</sup>

What about failures in communication not attributable to bad faith? Preventing opportunism aside, is there any reason to encourage users to ask

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<sup>98</sup> *Cf.* Costello v. United States, 365 U.S. 265, 282 (1961) (“Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”).

<sup>99</sup> *See supra* note 95; *see, e.g.*, Capital Records v. Thomas-Rasset, 692 F.3d 899, 901–902 (8th Cir. 2012) (affirming jury award of \$220,000 for engaging in file-sharing of 24 songs).

<sup>100</sup> *Accord* Smith, *supra* note 97, at 9–10 (“Opportunism . . . consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others.”).

<sup>101</sup> *Cf.* Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985) (unclean hands “requires that those seeking [equity’s] protection shall have acted fairly and without fraud or deceit as to the controversy in issue”).

<sup>102</sup> In the absence of transaction costs or externalities, of course, there is no need for the fair use doctrine on the standard economic account, as we would expect rightsholders and users to agree to license a use if and only if it was socially valuable. *See* Gordon, *supra* note 19, at 1613–15 (“An economic justification for depriving a copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way.”).

<sup>103</sup> In fact, we see some statements to this effect in the case law. *See, e.g.*, NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004) (considering “the propriety of the [user’s] conduct” and “bad faith” under the first fair use factor).

permission and authors to declare preferences? One potential reason is that early preference-revelation could promote early resolution of disputes and deter later fair use litigation.<sup>104</sup> Fair use litigation is uncertain and costly.<sup>105</sup> Moreover, there is reason to believe that pre-use negotiation is more likely to lead to a resolution—or, at least, not litigation—if the user opts to change course. Because of the author’s disproportionate leverage after the use is made, pre-use negotiation will tend to be fairer and more efficient. Prior to use, the author’s ability to threaten a suit for super-compensatory damages is more limited, as the user still possesses the effective counter-threat of not making the use at all.<sup>106</sup> In other words, the pre-use negotiation is, *ceteris paribus*, more likely to reflect the actual social value of the use.<sup>107</sup> Thus, in the absence of other externalities,<sup>108</sup> pre-use negotiation is more likely to lead to agreements to make uses only when they are socially beneficial.

Again, the above arguments hold only if *communication costs are low*. Whatever benefits there may be to early preference revelation, there are also considerable costs. For users, there are significant costs in ascertaining and contacting the rightsholder; for the author, in time lost announcing preferences, negotiating with users, or monitoring users for possible infringement. Thus, outside of the bad faith context, failure to ask permission or announce preferences should be penalized only when communication costs are low due to a preexisting relationship between the author and user, the availability of a low cost opt out system, or analogous contexts.

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<sup>104</sup> The conclusion that treating consent as a fair use factor will encourage earlier dispute resolution is tentative as it will depend on empirical facts about the settlement negotiation markets, which may in turn depend on agency problems (when the parties are represented), the expected costs of litigation, fee-shifting rules, and the like.

<sup>105</sup> See, e.g., LESSIG, *supra* note 89, at 187 (“[F]air use in America simply means the right to hire a lawyer to defend your right to create. . . . [Fair use litigation] costs too much, [and] delivers too slowly . . . .”); William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J. LAW & TECH. 243, 299 (criticizing fair use’s “uncertain and unusually fact-specific legal standard that provides no safe harbor for fair use [and] potentially crushing litigation and discovery expenses”).

<sup>106</sup> See *supra* notes 93–95 and accompanying text.

<sup>107</sup> Cf. Fisher, *supra* note 105, at 316–17 (“If, after creating their works, [users] seek licenses from the owners of the works they have used, the parties will be in a position of bilateral monopoly—a situation in which bargaining over a license fee is highly likely to break down.”).

<sup>108</sup> In a perfect world, we would hope that the traditional fair use factors operate as intended to account for such externalities. See *supra* note 96.

## CONSENT, USER RELIANCE, AND FAIR USE

**B. *The Equitable Component of Fair Use***

The second argument for consideration of authorial consent draws support from the doctrinal basis of fair use as an “equitable rule of reason.”<sup>109</sup> Fair use is by its nature a wide-ranging, highly contextual inquiry.<sup>110</sup> As expressed in the legislative history of the fair use provision:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.<sup>111</sup>

Moreover, Congress has made clear that courts deciding fair use cases have discretion to consider additional considerations beyond the statutory factors.<sup>112</sup>

As we have seen in the preceding section, consideration of authorial consent and refusal can promote equitable values such as good faith and justified reliance.<sup>113</sup> If we accept that Congress intended fair use to have an equitable component, and that courts have discretion to consider non-statutory factors, it is difficult to see why the nature of consent should not be a factor. Per Congress’s directive, courts often consider “moral rights” such as attribution and distortion in fair use cases.<sup>114</sup> Encouraging good faith behavior in author-user interactions vindicates similar interests.

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<sup>109</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (describing fair use as “an ‘equitable rule of reason’ analysis”).

<sup>110</sup> H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

<sup>111</sup> *Id.* at 65.

<sup>112</sup> See *supra* notes 50–54 and accompanying text.

<sup>113</sup> See *supra* Part III.B; see also *Precision Co. v. Automotive Co.*, 324 U.S. 806, 814 (1945) (“[The unclean hands] doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.”); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1042 (Fed. Cir. 1992) (“The second element, reliance . . . is essential to equitable estoppel.”).

<sup>114</sup> See, e.g., *Williamson v. Pearson Educ., Inc.*, 2001 WL 1262964, at \*5 (S.D.N.Y. 2001) (“Another relevant consideration within the first of the four fair use factors is the propriety of the defendant’s conduct. . . . In this case, defendants’ work clearly attributes the quoted passages to Williamson . . . .”) (citation omitted); *Maxtone–Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir.1986) (“The commission of errors in borrowing copyrighted material is a proper ingredient to consider in making the fair use determination.”).

Some courts and commentators resist this conclusion, however, and deny that “good faith” should have any place in the fair use analysis.<sup>115</sup> In part, this controversy stems from confusing signals sent by the Supreme Court. While the Court implied in *Harper & Row* that good faith factored into the fair use analysis, it later used a footnote in the *Campbell* decision to indicate that the matter remained an open issue.<sup>116</sup>

More fundamentally, however, the debate derives from conflicting views of the philosophical basis of copyright law. On one view, generally the dominant understanding of copyright in the American tradition, copyright is motivated wholly by a utilitarian calculus to provide incentives for the creation of new works.<sup>117</sup> Judge Pierre Leval, for example, argues that moral considerations such as “good faith” have no place in fair use.<sup>118</sup> Because copyright should be solely concerned with encouraging artistic creation, Judge Leval claims that fair use should look only at the use itself, not at the conduct of the user: “The [fair use] inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits.”<sup>119</sup> If one views copyright law as solely motivated by utilitarian goals, this view has some appeal.

Others, especially in European copyright traditions, believe that deontological notions should play a role in animating copyright law. For example, French *droit d’auteur*, which has been influential in civil law intellectual property systems, is usually justified on a natural rights basis

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<sup>115</sup> See, e.g., *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 483 (2d Cir. 2004) (Jacobs, J., concurring) (“I think that the secondary user’s good or bad faith in gaining access to the original copyrighted material ought to have no bearing on the availability of a fair use defense.”); Leval, *supra* note 4, at 1125–28 (arguing that “good faith” should not be considered as a fair use factor).

<sup>116</sup> Compare *Harper & Row, Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“Fair use presupposes ‘good faith’ and ‘fair dealing’”) (citation omitted) with *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 n.18 (1994) (“[R]egardless of the weight one might place on the alleged infringer’s state of mind . . .”). But see *NXIVM Corp.*, 364 F.3d at 483 (calling the Court’s comment in *Harper & Row* “a make-weight wholly unnecessary to the outcome”) (Jacobs, J., concurring).

<sup>117</sup> Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012) (“According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with just enough incentive to create artistic, scientific, and technological works of value to society by preventing certain would-be copiers’ free-riding behavior.”). This view is sometimes said to be reflected in the Constitution, which empowers 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.” U.S. CONST. art. I, § 8, cl. 8.

<sup>118</sup> See Leval, *supra* note 4, at 1126–28.

<sup>119</sup> *Id.* at 1126.

## CONSENT, USER RELIANCE, AND FAIR USE

and said to derive from John Locke’s theory of labor as the foundation of property.<sup>120</sup> Still other copyright theorists look to personhood theory, which derives from the Hegelian notion of artistic creation as an aspect of the creator’s personality, as the foundation for copyright.<sup>121</sup> On these rights-based views, moral notions of good faith have a more natural role to play in copyright.

The debate between strictly utilitarian views of copyright and its alternative bases, however, is well beyond the scope of this Article. For present purposes, it is sufficient to note that there is no reason that *both* consequentialist and deontological notions could not play a role in fair use.<sup>122</sup> For even if one takes a purely utilitarian view of fair use, consideration of consideration of “moral factors” like bad faith may promote utilitarian ends. Consequentialist goals—such as maximizing creative output—are not necessarily independent of moral considerations.<sup>123</sup> Indeed, as the preceding section argued, consideration of the author and user’s good faith can promote efficient behaviors by users and authors.<sup>124</sup> As a descriptive matter, this view appears to accurately account for how fair use analysis is typically conducted. Courts clearly afford great weight to the fourth fair use factor, which is driven by the consequentialist desire to maintain the original author’s incentives to create.<sup>125</sup> Just as clearly, courts

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<sup>120</sup> See generally Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 554–55 (2006) (“[I]n civil law countries such as France, the more individual-centered *droit d’auteur* system gives special importance to the principles of natural justice . . . .”); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–49 (1993) (summarizing the Lockean labor theory and allied approaches to intellectual property).

<sup>121</sup> See Fromer, *supra* note 117, at 1753–54 (overviewing personhood theory); see generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>122</sup> Jeanne Fromer, for example, recently articulated such a view. Fromer, *supra* note 117, at 1746 (arguing that utilitarian and moral rights theories of intellectual property “can be complementary in important ways because there is a utility to moral-rights concerns”).

<sup>123</sup> Cf. Fromer, *supra* note 117, at 1746 (arguing that utilitarian and moral rights theories of intellectual property “can be complementary in important ways because there is a utility to moral-rights concerns”).

<sup>124</sup> See *supra* Part III.A.

<sup>125</sup> The fourth fair use factor, “the effect of the use upon the potential market for or value of the copyrighted work,” 17 U.S.C. § 107, directly assesses the fair use on a consequentialist metric: does the use serve as a substitute for the original work that undermines the original author’s incentive to create? Indeed, on some economic-based views of fair use, the fourth factor is essentially the only consideration, with the other factors merely serving as proxies for whether a use is an economic substitute for the original. See WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 153–54

sometimes give weight to moral considerations such as attribution and good faith.<sup>126</sup>

Thus, at least in the eyes of Congress, fair use is rightly concerned with equitable considerations. It is therefore natural that, in appropriate cases, fair use should consider the nature of authorial consent and refusal when doing so promotes equitable interests. Indeed, it may be seen as an advantage that fair use, as a flexible judicial inquiry, can incorporate litigant-specific factors into its decisionmaking. In other words, the fair use inquiry may be primarily driven by the social value of the use, but it need not ignore all other considerations, including the circumstances of the user's failure to obtain consent.

### C. Summary

In sum, the model of consent-seeking interactions presented above implies that consent should be relevant to cases involving user reliance interests and strategic behavior. Both copyright holders and users ought to be deterred from acting opportunistically. In particular, because of the “lock in” effect and to vindicate user reliance interests, copyright holders should be penalized for failures to object to known uses. Both conclusions gain additional support from fair use's equitable nature.

Indeed, it is possible to view the proposed consent consideration less as a “new” consent fair use factor, but instead as a recognition that consent can sometimes be relevant under the traditional fair use factors. Bad faith is already considered by some courts under the first factor—the purpose of the use—and weighs against the bad faith actor. Similarly, a lack of diligence by copyright holders in asserting their rights can be conceptualized under the fourth fair use factor. On this view, silence or acquiescence from a copyright holder serves as an indication that there is little or no harm to the market for the original work, which weighs in favor of fair use.

The key point is not the particular doctrinal hook but simply that the standard view does not account for important reliance interests. Consideration of consent when it would otherwise be relevant in fair use can cure that deficiency. Consent may not be relevant in fair use cases involving a simple good-faith refusal, but it has a significant role to play in important classes of cases involving user reliance, such as digital

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(2003) (“In general, copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs and screws) is not.”)

<sup>126</sup> See, e.g., *Harper & Row, Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir.1986); *Williamson v. Pearson Educ., Inc.*, 2001 WL 1262964, at \*5 (S.D.N.Y. 2001).

## CONSENT, USER RELIANCE, AND FAIR USE

information aggregation systems, orphan works, and “partial consent” from the copyright holder. The next two sections will explain the role that consent should play in those cases.

#### IV. A TYPOLOGY OF CONSENT AND REFUSAL

This Section expands upon its critique of the standard view by developing a typology of the consent-seeking interactions between the copyright owner and potential users. This classification will make the Article’s proposed reforms more concrete by examining the various ways that a copyright holder may communicate his approval or disapproval, as well as his reasons for the same. In particular, the typology posits that consent in this context may be evaluated on two dimensions: its quantitative aspects and qualitative aspects.<sup>127</sup> The end goal is to develop a precise framework that will subsequently be used to examine the role that consent and refusal play in actual fair use cases.

##### A. *Quantitative Dimension*

The first aspect of the analysis looks to the *degree* of consent that the user has obtained: How strongly has the copyright holder indicated her approval or disapproval? At one extreme, the case of actual consent, the use will always be permitted, whereas a clear refusal will require the typical showing that the use is justified under the standard fair use factors. Intermediate cases, I argue, should require a lesser fair use showing in order to vindicate justified user reliance interests. Taking the possibilities with those most likely to favor fair use first:

*Affirmative Consent.* The copyright holder has expressly assented to the use, or otherwise consented in a legally effective manner, such as an implied license.<sup>128</sup> The fair use defense is not needed, because the use is authorized and there is no violation of the copyright holder’s exclusive

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<sup>127</sup> Communication costs loom in the background: varieties of consent that disfavor fair use on this typology should only penalize users or authors when they are not prohibitively costly.

<sup>128</sup> Copyright law allows for license implied by conduct only in “narrow circumstances.” *Estate of Roberto Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010). “The test most commonly used in determining if an implied license exists with respect to most kinds of works asks whether the licensee requested the work, whether the creator made and delivered that work, and whether the creator intended that the licensee would copy and make use of the work.” *Id.*



rights in the first instance.<sup>129</sup> The use is therefore always permitted, regardless of how weak the case for fair use may be on the traditional factors. Opt-in systems where the copyright holder has agreed to participate in the use also fall into this category.

*“Partial Consent.”* In this situation, there are implicit indications that the copyright holder approved of the use, such as his participation in the project or his acquiescence to the use through his conduct. For various reasons, however, this conduct falls short of a legally effective assent. For example, the court may take the common view that an implied license requires that the work must be created at the request of the defendant.<sup>130</sup> The facts of *Letterese*, detailed above,<sup>131</sup> offer an example of this situation. There, the copyright holder acquiesced in the use for a time, but then changed his mind because of a falling out with the user. Partial consent cases should tend to strongly favor fair use because of the significant reliance interests of the user.

*Failure to Express Disapproval/Opt Out.* The copyright holder has a clear opportunity to refuse to consent to the use, but declines to do so. In the non-digital context, this situation will most commonly arise when the copyright holder is aware of the proposed use because of a preexisting relationship between the copyright owner and user. A related case arises in the digital context, when a user incorporates a work by default, but provides a simple way for copyright holders to “opt out” of participation in that use. The facts of the challenge to the Google Books project, explained above,<sup>132</sup> offer an example. Google includes works in Google Books Search by default, but permits rightsholders who object to decline to be included in the search results. When communication costs are low and the copyright holder is aware of the option, failure to opt out should tend to favor fair use.

*Silence.* The category of silence captures the common case where there has been no direct interaction between the copyright holder and user. Often, silence is due to high communication costs. In some cases, particularly when the copyright holder is aware of the use and communication costs are not prohibitive, silence ought to favor fair use, as it is a signal that there is little market harm from the use. In other cases,

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<sup>129</sup> See 17 U.S.C. § 106 (2011) (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize [particular uses of his work, such as reproductions and derivative works.]”) (emphasis added).

<sup>130</sup> See generally PATRY ON COPYRIGHT § 5.131 (“Courts have held that there cannot be an implied license where the work was not created at defendant’s request . . .”).

<sup>131</sup> See *supra* notes 56–63 and accompanying text.

<sup>132</sup> See *supra* notes 5–10 and accompanying text.

## CONSENT, USER RELIANCE, AND FAIR USE

such as when communication costs are high, silence regarding the use should be considered neutral.

*Partial or Express Refusal.* These categories represent situations where the copyright owner has implicitly or explicitly indicated that he does not approve the use. An express refusal is self-explanatory. Like partial consent, partial refusals are “near miss” situations where the copyright holder’s indication was somehow ambiguous or ineffective. Neither category should influence the fair use inquiry. The traditional fair use factors are designed for this situation, to identify uses that should be permitted in spite of the copyright holder’s refusal. Thus, an actual refusal neither helps nor harms the user—consent simply has no role to play in this situation. Instead, the use should be evaluated on the usual statutory factors.

### B. Qualitative Dimension

A second aspect of the consent analysis is qualitative, and considers the motivations of each party underlying the course of action. What are the reasons for the copyright holder’s refusal to give consent and/or the user’s failure to obtain it?<sup>133</sup> Possibilities include:

*Impossibility.* An extreme case occurs when the user’s failure to obtain consent is entirely blocked by practical considerations. When communication costs are very high—cases of so-called “orphan works,” for example—the user may be effectively unable to contact the copyright holder.<sup>134</sup> Impossibility should tend to strongly favor fair use: because the

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<sup>133</sup> Though it does not explicitly account for it, the standard fair use factors already effectively distinguish between a copyright holder’s various reasons for refusal in some ways. In particular, the factors generally favor refusals motivated by simple economic reasons (i.e., the license fee offered is not adequate) vis-à-vis those motivated by other concerns. An example of a non-economic refusal would be a refusal to license a use in order to avoid criticism, as in the case of refusing to license a parody or an unfavorable book review. In privileging parodies and criticisms, the fair use factors function to disfavor refusals motivated by criticism avoidance. See *infra* Part I. The standard economic account of fair use yields a similar result. See generally Gordon, *supra* note 19 (describing account of fair use as justified when a use has externalities or transaction costs impede the user-rightsholder negotiation); see also LANDES & POSNER, *supra* note 125, at 149–59 (justifying parodies, book reviews, and other canonical fair uses on economic bases). Economic refusals are favored because they indicate that the copyright holder values preventing the use more than the user is willing to pay, which—in the absence of externalities—indicates that the use is socially inefficient. Non-economic refusals, such as a refusal to suppress a parody, frequently indicate that there are externalities involved such that the copyright holder’s valuation does not reflect the true social benefit of the use.

<sup>134</sup> See *infra* Part V.C (discussing orphan works cases).

user cannot contact the copyright holder, his failure to ask permission should not be held against him.

*Strategic Behavior (by the Copyright Holder).* When the copyright holder is motivated by opportunism, this will tend to strongly favor fair use. Opportunism, as used here, means knowing misrepresentations, in actions or words, regarding whether one believes a use to be fair or unfair, or whether one objects to a use. In particular, when the copyright holder has acquiesced in a use, a later disapproval after the use was made should be disfavored as undermining the justified reliance interests of the user.<sup>135</sup> Pre-use silence by the copyright holder specifically intended to create post-use leverage should be especially disfavored.

*Good Faith.* In this case, neither the user nor the copyright holder is acting opportunistically. Instead, there is a good faith disagreement about whether the use is fair. Usually, this will correspond to the case of silence or express refusal (e.g., the copyright holder makes his preferences known, but the user proceeds anyway because of his belief that the use is fair). Because neither party is acting strategically, the good faith scenario should be considered neutral—that is, consent simply should not be considered at all.

*Strategic Behavior (by the User).* The user, believing his use to be unfair, avoids asking permission of the copyright holder in order to avoid detection of his use. Such strategic behavior should tend to disfavor fair use both because the user is acting in bad faith, and because escaping detection may encourage users to engage in socially inefficient uses.<sup>136</sup>

*Mixed Motives.* It must be acknowledged that the typology presented above necessarily simplifies the incredibly-complicated world of human motivations. It is possible, of course, for parties to act “semi-strategically,” and with multiple or shifting motives. For example, a user may be uncertain about whether his use is fair, and seek to avoid detection out of fear of the potential costs of litigation. Such mixed cases should fall somewhere on the spectrum between purely good faith and purely opportunistic behavior.

*Timing.* The final element of the qualitative aspects of consent looks to timing. In general, fair use doctrine should privilege earlier actions by either party, as they tend to be demonstrative of good faith. In particular, approval or disapproval made prior to the use should be favored, as it gives

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<sup>135</sup> See *supra* Part III.A (explaining economic rationale for deterring opportunistic behavior).

<sup>136</sup> See *infra* notes 97–103, 109–115 and accompanying text. Of course, the copyright holder’s ability to obtain super-compensatory damages, see 17 U.S.C. § 504(c)(1)–(2) (2006), may counteract the user’s ability to escape detection.

## CONSENT, USER RELIANCE, AND FAIR USE

the user an opportunity to change his course of action before he is “locked in” to a particular use. Privileging earlier preference expression thus discourages strategic behavior by copyright holders, who may otherwise opt not to reveal their preferences to exploit the lock-in effect. This, in turn, allows the pre-use negotiation to better capture the actual social value of the use.

## V. CASE STUDIES

This Section will apply the above typology to a number of fair use fact patterns to explore the influence of the nature of consent and refusal on case outcomes. Building on recent work by Pamela Samuelson and Michael Madison, this Section disaggregates the mass of fair use decisions to analyze common fact patterns in fair use cases.<sup>137</sup> Here, the division focuses on commonalities in the consent-seeking interactions of users and copyright holders, such as “partial consent” cases or digital opt out systems. In particular, this Section examines cases where consent ought to be relevant per the model presented in Part III, i.e., those involving user reliance interests or strategic behaviors.

The theme that emerges from the case law is one of confusion—some courts have followed the black letter law’s standard view and neglected the consent consideration, while others have implicitly considered the role of consent. This Section will critique the analysis of the courts in the first group, and urge that the nature of consent should be made an explicit consideration in some situations.

### A. *Opt Out Systems and Information Aggregation*

An obvious area of application is in digital information aggregation cases, which have generated a number of important fair use decisions in the past decade.<sup>138</sup> In these cases, the user seeks to copy a large quantity of

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<sup>137</sup> See Madison, *supra* note 25, at 1622 (arguing that “the doctrine of fair use might be understood more profitably as addressing the intersection of copyright law and social and cultural patterns . . . .”); Samuelson, *supra* note 25, at 2541 (“[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters.”).

<sup>138</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1163–68 (9th Cir. 2007) (analyzing whether displaying thumbnail versions of photographs in search results is a fair use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817–22 (9th Cir. 2003) (analyzing whether displaying thumbnail images in search engine results is a fair use); *Internet Archive v. Shell*, 505 F. Supp. 2d 755, 760–61 (D. Colo. 2007) (describing suit against Internet

content in order to make some sort of collective use of that material: for example, to make it digitally accessible, searchable, or otherwise useful in ways that the individual works in isolation would not be. A familiar example would be Google Image Search. To make the images on the Internet searchable, Google automatically scans and indexes the visual material displayed on websites.<sup>139</sup> When an individual types in a query into Google's Image Search, Google displays thumbnail versions of (hopefully) relevant images as the search result.<sup>140</sup> While such systems are incredibly useful, they also draw objections to the unauthorized reproduction of copyrighted content on a massive scale.

In general, the creators of such tools may structure their services in three ways: an opt in, opt out, or a mandatory basis. An opt-in system only incorporates works whose copyright holders have affirmatively agreed to participate in the use.<sup>141</sup> An opt-out system includes all works in a particular category by default—for example, all content made publicly available on the Internet—but will exclude any works whose owners affirmatively “opt out,” i.e., indicate to the user that they do not wish their works to be included.<sup>142</sup> Google Image Search, for example, operates on an opt out basis: images on every webpage publicly available on the web are included in the search results by default, but website owners may use standardized tools to indicate that they do not wish to have their webpages indexed, or to have their images displayed.<sup>143</sup> A mandatory system includes all works by default, and does not provide content owners with any ability to opt out.

On the view of consent advocated herein, fair use should provide incentives to structure information-aggregation systems on an opt out basis, as opposed to a mandatory basis.<sup>144</sup> In terms of the consent typology, opt

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Archive for, inter alia, copyright infringement); *Field v. Google*, 412 F. Supp. 2d 1106, 1117–23 (D. Nev. 2006) (analyzing whether Google's caching of websites is a fair use).

<sup>139</sup> *Perfect 10*, 508 F.3d at 1155–56.

<sup>140</sup> *Id.*

<sup>141</sup> See Sieman, *supra* note 4, at 887 (defining and explaining features of opt in systems).

<sup>142</sup> See *id.* at 888–89 (defining and explaining features of opt out systems).

<sup>143</sup> See *Remove Content from Google – Completely Remove an Entire Page*, GOOGLE.COM, <https://support.google.com/webmasters/answer/1663419?hl=en> (last accessed July 10, 2014); *Field*, 412 F. Supp. 2d at 1112–13, 1119. While this “opt out” right is limited to website owners who wish to remove their own content from Google, the European Court of Justice recently ruled that third parties can sometimes force Google to remove information from its search results based on privacy concerns—the so-called “right to be forgotten.” See David Streitfeld et al., *European Court Lets Users Erase Records on Web*, N.Y. TIMES, May 14, 2014.

<sup>144</sup> An opt-in system presents no need for a fair use analysis because the user has the authorization of each individual rightsholder.

## CONSENT, USER RELIANCE, AND FAIR USE

out systems are grouped as the “failure to express disapproval” on the quantitative dimension, which should favor fair use. Copyright holders who are aware of an opt out, but chose not to take advantage of the option, should have a more difficult time defeating a fair use defense in a later suit. Such copyright holders should be penalized for not objecting to the use when they had the opportunity. Conversely, users who chose not to provide an opt out will need either some persuasive reason for doing so—i.e., a high score on the qualitative dimension—or an independently-sufficient case on the statutory fair use factors.

In *Field v. Google*, discussed earlier,<sup>145</sup> Google’s caching functionality was held to be a fair use. *Field* provides an example of when opt out functionality appears to be exerting an influence on a court’s fair use analysis. This is likely because the copyright owner’s conduct in *Field* was particularly egregious: Field was aware of Google’s caching functionality and how to opt out of it, but chose to make his works available online with the intent to “manufacture a claim for copyright infringement against Google” for profit.<sup>146</sup> Though formally irrelevant, the court’s disapproval of Field’s conduct appears to influence the analysis.<sup>147</sup>

Other courts, however, have not been as sensitive to the significance of opt out functionality. The two leading cases on search engine fair use—*Perfect 10 v. Google*<sup>148</sup> and *Kelly v. Arriba Soft Corp.*<sup>149</sup>—both neglect to credit (or even mention) the search engine’s opt out structure as a relevant consideration. Both *Perfect 10* and *Kelly* involved whether displaying a website’s copyrighted images in search engine results—albeit in a low resolution, “thumbnail” form—was a fair use. In *Perfect 10*, for example, the operator of an adult website sued Google when its copyrighted images were found in Google’s Image Search results.<sup>150</sup> Although the court in *Perfect 10* ultimately held that displaying thumbnail images in search results was fair, Google’s attempt to accommodate competing interests by allowing copyright holders to opt out of indexing was neglected in the analysis.<sup>151</sup>

<sup>145</sup> See *supra* notes 71–81 and accompanying text.

<sup>146</sup> *Field*, 412 F. Supp. 2d at 1113–14.

<sup>147</sup> See *supra* notes 74–81 and accompanying text.

<sup>148</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817–22 (9th Cir. 2003).

<sup>149</sup> *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1163–68 (9th Cir. 2007).

<sup>150</sup> *Id.* at 1157.

<sup>151</sup> See *id.* at 1168. In part, this failure may be due to the fact that Perfect 10 had, in fact, made efforts to protect its rights by keeping its images on a password-protected website accessible only to paid subscribers. *Id.* at 1157. Google respected these wishes and did not index the images on Perfect 10’s website; the infringing images appeared in the image search results only because third parties had posted unauthorized versions publicly on the

*AV ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), provides an example of a case where factoring in the nature of consent—which the court did not do—should arguably change the outcome. iParadigms operates Turnitin.com, a “plagiarism detection service” that maintains a proprietary database of works compiled from the web, print sources, and student papers.<sup>152</sup> Turnitin.com allows schools who use its service to check whether a student’s work was plagiarized by comparing the student paper to the material in the database. After performing this comparison, iParadigms “archives” students’ works by copying them into its database and using them in future plagiarism checks.<sup>153</sup> Several high school students who objected to this latter practice—not the plagiarism check itself, but the subsequent copying of their works into the database without their permission—sued iParadigms for copyright infringement.<sup>154</sup>

iParadigms admitted that the elements of copyright infringement were met, but claimed fair use as a defense.<sup>155</sup> The Fourth Circuit concluded that the use was fair, relying in part on decisions like *Perfect 10*.<sup>156</sup> And, indeed, the case for fair use in *iParadigms* under the four statutory factors is similar to the arguments that prevailed in *Field* and *Perfect 10*. Like those cases, iParadigms copies the entirety of the work for a commercial purpose, but its use is transformative because it serves an “entirely different function and purpose than the original works.”<sup>157</sup>

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Internet. *Id.* Nonetheless, Google’s attempt to respect *Perfect 10*’s wishes—albeit ineffectively in the event due to third party pirates—might still have been considered to weigh in its favor in the fair use analysis.

<sup>152</sup> *A.V. ex rel. Vanderhye v. iParadigms*, 562 F.3d 630, 634 (4th Cir. 2009).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 635.

<sup>155</sup> iParadigms also asserted that its use was authorized because the students had to click a box agreeing to iParadigms’ “terms and conditions” when they submitted their papers. *Id.* at 635–36. There was a substantial question as to whether this agreement was enforceable, however, because the students were minors at public high schools that had to submit their papers to Turnitin.com in order to receive school credit. *See AV v. iParadigms, Ltd. Liability Co.*, 544 F. Supp. 2d 473, 481–82 (E.D. Va. 2008) (addressing these issues but finding the agreement enforceable). The Fourth Circuit did not decide whether the agreement was enforceable because it concluded that iParadigms’ use was fair in any event. *See iParadigms*, 562 F.3d at 645 n.8.

<sup>156</sup> *See id.* at 639 (citing *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007), to support notion that iParadigms’ use is transformative).

<sup>157</sup> *Id.* at 639. *Compare id.* at 638–40 (“iParadigms’ use of plaintiffs’ works had an entirely different function and purpose than the original works; the fact that there was no substantive alteration to the works does not preclude the use from being transformative in nature.”) *with Perfect 10*, 508 F.3d at 1165 (“The fact that Google incorporates the entire *Perfect 10* image into the search engine results does not diminish the transformative nature of Google’s use.”).

## CONSENT, USER RELIANCE, AND FAIR USE

Neglected in the court's analysis was the fact that iParadigms, unlike the search engines at issue in *Field* and *Perfect 10*, structures its database on a mandatory basis. All student submissions are included by default, and individual students who object to the practice—like the plaintiffs in *iParadigms*—cannot opt out of inclusion.<sup>158</sup> Indeed, because of the formal irrelevance of consent, iParadigms never had to explain why it could not accommodate dissenting students through a simple opt-out mechanism.

All this is not to say that all digital information aggregation and information access systems must, as a matter of fair use law, be structured on an opt out basis. If a system has a compelling case on the traditional fair use factors or strong qualitative reasons for the mandatory structure, the failure to provide an opt out may be justified. The Internet Archive's Wayback Machine, which archives and permanently preserves much of the Internet's content for historical purposes, offers a potential example.<sup>159</sup> The Wayback Machine, like Google's cache system, has been threatened with suit for copyright infringement.<sup>160</sup> In actual practice, the Wayback Machine will remove material at the request of website owners,<sup>161</sup> but it may have a persuasive reason for a mandatory structure. Because the Internet Archive seeks to serve as an historical "resource for future generations,"<sup>162</sup> it could argue that allowing individual website owners to opt out would bias the historical record. The point is not that the consent factor will operate the same way in every case, but merely that by failing to consider it, courts are ignoring important interests in their fair use analyses.

<sup>158</sup> *iParadigms*, 562 F.3d at 635 ("Using the passwords provided by the schools [the high school student plaintiffs] submitted their papers, each of which included a 'disclaimer' objecting to the archiving of their works . . . however, each of these submissions was archived."). iParadigms, interestingly, did allow *schools* to opt of archiving student works, although this was of little use to the actual student authors. *See id.* at 634.

<sup>159</sup> *See About the Wayback Machine*, INTERNET ARCHIVE, <https://archive.org/about/> (last accessed July 10, 2014).

<sup>160</sup> *Internet Archive v. Shell*, 505 F. Supp. 2d 755, 760 (D. Colo. 2007). The case was eventually settled without a determination of the fair use issue. *See Brewster, Internet Archive and Suzanne Shell Settle Lawsuit* (Apr. 25, 2007, 12:25 PM), <http://archive.org/post/119669/lawsuit-settled>.

<sup>161</sup> *See Internet Archive v. Shell*, 505 F. Supp. 2d 755, 760 (D. Colo. 2007) ("Neither the Wayback Machine nor Internet Archive actively seek the permission of website owners prior to reproducing website content, but according to Internet Archive, the Internet Archive website explains how website owners can remove material from the archive"); *see also Removing Documents From the Wayback Machine*, INTERNET ARCHIVE, <http://archive.org/about/exclude.php> (last accessed July 10, 2014) ("The Internet Archive is not interested in offering access to web sites or other Internet documents whose authors who do not want their materials in the collection. To remove your site from the Wayback Machine, place a robots.txt file at the top level of your site . . .").

<sup>162</sup> *See Internet Archive*, 505 F. Supp. 2d at 760.



### ***B. Partial Consent and User Reliance Interests***

Another type of case where consent should play a significant role is in situations of “partial consent,” such as the *Letterese* case. Recall that in *Letterese*, the Church of Scientology had used aspects of a work, with the apparent permission of the author and rightsholder, for decades.<sup>163</sup> After a falling out with the rightsholder—whom the Church had excommunicated—the Church was sued for copyright infringement, but it successfully argued that its use was fair in the district court.<sup>164</sup> Under the consent theory developed in this Article, the longstanding acquiescence to the use by the rightsholder ought to weigh in favor of fair use because of the reliance interests that his conduct created.<sup>165</sup> The Eleventh Circuit, however, expressly disregarded the implied consent consideration in overruling the district court’s fair use holding.<sup>166</sup> This Article’s analysis suggests that the Eleventh Circuit’s approach in *Letterese* was misguided.

A similar approach was taken in another fair use case involving a religious dispute, *Worldwide Church of God v. Philadelphia Church of God* (“*WCG*”).<sup>167</sup> The *WCG* case grew out of a doctrinal dispute between the World Church of God (WCG) and the Philadelphia Church of God (PCG). The WCG’s founder, Herbert Armstrong, led the church for decades.<sup>168</sup> Toward the end of his life, Armstrong wrote a book called *Mystery of the Ages* (the “*Mystery*”); the WCG, in its religious mission, distributed over 9 million free copies of the *Mystery*.<sup>169</sup> After Armstrong’s death, however, the church splintered: while the mainstream WCG renounced many of Armstrong’s teachings and the *Mystery* in particular, the PCG broke away to form a rival sect that still revered Armstrong’s book as a “divinely inspired text.”<sup>170</sup>

The WCG, however, still held the copyright in the *Mystery*. Because WCG believed it had a “Christian duty” to suppress Armstrong’s “heretical” book, it destroyed the copies of the book in its possession and ceased any printing or distribution the *Mystery*.<sup>171</sup> The PCG relied on

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<sup>163</sup> *Peter Letterese & Assocs. v. World Inst. of Scientology*, 533 F.3d 1297, 1308 (11th Cir. 2008).

<sup>164</sup> *Id.* at 1295–98.

<sup>165</sup> Of course, the usual statutory factors must present at least a reasonable argument for fair use in order for this consent factor to be determinative.

<sup>166</sup> *Id.* at 1308.

<sup>167</sup> 227 F.3d 1110 (9th Cir. 2000).

<sup>168</sup> *Id.* at 1113.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1122 (Brunetti, J., dissenting).

<sup>171</sup> *Id.*

## CONSENT, USER RELIANCE, AND FAIR USE

existing copies of the *Mystery* for a time, but, as those deteriorated, it began making new copies for its own religious use beginning 8 years after its split with WCG.<sup>172</sup> WCG then sued for infringement of its copyright, and PCG asserted a fair use defense.<sup>173</sup> Analyzing the four statutory factors, *WCG* presents a close case: on the one hand, PCG's use is for a noncommercial religious purpose, and the market harm to WCG is nonexistent. On the other hand, PCG's copying is wholesale and non-transformative. As a result, the district court ruled that the use was fair, but the Circuit panel split 2-1 against fair use.<sup>174</sup>

In such a close case, the consent factor can make the difference, and in *WCG*, it should swing the decision in favor of fair use. PCG has powerful consent-based arguments in its favor: prior to Armstrong's death, WCG held out the work as available for religious use and encouraged that use by distributing millions of copies of the *Mystery* for free. On the quantitative dimension, this is a partial consent situation, where the user should be entitled to rely on the prior conduct of the author evincing permission of a use. Furthermore, PCG has no effective way to make its use of the work through negotiation: the *Mystery* had been out of print for decades and was almost certain to remain so. The Circuit court, however, adhered to the standard view and discounted these considerations.<sup>175</sup>

A final example of a partial consent case tending to favor fair use is *Estate of Martin Luther King v. CBS, Inc.*, a copyright dispute over Dr. Martin Luther King, Jr.'s famous "I Have a Dream" speech.<sup>176</sup> CBS, as part of a historical documentary entitled "The 20th Century with Mike Wallace," used film of Dr. King's 1963 speech that CBS reporters had shot and broadcast in their news coverage at the time.<sup>177</sup> Dr. King's estate sued for copyright infringement; as a defense, CBS asserted that the copyright was invalid and that its use was, in any event, fair.<sup>178</sup>

These facts provide another example of how consent can inform the fair use analysis. In addition to CBS's arguments under the standard fair use factors, CBS could argue that Dr. King's and the Southern Christian Leadership Conference's actions—which directly encouraged the speech to

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<sup>172</sup> *Id.* at 1113.

<sup>173</sup> *Id.* at 1113–14.

<sup>174</sup> *See id.* at 1114, 1122–25 (Brunetti, J., dissenting).

<sup>175</sup> *See id.* at 1115, 1119 (rejecting "PCG's claim of fair use based on WCG's withdrawal of [the *Mystery*] from distribution" and noting that WCG has "the right to change [its] mind.")

<sup>176</sup> 194 F.3d 1211 (11th Cir. 1999).

<sup>177</sup> *Id.* at 1213.

<sup>178</sup> *See In re Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1349 (N.D. Ga. 2002).

be filmed, broadcast, and disseminated—weigh in favor of fair use. Indeed, wide public dissemination was a large part of the political motivation of the Speech: “The SCLC had sought out wide press coverage of the March [on Washington] and the [“I Have a Dream”] Speech, and these efforts were successful; the Speech . . . was extensively covered on television and radio subsequent to the live broadcast.”<sup>179</sup> In this case, consent should therefore favor fair use because CBS’s film was originally made not only with the author’s permission, but with his encouragement.<sup>180</sup>

### C. *Impossibility and Orphan Works*

“Orphan works” describe copyrighted material whose “owner cannot be identified and located by someone who wishes to make use of the work.”<sup>181</sup> Changes to U.S. copyright law over the past several decades, mostly motivated by compliance with international agreements such as the Berne Convention, have combined to dramatically increase the number of orphan works. The first change was the elimination of copyright formalities—such as registration with the Library of Congress and marking the work with ©—as a prerequisite to copyright protection.<sup>182</sup> Copyright now attaches automatically to an original work once it is written, which greatly increases the number of copyrighted works.<sup>183</sup> Moreover, it is no longer possible to tell from the face of a work whether it claims copyright protection. The second change was the elimination of the copyright renewal requirement. Previously, copyright owners needed to actively renew their copyrights after 28 years,<sup>184</sup> and the vast majority of

<sup>179</sup> Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1213 (11th Cir. 1999).

<sup>180</sup> Because of the posture of the case, the Eleventh Circuit’s ruling addressed only whether Dr. King had made a “general publication” of the speech (and thus thrust it into the public domain); the case settled before a ruling on CBS’s fair use claim. *See id.* at 1356 (“[Following the Eleventh Circuit’s reversal on the general publication issue,] the parties entered into settlement negotiations and stipulated to the dismissal of plaintiff’s action with prejudice on July 12, 2000.”).

<sup>181</sup> U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006).

<sup>182</sup> *See id.* at 3; Christopher Sprigman, *Reform(al)izing Copyright*, 57 STAN. L. REV. 485, 494 (2004).

<sup>183</sup> *See* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”); *see also supra* note 89.

<sup>184</sup> Libby Greisman, *The Greatest Book You Will Never Read: Public Access Rights and the Orphan Works Dilemma*, 11 DUKE L. & TECH. REV. 193, 198–99 (2012); U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 3 (2006).

## CONSENT, USER RELIANCE, AND FAIR USE

copyrighted works fell into the public domain at that stage.<sup>185</sup> Finally, the term of copyright duration has been greatly extended, from an initial 28-year term (with an optional 28 year renewal term) under the 1909 Copyright Act to today's "virtually perpetual" term: the life of the author plus 70 additional years.<sup>186</sup> These changes vastly shrank the size of the public domain, creating a large category of older works that are no longer economically valuable, but nonetheless still protected by copyright.

The orphan works phenomenon creates significant social costs. As a practical matter, there is no way for potential users of orphan works to get permission from copyright holders, yet no guarantee that an owner will not emerge later and claim statutory damages of up to \$150,000 per work infringed.<sup>187</sup> This risk of liability deters potential users from making many socially-beneficial uses—such as new derivative works, preservation of decaying older works, or digitization of historical material—that cause little or no actual harm to copyright holders.<sup>188</sup> The orphan works problem is not merely theoretical—real-life examples abound.<sup>189</sup>

Legislative solutions, such as the return of copyright formalities, or a limitation on liability when a reasonably diligent search for the copyright owner was made, offer one solution to the orphan works problem.<sup>190</sup> In the absence of legislation, however, courts must confront whether uses of orphan works are fair, and consideration of the nature of consent has much to offer to that analysis.

One example is the litigation against HathiTrust, a partnership among a number of leading research universities to create a centralized database of digital versions of the works in their collections.<sup>191</sup> Among

<sup>185</sup> LANDES & POSNER, *supra* note 125, at 234–37 (presenting data showing that rightsholder declined to renew the vast majority—78%–97%, depending on the year—of registered works).

<sup>186</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 194–96 (2003); *id.* at 203 (Breyer, J., dissenting).

<sup>187</sup> See REPORT ON ORPHAN WORKS, *supra* note 181, at 1–4; 17 U.S.C. § 504(c)(1)–(2) (2011).

<sup>188</sup> See Brito & Dooling, *supra* note 92, at 84–86 (describing costs of the orphan works problem); REPORT ON ORPHAN WORKS, *supra* note 181, at 7 (“The orphan works problem is real.”).

<sup>189</sup> See REPORT ON ORPHAN WORKS, *supra* note 181, at 23–34 (describing productive uses of orphan works deterred by the current legal structure).

<sup>190</sup> See, e.g., LESSIG, *supra* note 89, at 248–53 (proposing reintroduction of renewal requirement); Sprigman, *supra* note 182, at 555–56 (proposing voluntary renewal system); REPORT ON ORPHAN WORKS, *supra* note 181, at 8, 127 (proposing limitation on remedies when user cannot identify or locate copyright holder after a diligent search).

<sup>191</sup> See *Authors Guild, Inc. v. HathiTrust*, \_\_ F.3d \_\_, No. 12-4547-cv, 2014 WL 2576342, at \*1 (2d Cir. June 10, 2014), *aff'g* 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012); see also

other things, HathiTrust Digital Library provides full public access to millions of public domain works.<sup>192</sup> Other features of HathiTrust—including the systematic digitization of in-copyright works—resulted in copyright infringement litigation by the Authors’ Guild.<sup>193</sup> Many aspects of the HathiTrust Digital Library project—including digitization for preservation purposes and enabling print-disabled access—have been held to be fair.<sup>194</sup> The challenge to HathiTrust’s Orphan Works Project (OWP), however, has not yet been resolved.<sup>195</sup>

The details of HathiTrust’s OWP are in the process of being reformulated, and the project may not ultimately be revived.<sup>196</sup> The original proposed system, however, worked roughly as follows. The libraries would identify works in their collections that are no longer commercially available, and make an attempt to contact the copyright holder.<sup>197</sup> If the copyright holder could not be located, HathiTrust would list the book as an “Orphan Candidate” on its website for 90 days. If the copyright holder still did not contact HathiTrust, a digital version of the orphan work would be made available online to authorized library users—university students and professors—with the number of simultaneous uses not to exceed the number of physical copies in the library’s collection.<sup>198</sup>

On the traditional fair use factors, the OWP has a strong but not overwhelming case.<sup>199</sup> While the use is made for nonprofit educational purposes and market harm is slight, the OWP creates wholesale, non-transformative copies of the original works. The consent consideration may aid HathiTrust’s argument, depending on how the OWP is eventually structured. If HathiTrust makes a reasonably diligent effort to contact orphan works’ rightsholders, and gives them a reasonable opportunity to

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*Our Partnership*, HATHITRUST, <http://www.HathiTrust.org/partnership> (last accessed July 10, 2014).

<sup>192</sup> See James Aaron, *The Authors Guild v. HathiTrust: A Way Forward for Digital Access to Neglected Works in Libraries*, 16 LEWIS & CLARK L. REV. 1317, 1319 (2012).

<sup>193</sup> See *HathiTrust*, 2014 WL 2576342, at \*1–\*2.

<sup>194</sup> *Id.* at \*7–\*13.

<sup>195</sup> See *id.* at \*14–\*15 (finding that Authors’ Guild’s challenge to HathiTrust’s OWP was not yet ripe because the OWP had yet to be implemented and may not even be revived).

<sup>196</sup> See *id.* at \*14–\*15; *Orphan Works Project*, UNIVERSITY OF MICHIGAN LIBRARY, <http://www.lib.umich.edu/orphan-works> (Feb. 17, 2014); *Statement on the Orphan Works Project*, UNIVERSITY OF MICHIGAN LIBRARY, <http://www.lib.umich.edu/news/u-m-library-statement-orphan-works-project> (Sept. 16, 2011).

<sup>197</sup> See *HathiTrust*, 902 F. Supp. 2d 445, 449 (S.D.N.Y. 2012).

<sup>198</sup> *Id.*

<sup>199</sup> See Aaron, *supra* note 192, at 1335 (analyzing OWP under the statutory fair use factors and concluding “HathiTrust may be able to prevail, but this is far too uncertain”).

## CONSENT, USER RELIANCE, AND FAIR USE

initially object and opt out at any time, the rightsholder's inaction may be treated as an implied consent that should favor fair use.

**D. "Purloined" Copies and Bad Faith**

Another class of cases in which consent may play a critical role are those involving strategic behaviors. A commonly-occurring example is the scenario when the user has obtained his copy of the original work through unauthorized means. Under the framework outlined in this Article, bad faith conduct in obtaining the work should weigh against fair use—although not, as some courts have held, in a dispositive fashion.

The Supreme Court's decision in *Harper & Row*, outlined above,<sup>200</sup> provides an example. Under the traditional four use factors, the use in *Harper & Row* presents a debatable case, with the first and third factors favoring fair use, and the second and fourth factors cutting against it. The user's conduct in *Harper & Row*, while not illegal, was at the least unsavory: The trial court found that "*The Nation* knowingly exploited a purloined manuscript" that it received from an anonymous source.<sup>201</sup> The majority found that this conduct weighed against fair use under the first factor.<sup>202</sup> Justice Brennan's dissent, although agreeing that bad faith can be relevant, accuses the majority of making too much of this "putative bad faith," maintaining that it "prejudices the [fair use] inquiry."<sup>203</sup> To be sure, courts should be careful not let either party's bad faith influence their analysis of the other factors. However, even the dissent acknowledged that the case was "close" on the traditional fair use factors.<sup>204</sup> Thus, it seems that the user's bad faith conduct may have made the difference in *Harper & Row*, and rightly so.

In the *Campbell* decision, the Supreme Court used a footnote to walk back its apparent holding in *Harper & Row* that good faith was relevant to fair use.<sup>205</sup> Following the *Campbell* decision, whether bad faith conduct by the user should be a factor in the fair use analysis is an active issue that has caused division in the lower courts.<sup>206</sup> The debate between

<sup>200</sup> See *supra* notes 83–88 and accompanying text.

<sup>201</sup> *Harper & Row*, 471 U.S. at 563.

<sup>202</sup> *Id.* at 562.

<sup>203</sup> *Id.* at 593–94 (Brennan, J., dissenting).

<sup>204</sup> *Id.* at 594.

<sup>205</sup> Compare *id.* at 562 ("Fair use presupposes good faith and fair dealing.") (quotations omitted) with *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) ("[R]egardless of the weight one might place on the alleged infringer's state of mind . . .").

<sup>206</sup> See, e.g., *Blanch v. Koons*, 467 F.3d 244, 262 (Katzmann, J., concurring) (2d Cir. 2006) (describing a "contentious battle over the role of good faith in the post-*Campbell* fair use

Judges Walker and Jacobs in *NXIVM Corporation v. Ross Institute* illustrates the controversy over bad faith's role in fair use.<sup>207</sup> NXIVM was in the business of selling to subscribers "an exclusive and expensive seminar training program known as 'Executive Success.'"<sup>208</sup> The user, Rick Ross, obtained a copy of NXIVM's unpublished training manual, which was kept highly confidential, and quoted from it in an online exposé of NXIVM.<sup>209</sup> Because Ross's work was a transformative criticism, the Second Circuit rightly found the use fair, even assuming bad faith by Ross in obtaining the manual.<sup>210</sup> The majority considered itself bound by *Harper & Row* to treat bad faith as a factor, but it did not consider it dispositive, given that the usual considerations weighed strongly in favor of fair use.<sup>211</sup> This Article's framework yields the same result—Ross's conduct lies somewhere between pure good faith and true opportunism on the qualitative dimension of consent, but his case on the traditional fair use factors is overwhelming.

In a concurrence, Judge Jacobs agreed with the result but rejected the notion that bad faith should ever be a factor in fair use. He asserted that *Harper & Row*'s intimations about good faith were made only "in passing" and that *Campbell* had "reopened the question."<sup>212</sup> Judge Jacobs then argued that bad faith should be irrelevant because fair use ought to be motivated solely by "the utilitarian goals of copyright" to "encourage[] creative output."<sup>213</sup> Accordingly, fair use should concern itself only with whether a use is transformative, or instead usurps the market for the original. Citing Judge Leval's views, Judge Jacobs claims that "[t]he bad faith of the secondary user in gaining access to the original author's material has no rational bearing on those . . . inquiries."<sup>214</sup>

As to both precedent and policy, Judge Jacobs's view is not persuasive. As to precedent, it is not convincing to claim that *Harper &*

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inquiry"); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 483–86 (2d Cir. 2004) (Jacobs, J., concurring) (criticizing majority's reliance on the defendant's bad faith and arguing that bad faith has no role in fair use inquiry).

<sup>207</sup> 364 F.3d 471 (2d Cir. 2004).

<sup>208</sup> *Id.* at 475.

<sup>209</sup> *Id.* at 475–76. The concurrence recalled the matter colorfully. *Id.* at 486 (Jacobs, J., concurring) ("Dr. Ross and his co-defendants quoted from NXIVM's manual to show that it [was] the pretentious nonsense of a cult.").

<sup>210</sup> *Id.* at 478–79.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 484 (Jacobs, J., concurring).

<sup>213</sup> *Id.* at 485.

<sup>214</sup> *Id.* (citing Leval, *supra* note 4, at 1126). See also *supra* notes 118–19 and accompanying text (explaining Judge Leval's argument that good faith should be irrelevant to fair use).

## CONSENT, USER RELIANCE, AND FAIR USE

*Row*'s statements on bad faith should be discounted because it "was not a close case"<sup>215</sup>—a statement that ignores the strong dissent of Justice Brennan, joined by Justices Marshall and White. More importantly, even accepting the premise that copyright should be motivated only by the utilitarian end of maximizing creative output, Judge Jacobs's view ignores the possibility that consideration of "moral factors" such as bad faith can promote utilitarian goals. In other words, moral factors and utilitarian ends are not necessarily independent.<sup>216</sup> As this Article has argued, consideration of the author and user's good faith can promote efficient behavior.<sup>217</sup> The underlying problem may be Judge Jacobs's apparent assumption that bad faith can only cut against users.<sup>218</sup> As shown above, there are a number of situations where the copyright holder's bad faith conduct—such as failing to announce preferences at the pre-use stage, or knowingly failing to opt out of a use—should cut in favor of fair use.

It is of course possible, as Justice Brennan warned, to mistake bad faith as the sole fair use factor, and some courts have succumbed to that temptation. For example, the Federal Circuit in *Atari Games Corp. v. Nintendo of Am. Inc.* relied on *Harper & Row* to hold that "[t]o invoke the fair use exception, an individual must possess an authorized copy of a literary work."<sup>219</sup> Atari is a maker of video games, and, in order to produce games that were compatible with Nintendo's NES platform, Atari fraudulently obtained a copy of the security code from the Copyright Office, and used it to "unlock" the NES.<sup>220</sup> The Federal Circuit's *per se* rule prohibiting fair use in this context is no longer good law after *Campbell*, and the rule was wrong as a normative matter even at the time *Atari* was decided. Although Atari's conduct was hardly admirable, it had a very strong case on the other fair use factors: the use was for a privileged purpose (the copying was driven by functional "research" concerns), the work was factual, and the resulting economic effect did not supersede the original's market (other than in the ordinary competitive sense). Indeed, several courts subsequently found that the "reverse engineering" at issue in

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<sup>215</sup> *See id.* at 484.

<sup>216</sup> *Cf. Fromer, supra* note 117, at 1746 (arguing that utilitarian and moral rights theories of intellectual property "can be complementary in important ways because there is a utility to moral-rights concerns").

<sup>217</sup> *See supra* Part III.A.

<sup>218</sup> *See* 364 F.3d at 485 ("[Copyright's] goals are not advanced if bad faith can defeat a fair use defense.").

<sup>219</sup> 975 F.2d 832, 843 (Fed. Cir. 1992).

<sup>220</sup> *Id.* at 836.



*Atari* should be a fair use.<sup>221</sup> The better rule is to judge reverse engineering under the usual factors—which will permit fair use in most cases—while not ignoring the bad faith factor entirely.

Finally, it is important to recognize that a mere failure to ask permission, when based on a good faith belief that a use is fair, should not count against the user. For example, in *Blanch v. Koons*, a work of Jeff Koons’s “appropriation art” that copied images from *Allure* magazine was held to be fair.<sup>222</sup> The court rightly rejected the suggestion that Koons’ failure to ask advance permission to use the images evinced bad faith.<sup>223</sup> When a user believes his use to be fair, as Koons did, there is no bad faith in not seeking permission. Such conduct should not weigh against fair use.<sup>224</sup>

Thus, though trial and error, some courts have eventually gotten it right in treating bad faith as a nondispositive consideration under the first fair use factor. Bad faith need not be ignored, but there is also no reason that it should trump all other fair use considerations.

## VI. COSTS AND CONCERNS

This Part will anticipate and address criticisms of this Article’s proposal to consider consent as a fair use factor in a limited class of cases. While there are potential costs associated with the proposal, this Part will argue that the benefits outweigh those costs.

### A. *Unpredictability in Application*

One potential cost of the proposed consent consideration is that it will make fair use law yet more indeterminate and unpredictable. Fair use is frequently derided for creating uncertainty through an unpredictable, multi-factor test.<sup>225</sup> Adding another consideration would not seem to help

<sup>221</sup> See *Lexmark Int’l., Inc. v. Static Control Components*, 387 F.3d 522, 544–45 (6th Cir. 2004) (noting that the first, second, and fourth factors favored fair use in reverse engineering case); see *id.* at 551 (Merritt, J., concurring) (“[the reverse engineering] use of the program in this case appears to fall under the fair use exception”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522–28 (9th Cir. 1992).

<sup>222</sup> 467 F.3d 244, 246–48 (2d Cir. 2006).

<sup>223</sup> *Id.* at 255–56.

<sup>224</sup> See *supra* Part IV.B. (explaining why consent should be neutral in the situation when neither party acts strategically).

<sup>225</sup> See, e.g., Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 (2008) (“Fair use therefore remains fairly unpredictable and uncertain in many settings.”); Parchomovsky & Goldman, *supra* note 24, at 1485–86 (“[T]he case law is characterized by widely divergent interpretations of fair use, divided courts, and frequent reversals. . . . [T]he ambiguity of the fair use doctrine works as a one-ratchet that will in

## CONSENT, USER RELIANCE, AND FAIR USE

matters. However, in practice, analyzing consent when it is relevant to the traditional fair use factors will not contribute much new uncertainty to the fair use inquiry. In many fair use cases—such as those involving a clear good-faith refusal by the copyright holder—consent will not be relevant, and therefore will not create any new uncertainty. In any event, some uncertainty is the price of Congress’s intention that fair use be a context-specific determination.

Despite the criticism from some quarters, it is easy to overstate the unpredictability of fair use. Several commentators have recently made the case that, when properly analyzed, fair use doctrine is not nearly as unpredictable as is often claimed.<sup>226</sup> Many fair uses—such as quotations, parodies, criticism, and reverse engineering—are so widely accepted that, in most cases, it is clear that a use is fair even without an explicit rule.<sup>227</sup> A more persuasive critique of the practical application of fair use may be that resource asymmetries between rightsholders and users can frustrate the vindication of fair use rights.<sup>228</sup> The real problem, on that view, is the high cost of litigation, not the uncertainty of the doctrine.

Even assuming that current fair use doctrine is too unpredictable, it must be borne in mind that this indeterminacy is mostly by design. Congress intended fair use to be a contextual, “case-by-case” determination.<sup>229</sup> Part of the price of having a flexible fair use doctrine is some uncertainty in outcome. The countervailing benefit, of course, is that fair use law is free to develop—e.g., by privileging “transformative” uses—

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many cases lead to the underuse of copyrighted works.”); LESSIG, *supra* note 89, at 187 (“[F]air use in America simply means the right to hire a lawyer . . .”).

<sup>226</sup> See, e.g., Samuelson, *supra* note 25, at 2541 (“[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns. . . .”); Sag, *supra* note 49, at 85 (finding “considerable evidence against the oft-repeated assertion that fair use adjudication is blighted by unpredictability and doctrinal incoherence”); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 717 (2011) (“Recently, three leading scholars have produced empirical studies that actually find some order in fair use case law . . .”).

<sup>227</sup> See Madison, *supra* note 25, at 1647–59 (describing these generally accepted fair uses); cf. Parchomovsky & Goldman, *supra* note 24, at 1502 (arguing for explicit *per se* rules to promote certainty in fair use).

<sup>228</sup> See Fisher, *supra* note 105, at 312 (“[A] large corporation with a relatively weak copyright case usually will have the litigation advantage against a smaller litigant, even when the smaller litigant has a strong [fair use] case.”); LESSIG, *supra* note 89, at 187.

<sup>229</sup> See H.R. REP. NO. 94-1476, at 66 (1976) (“[T]he courts must be free to adapt the [fair use] doctrine to particular situations on a case-by-case basis.”).

and to adapt to new technologies like search engines.<sup>230</sup> Indeed, if fair use is already unpredictable, adding a new consideration to fair use in a limited set of situations should not contribute much *new* uncertainty at the margin. Furthermore, as the case studies above show, it is fairly easy to evaluate which way consent will cut in a given case.<sup>231</sup> In sum, while uncertainty is a cost to this Article's proposal, it is not a significant one.

### ***B. Judicial and Evidentiary Costs***

Another cost associated with this Article's proposal relates to its practical implementation. Many of the inquiries relevant to the nature of consent—especially on the quantitative dimension—will be straightforward factual matters. For example, determining whether a digital system provides an opt out, whether a user requested permission, or whether a copyright holder had an opportunity to make a pre-use refusal do not present particularly difficult issues of proof. However, the consent determination will sometimes turn on tricky questions of intent, which may create some evidentiary costs. In any case, consent is another issue that parties may seek discovery on, and that judges must rule upon in those cases litigated to a decision. These determinations are not costless.

Evidentiary issues are a particular concern in evaluating the qualitative dimension of consent, as this may require evaluating the state of mind of the user or copyright holder. Determining subjective intent is often said to create difficult problems of proof.<sup>232</sup> These problems, however, are not intractable.<sup>233</sup> The parties in litigation have many traditional discovery tools, such as depositions, that can be effective at sorting out the truth of these matters.<sup>234</sup> As to the judicial determination, much of the qualitative consent inquiry tracks traditional equitable questions—were the parties

<sup>230</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (establishing the “transformative” nature of a use as a key part of the first fair use factor); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817–22 (9th Cir. 2003) (finding Google Image Search a fair use).

<sup>231</sup> See *supra* Part V.

<sup>232</sup> See, e.g., D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 773–75 (1987) (discussing difficulties of proving intent in discrimination cases); Nathan S. Richards, *Judicial Resolution of EMTALA Screening Claims at Summary Judgment*, 87 N.Y.U. L. REV. 591, 620 (2012) (“[P]roving intent is notoriously difficult.”).

<sup>233</sup> To take only the most obvious example, proof of ill intent (*mens rea*) is nearly always required to obtain any criminal conviction. See generally MODEL PENAL CODE § 2.02(1), General Requirements for Culpability (“Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”).

<sup>234</sup> See, e.g., FED. R. CIV. P. 27 (depositions), 33 (interrogatories), 34 (document discovery).

## CONSENT, USER RELIANCE, AND FAIR USE

acting in good faith?—in which courts have considerable experience and competence. In short, there is no reason to believe that determining intent will be more difficult in fair use cases than in any other case in which state of mind is in issue.

The recent litigation between the Associated Press (“AP”) and Shepard Fairey provides an example of how discovery can effectively ferret out bad faith actors in fair use cases. In 2008, Fairey, a graphic artist, created the well-known “Hope Poster,” which depicts President Obama in red, white, and blue with the word “HOPE” running across the bottom.<sup>235</sup> Fairey relied on an AP photograph of Obama, which he downloaded from the Internet, as a starting point for the poster.<sup>236</sup> When the AP discovered this use, it demanded compensation from Fairey; Fairey responded by filing suit, seeking a declaratory judgment that his use was fair.<sup>237</sup> Fairey’s complaint asserted that he used a different photo (also owned by AP) as his source material.<sup>238</sup> Fairey claims that this assertion was initially a mistake; rather than admitting his error, however, Fairey lied to the court about the true source photo, destroyed evidence, and submitted fabricated evidence to support his lie.<sup>239</sup> This conduct came to light in the course of litigation, and led to a later settlement of the fair use case and contempt charges against Fairey.<sup>240</sup> The *Fairey* case illustrates that the usual features of adversarial civil litigation are capable of uncovering bad faith behavior by copyright owners and users.

### C. Inhibiting “Tolerated Uses”

A common concern with consideration of consent as a fair use factor relates to the potential *ex ante* behavioral responses from copyright holders. In particular, one may worry that the proposal creates an incentive for copyright owners to mark their works with restrictive legends intended to broadly disclaim uses of their material. At the extreme, one can imagine rightsholders attaching preemptive boilerplate to all works in order to

<sup>235</sup> See generally Fisher, *supra* note 105, at 249–53 (describing creation of the Hope Poster); see also *id.* at 327 fig.1 (image of the poster).

<sup>236</sup> *Id.* at 249–50.

<sup>237</sup> See Complaint, *Fairey v. The Assoc. Press*, No. 09 Civ. 01123 (S.D.N.Y. Feb. 9, 2009), 2009 WL 319564.

<sup>238</sup> See *id.* at 8.

<sup>239</sup> See Liz Robbins, *Artist Admits Using Other Photo for ‘Hope’ Poster*, N.Y. TIMES, Oct. 18, 2009; Fisher, *supra* note 105, at 256.

<sup>240</sup> See Randy Kennedy, *Shepard Fairey and The A.P. Settle Legal Dispute*, N.Y. TIMES, Jan. 12, 2011; David Ng, *Shepard Fairey Gets Two Years’ Probation in Obama ‘Hope’ Poster Case*, L.A. TIMES, Sept. 7, 2012.

disclaim implied consent to any potential use; we might term this concern the “boilerplate horrible.”<sup>241</sup> A related concern is that the proposal will discourage “tolerated uses”: Out of fear that they may lose their rights if they do not proactively police them, rightsholders may no longer allow uses that are technically infringing, but oft permitted in practice.<sup>242</sup>

There are several reasons why these concerns will not operate to restrict fair use. As to the fear of excessive boilerplate, for institutional copyright holders such boilerplate is already a reality in many cases, for better or worse.<sup>243</sup> The most familiar examples are the grimly-worded FBI Warnings that precede movies played on DVDs, or the overbroad disclaimers in the front matter of most books.<sup>244</sup> To be sure, there are valid concerns about the reach of these copyright warnings and their chilling effects on users.<sup>245</sup> However, the sky has not fallen on fair use as a result of these warnings; nor would it under this Article’s proposal. Nothing in the above suggests that copyright boilerplate would be given preclusive effect or defeat an otherwise solid claim of fair use. At most, these wholesale copyright warnings would simply tend to defeat arguments that the use was implicitly licensed—a claim that is unlikely to be strong anyway when the plaintiff is an institutional rightsholder who employs such boilerplate.

A related objection is that this Article’s proposal would tend to undercut norms of “tolerated use.” Tolerated use describes “[an] infringing

<sup>241</sup> Cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing a hypothetical “mandate to purchase green vegetables” as the “broccoli horrible”).

<sup>242</sup> See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 617 (2008) (“‘Tolerated use’ is a term that refers to the contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works.”).

<sup>243</sup> See generally JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* 2–25 (2011) (describing phenomenon of “copyfraud”—copyright overreaching, such as copyright notices placed on public domain works, which contributes to the expansion of the proper bounds of copyright law).

<sup>244</sup> The current FBI warning declares “The unauthorized reproduction of this copyrighted work is illegal. Criminal copyright infringement is investigated by federal law enforcement agencies and is punishable by up to 5 years in prison and a fine of \$250,000.” See David Kravets, *Pirates Beware: DVD Anti-Piracy Warning Now Twice as Fierce*, WIRED, May 8, 2012, <http://www.wired.com/threatlevel/2012/05/anti-piracy-warning-updated>. Most books by the large publishing houses contain analogous warnings to the effect of “All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, by any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the [the publisher].” See, e.g., BRYAN A. GARNER, *GARNER’S MODERN AMERICAN USAGE* at p. iv (3d ed. 2009).

<sup>245</sup> See MAZZONE, *supra* note 244, at 228–30 (providing examples of productive uses deterred by copyright warnings).

## CONSENT, USER RELIANCE, AND FAIR USE

usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about.”<sup>246</sup> A typical example would be an online fan encyclopedia, such as *A Wiki of Ice and Fire*, which consists of fan-generated content relating to George R. R. Martin’s “A Game of Thrones” fantasy series.<sup>247</sup> Although much of the content on such an encyclopedia is protected by fair use, some content may infringe on the copyright owner’s right to produce “derivative works based upon” the original work.<sup>248</sup> However, perhaps based on “copyright owners’ judgment that the infringing use[] [is] complementary” to the original—i.e., it helps stimulates demand for the original—such uses are frequently allowed.<sup>249</sup>

Consideration of consent in a limited class of fair use cases does not seriously undermine incentives to tolerate uses. If a copyright owner judges a use to be complementary, he will wish to allow it whether or not consent is treated as a fair use factor. Unlike, for example, trademark law—where a rightsholder risks forfeiting his *entire* property right if he is found to abandon it<sup>250</sup>—implied consent to a use should be evaluated on a use-by-use basis. A rightsholder’s toleration of one complementary use does not mean he has waived all his other rights. At most, the copyright holder may be found to have acquiesced in that *particular* use if he does not object, and the user will have a stronger case for fair use as a result. This marginal incentive is unlikely to change the copyright holder’s behavior when there are independent reasons to tolerate the use.

Both the boilerplate horrible and tolerated use concerns tend to overlook the *pro-user* elements of the consent proposal, and exaggerate its potential *pro-author* elements. The concern in both cases is that socially beneficial uses will be further curtailed. However, properly understood, this Article’s proposal will function in a *pro-user* fashion in almost all cases. The quantitative dimension of consent can only favor fair use. In the situation of an express refusal, the user will be in the same situation as under current doctrine. Consent will not be relevant, and he will need to make his case on the traditional fair use factors. In contrast, intermediate categories of consent—such as silence or “partial consent”—will weigh in

<sup>246</sup> Wu, *supra* note 243, at 619.

<sup>247</sup> See *A Wiki of Ice and Fire, About the Wiki*, <http://awoiaf.westeros.org>. Though it is often referred to colloquially as “A Game of Thrones” (the title of the first novel in the series and an HBO television adaption), the actual name of the series of fantasy novels is *A Song of Ice and Fire*.

<sup>248</sup> 17 U.S.C. § 107(2) (2011); see also *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 540–51 (S.D.N.Y. 2008) (finding that the *Harry Potter Lexicon*, a fan-generated encyclopedia about the “Harry Potter” series, was not a fair use).

<sup>249</sup> Wu, *supra* note 243, at 619.

<sup>250</sup> 15 U.S.C. § 1127 (2012); *Silverman v. CBS Inc.*, 870 F.2d 40, 45–49 (2d Cir. 1989).

favor of fair use.<sup>251</sup> The only situation in which considering consent will restrict the scope of fair use is when the user has acted in bad faith.

On a similar note, it should also be observed that copyright encompasses more than the archetypal case of a large institutional rightsholder (e.g., Disney) against an individual user. The temptation in that case, depending on one's normative perspective, may be to favor the individual user. In fact, the bulk of copyrighted material—if not necessarily copyright *litigation*—is authored and owned by individuals.<sup>252</sup> Thus, much of what is being regulated by copyright law pits individual rightsholders against individual users—say, when a personal Facebook photo is copied by an acquaintance and put on her Pinterest page. Indeed, it is in this more personal world in which this Article's proposal may have the most relevance, as those will frequently be cases when communication costs are low.

#### ***D. Interaction with Implied License and Other Doctrines***

A final objection to this Article's proposal is that the user reliance interests advanced by considering consent in fair use would be better achieved through other copyright law reforms, such as an expansion of the implied license doctrine, equitable doctrines, and the elimination of statutory damages. Why, the argument goes, must fair use do this work? Wouldn't it be more natural to promote user reliance interests through the implied license doctrine, and equitable interests through doctrines like laches?

As a descriptive matter, the current formulations of these other doctrines do not reach much of the conduct that would be encompassed by this Article's proposal. For example, the implied license doctrine often will not reach cases of "partial consent" because copyright law requires that most transfers of rights be in writing.<sup>253</sup> As a result, licenses are implied by conduct only in "narrow circumstances," and some courts further require that the original work must be created at the request of the licensee.<sup>254</sup>

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<sup>251</sup> See *supra* Part IV.A.

<sup>252</sup> See *supra* note 89 and accompanying text.

<sup>253</sup> See 17 U.S.C. § 204 (2011) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed . . .").

<sup>254</sup> *Estate of Roberto Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010) ("The test most commonly used in determining if an implied license exists with respect to most kinds of works asks whether the licensee requested the work, whether the creator made and delivered that work, and whether the creator intended that the licensee would copy and make use of the work.").

## CONSENT, USER RELIANCE, AND FAIR USE

Similarly, the scope of laches and other traditional equitable doctrines is often limited in copyright actions.<sup>255</sup> Indeed, the Supreme Court recently held that laches can never bar a copyright action that seeks damages for wrongs within the three-year statutory limitations period—even when the plaintiff has delayed for decades in bringing suit.<sup>256</sup> Given these limitations, fair use offers a more promising doctrinal route to vindicate user reliance interests.

However, the current limitations of other doctrines do not counter the deeper objection—that it is *those* doctrines, and not fair use, that should be reformed. An initial response to this concern is a practical one: change in fair use doctrine is simply a more likely route for reform. Fair use has a common law tradition of evolution, incorporating new factors such as “transformativeness” that were not previously considered.<sup>257</sup> Moreover, fair use reform can be achieved by judicial change alone, in contrast to other doctrines, where reform may require congressional action.<sup>258</sup> Given the well-known public choice failures in copyright law, congressional reform is a difficult hurdle.<sup>259</sup>

The theoretical response to this point is that fair use is a more flexible and tailored doctrinal tool. For example, an expansion of implied license doctrine can only deal with one part of the problem identified in this Article: the “partial consent” situation. In that case, an expanded implied license doctrine might reach similar results, with the copyright holder being

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<sup>255</sup> See, e.g., *Lyons P’ship v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) (holding that defense of laches cannot bar timely filed copyright suits). *Peter Letterese & Assocs. v. World Inst. of Scientology Enters., Int’l*, 533 F.3d 1287, 1321 (11th Cir. 2008) (laches may bar retrospective relief, but cannot bar claims for prospective relief from copyright infringement).

<sup>256</sup> See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. \_\_\_, No. 12-1315, slip op. at 1, 7–9 (May 19, 2014) (holding that laches cannot be invoked to bar copyright action for damages within statutory limitations period despite plaintiff’s 18-year delay in filing suit), [http://www.supremecourt.gov/opinions/13pdf/12-1315\\_f20h.pdf](http://www.supremecourt.gov/opinions/13pdf/12-1315_f20h.pdf). The Court was careful to note, however, that laches may sometimes curtail the scope of the relief available in “extraordinary circumstances,” and that the doctrine of estoppel remains available to bar a suit when circumstances warrant. See *id.* at 18–20.

<sup>257</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (citing *Leval*, *supra* note 4, at 1111, to highlight the importance of whether a use is “transformative” under the first fair use factor); *Beebe*, *supra* note 21, at 603–06 (describing the rise in citations to transformativeness as a fair use factor following *Campbell*).

<sup>258</sup> For example, much of the restrictiveness in implied license doctrine is driven—albeit not dictated—by statutes limiting copyright transfers without a written instrument. See 17 U.S.C. § 204 (2011). Most obviously, statutory damages, which contribute to the “lock in” effect on users, are mandated by Congress. See 17 U.S.C. § 504(c) (2011).

<sup>259</sup> See, e.g., *LITMAN*, *supra* note 26, at 22–35 (discussing public choice problems in copyright legislation).



penalized for conduct tending to show assent to a use. But that is only part of the issue—implied license is less well equipped to address strategic behaviors, such as the user’s “avoid detection” strategy (which would have to be addressed by reforms in equitable doctrines, such as estoppel). By contrast, considering consent in fair use allows multiple dimensions to be evaluated simultaneously, with a strong showing on one dimension offsetting a weaker showing on the other. The fair use revision advocated here thus covers a broader range of conduct than other doctrinal reforms, and does so in a more contextual way.<sup>260</sup>

## CONCLUSION

As this Article has argued, considerations relating to consent and refusal have been wrongly neglected in courts’ fair use analyses. The result has been misguided decisions in a number of areas, or *sub rosa* consideration of consent—with attendant harms to judicial transparency and consistency. This Article urges that consideration of the nature of the copyright owner’s consent be made an explicit fair use factor in appropriate cases, and provides a useful classification of consent and refusal to aid courts in fair use decisionmaking.

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<sup>260</sup> Ultimately, it is conceivable that simultaneous revisions on several doctrinal fronts—implied license doctrine, laches, unclean hands, estoppel, et al.—would reach a similar end result to considering consent. (And, to be clear, I would welcome reform on all these fronts.) Unless one privileges form over function, it is hard not to be agnostic as between these two routes to the same end. As a practical matter, however, fair use’s capacious nature makes it a more likely candidate for reform.