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GOOGLE NEWS AND PUBLIC POLICY'S INFLUENCE ON FAIR USE IN ONLINE INFRINGEMENT CONTROVERSIES

ROWAN F. REYNOLDS*

INTRODUCTION

In November 2009 rumors surfaced that Rupert Murdoch planned to restrict all of News Corp.'s media content to Bing, a Microsoft search engine.¹ Murdoch's plan was not altogether surprising given his accusations that Google steals news content via Google News.² Although not necessarily in response, Google announced that it would begin to restrict the number of free clicks users would have per day before they "may be routed to payment or registration pages."³ That "unrelated" exchange between Murdoch and Google is one example of the tension felt by many news organizations regarding Google's aggregation of news. However, only a few have been willing to bring their concerns into the courtroom.⁴ Of the few news organizations that did bring suit, the court did

* St. John's University School of Law, J.D., 2011. I would like to dedicate this note to my grandfather, Jack Reynolds, and to my aunt, Lisa Weekes. I would also like to thank my advisor, Professor de la Durantaye, for her help and guidance. Finally, thanks goes out to Professor Ruescher and the JCREd staff for their helpful edits.

¹ See Michael Bloch, *Murdoch and Bing Alliance?*, TAMING THE BEAST, Nov. 24, 2009, <http://www.tamingthebeast.net/blog/online-world/murdoch-and-bing-alliance.htm>; Dan Kennedy, *Will Murdoch's Bing Gamble Pay Off?*, GUARDIAN, Nov. 24, 2009, <http://www.guardian.co.uk/commentisfree/cifamerica/2009/nov/24/rupert-murdoch-bing-google>. Interestingly enough, Bing is also Microsoft's attempt to cut into Google's control over the search engine market. *Id.*

² Weston Kosova, *Rupert Murdoch Says Google Is Stealing His Content. So Why Doesn't He Stop Them?*, NEWSWEEK, Oct. 9, 2009, <http://blog.newsweek.com/blogs/techtonicshifts/archive/2009/10/09/rupert-murdoch-says-google-is-stealing-his-content-so-why-doesn-t-he-stop-them.aspx> (noting that Google links to other news organizations' stories but doesn't pay the organizations to do so); Tim Arango & Ashlee Vance, *News Corp. Weighs an Exclusive Alliance With Bing*, N.Y. TIMES, Nov. 24, 2009 (quoting Mr. Murdoch with saying that Google and other online entities "steal" his stories); *Bing Tries to Sign Up Newspapers*, ECONOMIST, Nov. 28, 2009 (explaining that Mr. Murdoch has "long criticiz[ed] Google for 'stealing' his newspapers' stories[.]").

³ *Google to Limit Free News Access*, BBC NEWS, Dec. 2, 2009, <http://news.bbc.co.uk/2/hi/business/8389896.stm>; see also Jane Wardell & Andrew Vanacore, *Google to curb free access to news*, NEWSDAY, Dec. 3, 2009 (stating that "Google said it will let publishers limit the number of restricted articles that readers can see for free through its search engine to five per day.").

⁴ So far, only Agence France Presse and Copiepresse have brought suits against Google based on

not have an opportunity to decide whether Google's aggregation of news is protected under fair use.⁵

Of all the defenses to copyright infringement,⁶ fair use is the most flexible.⁷ As *Campbell v. Acuff-Rose Music, Inc.* noted, fair use permits courts to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."⁸ Congress codified the doctrine in the Copyright Act of 1976,⁹ laying out four factors consistent with fair use's common law foundations.¹⁰ But it would have been difficult for Congress to foresee the rise of the Internet and how this new technology would, in turn, influence fair use.

A fair use analysis has always been difficult for courts because the line between what is protected and what is not is not always clear. Esteemed jurist Learned Hand even called the doctrine "the most troublesome in the

copyright infringement concerns from Google News. See Stephen Castle, *Court stops Google reproducing Belgian press*, INDEPENDENT (London), Feb. 14, 2007 for a discussion of how a Belgian court banned Google from reproducing articles from Belgian newspapers; see also Thomas Crampton, *Google Said to Violate Copyright Laws*, N.Y. TIMES, Feb. 14, 2007, for a discussion of the Brussels' court's holding that Google violated copyright laws by publishing links to articles from Belgian newspapers without permission.

⁵ The suit by Agence France Presse against Google resulted in a settlement. Agence France Presse v. Google, Inc., No. 1:05cv00546 (D.C. Cir. Apr. 6, 2007), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/64/> [hereinafter *AFP/Google Settlement*]. But the case brought against Google by Copiepresse found that Google had infringed and thus was not entitled to an exception. Copiepresse v. Google No. 06/10.928/C at 13, 22–23, available at <http://www.copiepresse.be/13-02-07-jugement-en.pdf>.

⁶ Other defenses to copyright infringement include a *de minimis* defense, which applies when a party copies an insignificant amount of a work, and an implied licensing defense, which applies when the original party gives implied consent. See, e.g., Manali Shah, Book Note, *Fair Use and the Google Book Search Project: The Case for Creating Digital Libraries*, 15 COMM.LAW CONSPECTUS 569, 580 (2007) (concluding that although Google Books is not protected under fair use, the public benefit of such a service should, nonetheless, force the District Court for the Southern District of New York to validate it); Ian C. Ballon, E-COM. & INTERNET L. 9.03[3][B] (2009-2010 update) ("Even where copyright liability potentially may be shown, a number of defenses may apply to permit linking in different contexts on the World Wide Web, including implied license, fair use and *de minimis* infringement[.]").

⁷ 4-13 NIMMER ON COPYRIGHT § 13.05[A] (Matthew Bender & Company, Inc. 2009) (18 AM. JUR. 2d *Copyright and Literary Property* § 78 (2010)) (noting that the fair use doctrine is defined in general terms so that the courts have discretion in determining whether it is applicable); 18 C.J.S. *Copyrights* § 95 (2010) (explaining that "[t]he fair use doctrine permits courts to avoid rigid application of the copyright statute when such application would stifle the very creativity which the statute is designed to foster.").

⁸ 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (holding that the court of appeals gave "insufficient consideration" to other fair use factors)).

⁹ 17 U.S.C. § 107 (2006).

¹⁰ See H.R. REP. NO. 94-1476, at 66 (1976) ("Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way[.]"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 462 (1984) (explaining that the four factors are intended to illustrate the behaviors consistent with common law fair use, not to alter or replace).

whole law of copyright[.]”¹¹ But fair use analyses of online content pose two additional difficulties: courts must determine 1) how to filter legitimate public policy considerations from policies invoked out of convenience and 2) how much weight to assign those policies. The weight courts give public policy is relevant because when an infringing party raises policy arguments in a fair use defense, those policy arguments can shift one of the most critical fair use factors in its favor.¹²

Google News is one service whose benefits to public policy are significant enough to influence a court to find that the service is protected under fair use. Launched in September 2002,¹³ Google News aggregates thumbnail photographs,¹⁴ headlines, and text excerpts from various media outlets around the world.¹⁵ For example, one headline and corresponding excerpt, as displayed on Google News, appeared as follows:

Obama Hasn't Closed the Health-Care Sale

Wall Street Journal - Karl Rove - 30 minutes ago

Now that the Senate Finance Committee has voted for the health-care bill drafted by Montana Democratic Sen. Max Baucus, negotiations over the real bill can begin in Senate Majority Leader Harry Reid's cozy Capitol hideaway.¹⁶

¹¹ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (determining that fair use should not resolve cases “unless the advantage is very plain.”).

¹² See *Fisher v. Dees*, 794 F.2d 432, 436–37 (9th Cir. 1986) (“Because ‘fair use presupposes “good faith” and “fair dealing” ‘ . . . courts may weigh the ‘propriety of the defendant’s conduct’ in the equitable balance of a fair use determination[.]” (quoting *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985))); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006) (citing *Fisher*, 794 F.2d at 436–437).

¹³ See *Google Milestones*, <http://www.google.com/corporate/history.html> (last visited Mar. 10, 2010); Stefanie Olsen, *Google Search Gets Newsier*, CNET NEWS, Sept. 23, 2002, <http://news.cnet.com/2100-1023-958927.html> (discussing on September 23rd Google News, which had then been revealed “on Monday”).

¹⁴ Merriam-Webster defines “thumbnail” as “a miniature computer graphic sometimes hyperlinked to a full-size version[.]” MERRIAM WEBSTER DICTIONARY (2010) available at <http://www.merriam-webster.com/dictionary/thumbnail>. MSN Encarta Dictionary defines “thumbnail” as “a small version of a larger graphic image displayed on a computer monitor so as to save space[.]” MSN ENCARTA DICTIONARY (2009) available at <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?lextype=3&search=thumbnail>. Usually online thumbnails are of a lower resolution, and thus are a lower-quality version as compared to the original.

¹⁵ Google News works by searching national and international papers in addition to blogs, indexing stories using certain criteria including how often and what sights the story appears. In addition, Google News will use freshness, location, relevance and diversity of a story. See Google News, *About Google News*, http://news.google.com/intl/en_us/about_google_news.html (last visited Mar. 10, 2010). CNET also indicated that “[Google News] combs regional and national papers in the U.S. and around the globe.” Stefanie Olsen, *Google Search Gets Newsier*, CNET NEWS, Sept. 23, 2002, <http://news.cnet.com/2100-1023-958927.html>.

¹⁶ Karl Rove, *Obama Hasn't Closed the Health-Care Sale*, WALL ST. J., Oct. 15, 2009,

Article excerpts, like the one above, usually contain no more than thirty-five words. In addition, Google always credits the original source of the article and mentions the name of the article's author if available.¹⁷ Users also have the ability to conduct key-word searches within Google News, personalizing the content most relevant to their interests.¹⁸

Despite Google News' attributes, some news industry leaders argue that Google displays news content without permission and for profit,¹⁹ allowing individuals to view the news without having to go to an article's original source.²⁰ Google counters that such content is not even copyrightable and that its service provides a substantial public benefit by offering more efficient access to a broader spectrum of news.²¹ As stated by Google Vice President Marissa Miller, Google News "changes news reading habits because (usually) you pick a source and [then] pick the story that interests you With this service, you pick the story that interests you and then pick the news source."²²

<http://online.wsj.com/article/SB10001424052748704107204574473372635087870.html>.

¹⁷ A quick glance at Google News shows that it credits the author and source of the article. See Google News, <http://news.google.com> (last visited Mar. 10, 2010). Google's Terms of use states that they do "not claim ownership rights to the full news stories, which are instead held by the sites to which the Service links." Google News, *Terms of Use*, http://news.google.com/intl/en_us/terms_google_news.html (last visited Mar. 10, 2010).

¹⁸ See Google News, *News Help: Tips for Searching: By Keywords*, <http://www.google.com/support/news/bin/answer.py?hl=en&answer=82477> (last visited Mar. 10, 2010) (discussing methods of refining search results). Google News also features an Internet search focusing on news reporting web sites. See Ben Kociubinski, *Legal Update: Copyright and the Evolving Law of Internet Search*- Field v. Google, Inc. and Perfect 10 v. Google, Inc., 12 B.U. J. SCI. & TECH. L. 372, 385 (2006).

¹⁹ News bosses like Rupert Murdoch believe that when Google News links to their stories without crediting them, this is equivalent to theft. See Kosova, *supra* note 2. A constant sore point between news executives and Google News is Google News's use of "headlines and snippets" from the executive's sources which may not be considered fair under copyright law. See Miguel Helft, *Google Insists It's a Friend to Newspapers*, N.Y. TIMES, Apr. 7, 2009, <http://www.nytimes.com/2009/04/08/technology/internet/08google.html>. Media executives are concerned that Google News is taking large pieces of original work and profiting off of these pieces. See Brian Stelter, *Copyright Challenge for Sites That Excerpt*, N.Y. TIMES, Mar. 1, 2009, <http://www.nytimes.com/2009/03/02/business/media/02scrape.html>.

²⁰ See, e.g., Compl. ¶ 35, *Agence France Presse v. Google, Inc.*, No. 1:05cv00546 (D.C. Cir. Mar. 17, 2005), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/1/> (referring to the plaintiff's contention that when Google "reproduces and displays AFP's photographs, headlines and story leads it removes AFP's copyright management information found at the original source."); *Copiepresse v. Google* No.06/10.928/C at 20, available at <http://www.copiepresse.be/13-02-07-jugement-en.pdf> (holding that Google had infringed on Copiepresse's copyrights by displaying headlines on Google News).

²¹ See Mot. and Mem. for Partial Summ. J. Dismissing Count II for Lack of Protectable Subject Matter at 6, *Agence France Presse v. Google, Inc.*, No. 1:05cv00546 (D.C. Cir. Oct. 12, 2005), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/24/> [hereinafter *Google's Motion for Partial Summary Judgment*] (stating that ordinary factual statements about news are not protectable).

²² Stefanie Olsen, *Google Search Gets Newsier*, CNET NEWS, Sept. 23, 2002, <http://news.cnet.com/2100-1023-958927.html>.

Google News does raise infringement concerns, but those concerns are not the focus of this note. Rather, this note considers whether Google News' display of copyrighted material is protected under fair use and discusses public policy's influence on the doctrine. As courts have yet to address whether Google is protected under fair use, this note will use as its guide *Agence France Presse (AFP) v. Google, Inc.*,²³ a case that settled and whose arguments mostly centered on whether the content Google News displays was copyrightable in the first place.

This note contains three parts. Part I gives a brief overview of copyright law and presents the arguments leading up to the *AFP* settlement addressing whether headlines and excerpts are copyrightable. This note then argues that headlines and news excerpts, when taken together, are copyrightable compilations and that Google has infringed on AFP's exclusive right to reproduce and display its work under 17 U.S.C. § 106.²⁴ Part II addresses fair use, presenting the doctrine's four factors and summarizing the relevant case law relating to fair use involving online content. This section then proposes that fair use protects Google News regardless of public policy considerations. Part III examines public policy's role in fair use. It looks at how public policy influences the first factor, the policy benefits of Google's news aggregation, and why those benefits have placed many news organizations in a catch-22. Lastly, this note addresses the convenient nature of such policy arguments, especially when raised by a search engine. It cautions that assigning policy interests too much weight takes advantage of fair use's flexible nature and further blurs the line between what the doctrine can and cannot protect.

I. COPYRIGHT LAW BRIEFLY REVISITED

Part A identifies what works are entitled to copyright protection, what exclusive rights this protection affords, and the elements necessary for infringement. Part B introduces *AFP v. Google, Inc.* Part C argues that the content on Google News is entitled to copyright protection and demonstrates Google's subsequent infringement.

²³ No 1:05cv00546 (D.C. Cir. Apr. 6, 2007), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/64/>; see also Eric Goldman, TECHNOLOGY & MARKETING LAW BLOG, http://blog.ericgoldman.org/archives/2007/04/afp_v_google_se.htm (Apr. 7, 2007, 9:58 EST) (stating that the case between Google and Agence France Presse was settled).

²⁴ 17 U.S.C. § 106 (2006).

A. Copyright Law

The Copyright Clause of the United States Constitution permits 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[.]”²⁵ Section 101 of the Copyright Act defines copies as works that can be reproduced or otherwise communicated “by any method now known or later developed[.]”²⁶ However, not all works are protected. Section 102 identifies eight different categories of protected works, but fails to extend protection to “any idea, procedure, process, system, method of operation, concept, principle, or discovery[.]”²⁷

a. What is Copyrightable?

Although ideas and narrated facts are not copyrightable, compilations of facts can be.²⁸ The Act defines compilations in the following way: “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”²⁹ *Feist Publications, Inc. v. Rural Telephone Service Co.*³⁰ articulates the test for determining whether a compilation is copyrightable: a work must be: 1) formed by the collection and assembly of pre-existing materials, facts, or data 2) selected, coordinated, or arranged, and 3) the resulting original creation is based upon that selection, coordination, or arrangement.³¹ *Feist* identified the second prong as the most important, explaining that, “[courts] should focus on the manner in which the collected facts have been selected,

²⁵ U.S. CONST. art. I, § 8, cl. 8.

²⁶ 17 U.S.C. § 101 (2006).

²⁷ 17 U.S.C. § 102(b) (2006) (extending protection to literary, musical, dramatic, pantomimes and choreographic, pictorial, graphic, and sculptural, motion pictures and other audiovisual, sound recordings, and architectural works).

²⁸ Compare *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“No author may copyright his ideas or the facts he narrates.” (citing 17 U.S.C. § 102(b) (2006))), and Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 631 (2003) (stating that ideas and facts are denied the protection of the copyright statute), with *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“[I]t is beyond dispute that compilations of facts are within the subject matter of copyright.”), and *CDN Inc., v. Kapes*, 197 F.3d 1256, 1259 (9th Cir. 1999) (“[C]ompilations of facts are copyrightable even where the underlying facts are not.”).

²⁹ 17 U.S.C. § 101 (2006).

³⁰ 499 U.S. 340, 363 (1991) (holding that *Feist*, which used information found in Rural Telephone Service Company’s white pages without consent, did not commit copyright infringement).

³¹ *Id.* at 357; see also *Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., Inc.*, 945 F.2d 509, 512 (2d Cir. 1991) (explaining the test used to determine whether a compilation is copyrightable).

coordinated, and arranged.”³² The Court also added that “the facts must be selected, coordinated, or arranged ‘in such a way’ as to render the work as a whole original.”³³ *Feist’s* third prong is satisfied as long as a party arranges facts without copying them from another party and displays “some minimal level of creativity.”³⁴

b. Defining Copyright Infringement

Section 501 defines copyright infringement in part as a violation of “any of the exclusive rights of the copyright owner as provided by section[] 106”³⁵ As listed in Section 106, those exclusive rights include the right to reproduce copyrighted works, to prepare derivative works based on the copyrighted work, to distribute the copyrighted work, to perform the copyrighted work, and to display the work in public.³⁶ Thus, for a party to claim copyright infringement, it must show: “(1) ownership of a valid copyright, and (2) [the] copying of constituent elements of the work that are original.”³⁷

B. *AFP v. Google, Inc.*

On March 17, 2005, AFP filed its initial complaint against Google, alleging copyright infringement by Google News of its photographs, headlines, and story leads.³⁸ The company sought to enjoin Google from reproducing this content and sought damages of at least \$15,000,000.³⁹ On May 19, 2005, Google answered, admitting that Google News does display thumbnails, headlines, and snippets of articles but denied allegations of copyright infringement.⁴⁰ The case appeared to be headed for litigation

³² *Feist*, 499 U.S. at 358.

³³ *Id.*

³⁴ *Id.* (“[T]he originality requirement is not particularly stringent.”).

³⁵ 17 U.S.C. § 501(a) (2006).

³⁶ 17 U.S.C. § 106 (2006). *See, e.g.*, Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1475 (1995) (“[Copyright] includes the exclusive rights to reproduce the work in copies, to prepare derivative works based on the copyrighted work, to distribute copies of the work, and to perform or display the work publicly.”).

³⁷ *Feist*, 499 U.S. at 361; *see also* *Dr. Seuss Enters., v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir. 1997) (“To prove a case of copyright infringement, Seuss must prove both ownership of a valid copyright and infringement of that copyright by invasion of one of the five exclusive rights.”).

³⁸ Compl. for Prelim. and Permanent Inj. and Copyright Infringement at 12–15, *Agence France Presse v. Google, Inc.*, No. 1:05cv00546 (D.C. Cir. Mar. 17, 2005), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/1>.

³⁹ *Id.* at 17.

⁴⁰ *Google, Inc.’s Answer and Countercls.* at 26–27, *Agence France Presse v. Google, Inc.*, No. 1:05cv00546 (D.C. Cir. May 19, 2005), available at <http://docs.justia.com/cases/federal/district->

until the parties stipulated to a joint dismissal on April 6, 2007.⁴¹

Google argued that it could not have infringed because headlines are types of titles and thus are not entitled to copyright protection.⁴² The company cited Webster's definition of a headline as a "title or caption of a published article."⁴³ Google then pointed to section 202.1(a) of the Copyright Office regulations, which does not extend copyright protection to titles.⁴⁴ Google also implied that because article excerpts are inherently factual, story leads are not entitled to copyright protection either.⁴⁵ Google denied that story leads, in conjunction with headlines, are the most important part of an article.⁴⁶ Instead, it contended that headlines and story leads only contain certain basic facts or the "who, what, when, where and why" of the story.⁴⁷ While Google did admit that the presentation of substantial parts of a news story coupled with facts may be entitled to protection,⁴⁸ it countered that "single paragraph[s]" of stories are not protected, implying that story leads displayed on Google News, which include only around thirty-five words, are not protected either.⁴⁹

AFP argued that headlines are copyrightable and strongly disputed Google's interpretation of the Copyright Office regulations. First, APF pointed out that section 202.1(a) does not mention "headlines" in the group of works not entitled to copyright protection.⁵⁰ In addition, AFP noted that nothing in the Copyright Clause of the Constitution, the Copyright Act, or the Copyright Act's legislative history mentions "headlines" or suggests that a headline cannot receive copyright protection.⁵¹ AFP also cited over

courts/district-of-columbia/dcdce/1:2005cv00546/113951/6/ [hereinafter *Google's Answer*].

⁴¹ See *AFP/Google Settlement*, *supra* note 5.

⁴² See *Google's Motion for Partial Summary Judgment*, *supra* note 21, at 3.

⁴³ *Id.* (citing WEBSTER'S II NEW RIVERSIDE UNIV. DICTIONARY 569 (1988)).

⁴⁴ See *id.* (citing 37 C.F.R. § 202.1(a) (1992)).

⁴⁵ See *Google's Answer*, *supra* note 40, at 4-5.

⁴⁶ See *id.* at 4 (stating that a "story lead" can consist of more than the first sentence, and denying that headlines and story leads are the most important parts of a story).

⁴⁷ *Id.* (indicating that it is commonly understood and practiced in the field of journalism that headlines and story leads disclose the basic facts of the article).

⁴⁸ See *Google's Motion for Partial Summary Judgment*, *supra* note 21, at 4 (accepting that protection may extend to the presentation of facts in a substantial news story).

⁴⁹ *Id.* (citing *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71 (2d Cir. 1999), which held that a "single paragraph of a [news] story was not protected.")

⁵⁰ See AFP's Response in Opposition to Google, Inc.'s Mot. for Partial Summ. J. at 6, *Agence France Presse v. Google, Inc.*, No 1:05cv00546 (D.C. Cir. Oct. 26, 2005), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/28/> [hereinafter *AFP's Response in Opposition*] (referring to "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents[.]"(citing 37 C.F.R. §202.1 (2006))).

⁵¹ See *id.* (refuting Google's position that copyright protection is inapplicable to headlines).

forty dictionaries that fail to include the word “headline” in their definition of “title.”⁵² Lastly, the organization asserted that “[i]t is well-settled that copyright protection extends to fact-based compilations[.]”⁵³ as its headlines are “the result of creative and original work [by professionals who] create an original creative (often witty) written, expressive compilation of the facts[.]”⁵⁴

C. Headlines and Excerpts Are Copyrightable Compilations

Under the test set forth in *Feist*, news headlines and excerpts, with or without thumbnail photographs, are copyrightable compilations. The first prong requires that a work be “the collection and assembly of pre-existing material, facts, or data[.]”⁵⁵ AFP’s headlines and news excerpts easily satisfy the first part of the test because many headlines, by their nature, are a collection of facts.

The second prong, once again, focuses “on the manner” in which the facts are arranged.⁵⁶ AFP’s headlines and the arrangement of facts within them are inherently designed to grab a reader’s attention. AFP even possesses a style manual addressing how its headlines should be organized.⁵⁷ In addition, the first thirty-five words of an article, the portion Google often displays, represent an author’s first opportunity to present the most crucial information relating to a story while giving that newspaper’s slant on the issue. Although much of this content contains facts, it is more than just a list. The author has added substantive qualities to those facts based on how he or she presented them, especially in relation to the headline that precedes the excerpt. Google rightly pointed out that this manual directs individuals not to “jazz up headlines” and questioned the potential creativity of such short fact-based works.⁵⁸ AFP’s headlines are certainly less eye-catching than some of their satirical counterparts.⁵⁹

⁵² See *id.* at 12-13 (searching under the word “Title” did not reveal any definition that included the term “headline”).

⁵³ *Id.* at 7 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991)).

⁵⁴ *Id.* at 17.

⁵⁵ *Feist*, 499 U.S. at 357.

⁵⁶ *Id.* at 358.

⁵⁷ See *Google’s Motion for Partial Summary Judgment*, *supra* note 21, at 4 (citing AFP STYLE BOOK 1313-14 (Darrell Christian, Sally Jacobsen & David Minthorn eds., 2010) and describing its rules for headlines).

⁵⁸ *Id.* (demonstrating Google’s attempt to show that AFP headlines could not be creative).

⁵⁹ See, e.g., THEONION.COM, *Area Man Passionate Defender Of What He Imagines Constitution To Be*, http://www.theonion.com/content/news/area_man_passionate_defender_of (last visited Mar. 14, 2011), and THEONION.COM, *Second-Most Popular Kid In School Assumes Power Following Death of Star Quarterback*, <http://www.theonion.com/articles/secondmost-popular-kid-in-school-assumes->

However, AFP's straight-forward arrangement does render "the work as a whole original"⁶⁰ because it has a specific system, as laid out by its style manual, for how its headlines are to be written in addition to having substantive news excerpts.

AFP also fulfilled *Feist's* third prong. It not only produced its own headlines and stories "independently[,]"⁶¹ but also displayed more than a minimal amount of creativity in systematically arranging its headlines and the information in its news excerpts to peak a reader's interest. That system, regardless of how simple, is creative because it attracts a reader's attention in a particular way: by giving the reader a "clear, short, and simple" statement of the facts.

a. Google's Subsequent Infringement

AFP has met both elements required to prove infringement. First, AFP headlines qualify as copyrightable compilations. Second, Google copied content that was original to AFP⁶² because, as addressed above, AFP's arrangement of facts in its headlines and excerpts surpasses the minimal standard for creativity. As a result, Google infringed on two of the AFP's exclusive rights under 17 U.S.C. § 106 by both reproducing and displaying AFP's content without permission.

II. FAIR USE AS APPLIED ONLINE: WHERE GOOGLE NEWS WOULD STAND

Part A introduces fair use and discusses its four factors. This part also highlights some recent decisions involving fair use and how those decisions have interpreted the two most important fair use factors, the first and the fourth. Parts B and C propose that the display of copyrighted material on Google News is protected under the fair use doctrine.

A. The Doctrine of Fair Use

Although Congress enacted the first copyright legislation in 1790,⁶³ fair

power-ful,18088 (last visited Mar. 14, 2011), which exemplify the more "eye-catching" headlines used by AFP's more satirical counterparts.

⁶⁰ *Feist*, 499 U.S. at 358.

⁶¹ *Id.*

⁶² *See id.* at 361 (determining whether *Feist* had copied "anything that was 'original' to Rural[.]"); *see also* *Burrow-Giles Litographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (determining whether a photograph is an original work of art making it copyrightable).

⁶³ According to Nimmer, the first copyright legislation Congress passed was the Act of May 31, 1790, ch. 15, 1 Stat. 124. Up to 1976, Congress had updated copyright law two times. The first was the Copyright Act of 1909, 17 U.S.C. § 1 (2006), which "continues to govern pre-1978 causes of action[.]"

use was a “judge-made rule of reason”⁶⁴ for almost two centuries until Congress incorporated the doctrine into the Copyright Act of 1976.⁶⁵ The Act lists four factors courts must consider in a fair use analysis:

- (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.⁶⁶

These factors must be examined together as a whole and “weighed together, in light of the purposes of copyright.”⁶⁷ Congress also made clear that it did not want the Act’s four factors to be exhaustive;⁶⁸ rather it “intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”⁶⁹ In turn, courts have recognized the doctrine to be a malleable one and have avoided rigid application of the statute by considering other factors.⁷⁰ But courts have found that, “[w]hile no one factor is dispositive,” the first and fourth factors are the principle guides for their analysis.⁷¹

NIMMER ON COPYRIGHT § 1-OV. The second was the Sound Recording Act of 1971. Act of Oct. 15, 1971, Pub. L. 92-140, 85 Stat. 391.

⁶⁴ 4-13 NIMMER ON COPYRIGHT § 13.05 (Matthew Bender & Company, Inc. 2009).

⁶⁵ 17 U.S.C. § 107 (2006); *see also* Triangle Publ’n, Inc. v. Knight-Ridder Newspapers Inc., 626 F.2d 1171, 1174 (5th Cir. 1980) (stating that in codifying the concept of fair use, Congress did not intend to depart from court-created principles).

⁶⁶ 17 U.S.C. § 107 (2006).

⁶⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

⁶⁸ H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680; *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 939 (2d Cir. 1994) (noting that the four factors are not exhaustive or exclusive).

⁶⁹ H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681.

⁷⁰ *See* *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006) (“The Copyright Act authorizes courts to consider other factors than the four non-exclusive factors discussed above.”); *see also* *Fisher v. Dees*, 794 F.2d 432, 436–37 (9th Cir. 1986) (“courts may weigh ‘the propriety of the defendant’s conduct’ in the equitable balance of a fair use determination[.]”).

⁷¹ *Field*, 412 F. Supp. 2d at 1118 (stating that “courts traditionally have given the most weight to the first and fourth factors.”); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that the nature of the work is at the center of the fair use analysis); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating that the last factor of the fair use analysis is the most significant of the four).

a. The Purpose and Character of the Use

A court's analysis of the first factor is two-fold:⁷² first, it must evaluate the commercial nature of the use;⁷³ and second, it must "determine whether and to what extent the new work is 'transformative.'" ⁷⁴ To determine the commercial nature of the use, courts look to "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price" and not to "whether the sole motive of the use is monetary gain[.]"⁷⁵

In addressing the second question, *Campbell v. Acuff-Rose Music, Inc.*⁷⁶ held that to be transformative, a work cannot supersede the original and must "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message[.]"⁷⁷ Additionally, courts have found transformative works that provide a social benefit or improve access to information.⁷⁸ Judge Pierre N. Leval of the Second Circuit even suggested that if a work was not transformative, the analysis should end right then and there,⁷⁹ anointing this factor "the soul of fair use."⁸⁰ Finally, courts have found that the more transformative a work, the less important its commercial nature,⁸¹ arguably giving the former more weight.⁸²

⁷² See *Campbell*, 510 U.S. at 584 (stating that "[t]he language of [17 U.S.C. § 107] makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character."); see also *Harper & Row, Publishers*, 471 U.S. at 561 (explaining that the use of the words "including" and "whether" in the statute separate the first factor into a two step process).

⁷³ See 17 U.S.C. § 107 (2006) (noting that a court shall consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes[.]"); *Campbell*, 510 U.S. at 585 (stating commerciality is one factor that must be "weighed with other[s] in fair use decisions[.]").

⁷⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007) (quoting *Campbell*, 510 U.S. at 579).

⁷⁵ *Harper & Row, Publishers*, 471 U.S. at 562.

⁷⁶ 510 U.S. 569, 583 (1994) (finding a parody of the song "Oh, Pretty Woman" to be transformative).

⁷⁷ *Id.* at 579.

⁷⁸ See *Perfect 10, Inc.*, 487 F.3d at 721 (finding a search engine to be socially beneficial), *vacated*, 416 F. Supp. 2d 828 (C.D. Cal. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (finding that a search engine improved access to information).

⁷⁹ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990) ("[i]f a quotation of copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors.").

⁸⁰ *Id.*

⁸¹ See *Kelly*, 336 F.3d at 818 ("The more transformative the new work, the less important the other factors, including commercialism, become." (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))).

⁸² See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (considering the "transformative" nature of the work the most important aspect in analyzing the first factor); Leval, *supra* note 79, at 1111 (labeling the determination of a work's transformative nature as

*Kelly v. Arriba Soft Corp.*⁸³ focused its inquiry on the transformative nature of a search engine. In this case, a professional photographer sued a search engine for copyright infringement because the search engine displayed smaller versions of the plaintiff's photographs without her consent.⁸⁴ After the court determined that Arriba was not trying to profit from the thumbnails photographs, the court found the search to be transformative for two reasons. First, *Kelly* found "improv[ed] access to information on the [I]nternet" to be a great social benefit.⁸⁵ Second, the court pointed to the great "public benefit of the search engine [as compared to] the minimal loss of integrity to Kelly's images."⁸⁶ Ultimately, the Ninth Circuit held that Arriba's display of thumbnail photographs was a fair use, mainly looking to the first and fourth factors in its determination and finding both in Arriba's favor.⁸⁷

*Field v. Google, Inc.*⁸⁸ found that the first factor favored Google because of the "functionality" Google's cache provides.⁸⁹ This function allows users to access a page when it is no longer available and "detect changes" in websites that can have "political, educational, legal or other ramifications."⁹⁰ After full analysis of all four factors, the court granted Google's motion for summary judgment, holding that "Google's use of the works [was] a fair use under 17 U.S.C. § 107."⁹¹

*Perfect 10, Inc. v. Amazon.com Inc.*⁹² is also instructive. Perfect 10 originally brought separate suits against Amazon and Google in district court, claiming that Google infringed by displaying thumbnail versions of copyrighted photographs.⁹³ The district court held that, despite the

the most important part of the evaluation).

⁸³ 336 F.3d 811 (9th Cir. 2003).

⁸⁴ *See id.* at 816.

⁸⁵ *Id.* at 819.

⁸⁶ *Id.* at 820.

⁸⁷ *See id.* at 822 ("Having considered the four fair use factors . . . two weigh in favor of Arriba, one is neutral, and one weighs slightly in favor of Kelly, we conclude that Arriba's use of Kelly's images as thumbnails in its search engine is a fair use.").

⁸⁸ 412 F. Supp. 2d 1106 (D. Nev. 2006).

⁸⁹ *Id.* at 1118 ("Google's cache functionality enables users to access content when the original page is inaccessible. The Internet is replete with references from academics, researchers, journalists, and site owners praising Google's cache for this reason. In these circumstances, Google's archival copy of a work obviously does not substitute for the original. Instead, Google's "Cached" links allow users to locate and access information that is otherwise inaccessible.").

⁹⁰ *Id.*

⁹¹ *Id.* at 1109.

⁹² 487 F.3d 701 (9th Cir. 2007), *amended by* 508 F.3d 1146 (9th Cir. 2007).

⁹³ *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 831 (C.D. Cal. 2006) (consolidating the actions and considering whether Google had infringed by in-line linking images displayed by third-party websites), *aff'd in part, rev'd in part* 487 F.3d 701 (9th Cir. 2007), *amended by* 508 F.3d 1146 (9th Cir. 2007).

“enormous public benefit” Google’s search engine provided, the display of Perfect 10’s thumbnails was not justified under fair use.⁹⁴ The Ninth Circuit, however, reversed on that finding.⁹⁵

In its analysis of the first factor, *Perfect 10* found that Google’s display of thumbnails was “highly transformative”⁹⁶ and that the district court erred by not finding this factor in Google’s favor.⁹⁷ The court recognized the social benefit of search engines as electronic reference tools⁹⁸ and that Google used the thumbnails in a new context and for a different purpose.⁹⁹ Although it concluded that the transformative nature of Google’s search engine outweighed its commercial use of the thumbnails,¹⁰⁰ the Ninth Circuit noted the district court’s observation that Google’s display of thumbnails benefits Google’s bottom line.¹⁰¹

b. The Nature of the Copyrighted Work

This factor directs courts to examine the nature of the work to determine how much protection to afford it. The more creative the original work, the more protection it will receive,¹⁰² as the work is “closer to the core of intended copyright protection[.]”¹⁰³ Thus, factual works will receive less copyright protection and consequently, will be more vulnerable to fair use. This factor does not weigh as heavily as others in a court’s fair use determination.¹⁰⁴

⁹⁴ *Id.* at 851.

⁹⁵ *See Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 725 (9th Cir. 2007) (“[W]e conclude that Google’s use of Perfect 10’s thumbnails is a fair use.”).

⁹⁶ *Id.* at 721.

⁹⁷ *See id.* at 723 (disagreeing with the district court’s conclusion “that because Google’s use of the thumbnails could supersede Perfect 10’s cell phone download use and because the use was more commercial than Arriba’s, this fair use factor weighed ‘slightly’ in favor of Perfect 10.”).

⁹⁸ *See id.* at 721.

⁹⁹ *See id.* (comparing a search engine to a parody).

¹⁰⁰ *See id.* at 723.

¹⁰¹ *See id.* at 722 (discussing the district court’s holding in *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 847 (C.D. Cal. 2006)).

¹⁰² *See Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers, LLC*, 629 F. Supp. 2d 526, 534 (E.D. Va. 2008) (applying the second factor of the fair use doctrine to a developer’s unlicensed use of an architecture firm’s plans); *see also NIMMER*, *supra* note 7, at § 13.05(A)(2)(a) (discussing the principles supporting the second factor of the fair use doctrine).

¹⁰³ *NIMMER*, *supra* note 7, at § 13.05(A)(2)(a).

¹⁰⁴ *See Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997) (classifying the second factor of the fair use doctrine as not being “terribly significant in the overall fair use balancing”); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1118 (D. Nev. 2006) (“While no one factor is dispositive, courts traditionally have given the most weight to the first and fourth factors.”).

c. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Under this factor, a court must explore whether the use of the copied material is reasonable compared to the original work.¹⁰⁵ Although the extent to which a work is copied may vary,¹⁰⁶ the copied portion may be insubstantial and still prohibited if it borrows from the “heart” of the work.¹⁰⁷ Conversely, *Sony Corp. v. Universal City Studios, Inc.*¹⁰⁸ held that a party might reproduce an entire work as long as the second work’s use had a different purpose.¹⁰⁹

d. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

*Harper & Row, Publishers v. Nation Enterprises*¹¹⁰ called this factor “undoubtedly the single most important element of fair use.”¹¹¹ Courts must evaluate the economic effect, specifically “the extent of the market harm”¹¹² the use has upon the original work and any derivatives of the original.¹¹³ Thus, a work that does not cause economic damage to the original work “need not be prohibited in order to protect the author’s incentive to create.”¹¹⁴ There are, however, limitations to a court’s analysis. Nimmer noted that “[o]nly the impact of the use in defendant’s work of material that is protected by plaintiff’s copyright need be considered under

¹⁰⁵ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 586 (1994) (applying the third factor of the fair use doctrine as a question of reasonability); *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841) (stating that the key question in applying the third factor of the fair use doctrine is whether the use in question is justifiable).

¹⁰⁶ See *Dr. Seuss*, 109 F.3d at 1402 (“[W]e recognize that the extent of permissible copying varies . . .” (quoting *Campbell*, 510 U.S. at 586–87)); *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 570 (N.D.N.Y. 1995) (noting that in some circumstances, even the total reproduction of an entire copyrighted work may not mitigate against a finding of fair use).

¹⁰⁷ See, e.g., *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 564–65 (1985) (noting a district court’s finding of a copyright violation when a magazine reprinted an insubstantial portion of a book, but that portion was the essential “heart” of the book).

¹⁰⁸ 464 U.S. 417 (1984).

¹⁰⁹ “[T]hat time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.” *Id.* at 449–50. The court in *Field v. Google* also recognized this same principle. *Field*, 412 F. Supp. 2d at 1120.

¹¹⁰ 471 U.S. 539 (1985).

¹¹¹ *Id.* at 566.

¹¹² *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

¹¹³ See *id.* (asking “whether unrestricted and widespread dissemination would hurt the potential market for the original and derivatives of *The Cat in the Hat*.”); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 568 (1985) (“This inquiry must take account not only of harm to the original but also of harm to the market for derivative works.”).

¹¹⁴ *Field*, 412 F. Supp. 2d at 1121 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984)).

this factor.”¹¹⁵

In its analysis of the fourth factor, *Kelly* indicated that the search engine actually benefited the plaintiff because it appeared to drive more traffic to the plaintiff’s website.¹¹⁶ *Kelly* also asserted that if users wanted more information, there was nothing stopping them from going to the original source: “Even if users were more interested in the image itself rather than the information on the web page, they would still have to go to *Kelly*’s site to see the full-sized image. The thumbnails would not be a substitute for the [original images].”¹¹⁷

In *Field*, the fourth factor favored Google because the court could find no economic impact on *Field*’s works as a result of the cached links.¹¹⁸ While *Perfect 10* found the fourth factor favored neither party, it similarly reasoned that Google’s adverse affect on the market for *Perfect 10*’s thumbnail images was unclear and purely “hypothetical.”¹¹⁹

B. Headlines and News Excerpts Are Protected under Fair Use

The following section argues that a court would find Google News to be protected under fair use. This section will conduct a separate analysis of each factor and then determine which factors favor Google and which favor AFP. This determination, however, will not take into account public policy considerations, saving that discussion for Part III.

a. The Purpose and Character of the Use

The first question under this factor becomes whether Google stands to profit from AFP’s news content without paying for it.¹²⁰ Although Google News contains no advertisements on news.google.com, ads do appear after a user searches for content within Google News, just as ads would with any other Google search. In addition, the service re-enforces partnerships

¹¹⁵ NIMMER, *supra* note 7, at §13.05(A)(4).

¹¹⁶ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (stating that “the search engine would guide users to *Kelly*’s web site rather than away from it.”).

¹¹⁷ *Id.*

¹¹⁸ See *Field*, 412 F. Supp. 2d at 1121 (finding that there was no market for the plaintiff’s stories).

¹¹⁹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 725 (9th Cir. 2007) (reversing the district court’s determination that Google’s service would make users less likely to pay for downloaded images from *Perfect 10*).

¹²⁰ See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”); *Roy Export Co. v. Colombia Broad. Sys. Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980) (finding that a relevant factor for consideration is whether the user may profit from the exploitation of the material that is copyrighted).

formed through Google's AdSense program.¹²¹ As the Google public policy blog notes, this program "pays out millions of dollars to newspapers that place ads on their sites [by helping] newspapers make more from each click we send them by serving better, more relevant ads to their readers to generate higher returns."¹²²

But does Google News' transformative nature overshadow any potential commercial gain? Recall *Campbell*, which held that for a work to be transformative it must offer something new, differing in purpose or character, and *Kelly*, which considered improved user access to information.¹²³ Google News may have a different purpose than print media because it meets the public's demand for more information, more quickly, whenever it wants. However, Google News does appear, in some cases, to supersede the original source of the news content as a result of its aggregation.

b. The Nature of the Copyrighted Work

Despite being copyrightable compilations, headlines and news excerpts are composed primarily of facts and, subsequently, appear to be works that fair use will be less inclined to protect. As *Feist* pointed out, "[e]ven if a work qualifies as a copyrightable compilation, it receives only limited protection."¹²⁴ Ironically, by combining the pictures, headlines, and articles, Google has also aggregated the creative aspects each had individually and, in a way, enhanced their collective creative value.

c. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Are the headlines and news excerpts Google used reasonable compared to the entire article? *Kelly* held that a search engine's display of photos was reasonable because it "allow[ed] users to recognize the image and decide whether to pursue more information about the image" by going to

¹²¹ "Google AdSense is a fast and easy way for website publishers of all sizes to display relevant Google ads on their website's content pages and earn money. Because the ads are related to what your visitors are looking for on your site — or matched to the characteristics and interests of the visitors your content attracts — you'll finally have a way to both monetize and enhance your content pages." Google AdSense, <https://www.google.com/adsense/login3> (last visited Nov. 25, 2009).

¹²² Some questions related to Google News and the Associated Press, <http://googlepublicpolicy.blogspot.com/2009/04/some-questions-related-to-google-news.html> (Apr. 7, 2009, 8:03 EST).

¹²³ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (stating that the use of the images between the two parties differs — "improving access to information on the internet versus artistic expression.").

¹²⁴ *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991).

the host website.¹²⁵ Similarly, if Google News did not provide sufficient information, the service would much less useful because a user would be unable to determine if the headline and excerpt were of interest. But has Google taken the heart of AFP's news stories by displaying the very beginning of an article with its headline? While an article's most crucial information often appears in its headline, first paragraph, and final paragraph, Google takes only part of the first paragraph, just enough to help the reader decide whether to follow the link to the entire article.

d. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

Can news aggregators be blamed for compounding the news industry's economic woes? The Internet in general has made people less inclined to pay for content that they would have previously purchased. The Economist noted that the Internet has the "tendency to disintermediate content from carrier."¹²⁶ In addition, news industry concerns that some users view headlines and excerpts to get a sense of the day's news without clicking on the link have merit. This result creates less incentive for advertisers to purchase ad-space on the original source's website. Despite some users who browse headlines without clicking, Google News does drive a substantial amount of users to an article's host website¹²⁷ and bolsters online-ad revenues for newspapers.¹²⁸

C. Fair Use Protects Google News

Under the first factor, Google News' transformative value overshadows its commercial nature because it offers users the power to decide what stories are most important to them. Thanks to the Internet, the demand for information, particularly the news, and an increased access to it, has grown. Google News is about reader efficiency and reader choice. As Krishna

¹²⁵ Kelly, 336 F.3d at 821.

¹²⁶ *The triumph of the monthly bill*, ECONOMIST, Oct. 10-16, 2009, at 66, available at http://www.economist.com/businessfinance/displaystory.cfm?story_id=14587429.

¹²⁷ See Noel Sheppard & Marc Sheppard, *Is Left-Leaning Google Censoring Right-Leaning Websites?*, AM. THINKER, May 22, 2006, http://www.americanthinker.com/2006/05/is_leftleaning_google_censorin.html (noting that Google has resulted in "more reads for news and opinion providers.").

¹²⁸ See Helft, *supra* note 19 (stating that Google has said it drives a "huge amount of traffic to newspaper Web sites, which the publishers monetize through advertising."); Keiyana Fordham, *Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 987 (2010) (explaining that news aggregators argue that newspapers benefit because traffic is directed to their websites).

Bharat, the creator of Google News, noted: “[W]e thought it would encourage readers to get a broader perspective by digging deeper into the news—reading ten articles instead of one, perhaps—and then gain a better understanding of the issues, which could ultimately benefit society.”¹²⁹

An analysis of the second and third factors does not favor AFP either. As the second factor indicates, fact-based works will receive less protection than creative ones. No matter the degree to which AFP re-arranges facts within its headlines and excerpts, the level of creativity such works can attain is limited by their fact-based nature. In addition, despite AFP’s arguments that “headlines and leads are not stand-alone items but rather integral parts of stories[,]”¹³⁰ the amount of content Google used was reasonable under the third factor. It is extreme to claim that Google has taken the heart of a work by displaying only enough information to peak a reader’s interest.

Lastly, under the fourth factor it does not follow that because the Internet has a tendency to disconnect users from original content that Google News has also done the same. Assigning blame to Google News is misplaced, as the service does not “disintermediate content from carrier[,]”¹³¹ but rather enhances the value of the news content by driving more users to the host website.¹³² Google News benefits news organizations financially because the service diverts more readers to stories they might not have found, but for Google’s aggregation. All four factors favor Google and its display of news content on Google News is protected under fair use.

III. PUBLIC POLICY’S INFLUENCE ON FAIR USE

Part A discusses public policy’s role in fair use and considers its current influence through courts’ definition of “transformative.” Part B examines how the benefits of Google News have placed many news organizations in

¹²⁹ And now, News, <http://googleblog.blogspot.com/2006/01/and-now-news.html> (Jan. 23, 2006 12:15:00 PM).

¹³⁰ AFP’s Mot. to Dismiss at 7, *Agence France Presse v. Google, Inc.*, No 1:05cv00546 (D.C. Cir. June, 8, 2005), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/13/>.

¹³¹ *The triumph of the monthly bill*, *supra* note 127.

¹³² See Memorandum from Google Inc., *Comments on FTC’s News Media Workshop and Staff Discussion Draft on “Potential Policy Recommendations to Support the Reinvention of Journalism”* (July 20, 2010), available at http://docs.google.com/viewer?url=http://www.google.com/googleblogs/pdfs/google_ftc_news_media_comments.pdf&pli=1&chrome=true (stating that Google News directs readers to original publishers’ websites nearly one billion times per month); see also Jim Hedger, *Basic SEO Venues – The Google network, Tying it together*, ISEDB.COM, Sept. 19, 2007, <http://www.isedb.com/db/articles/1714/1/Basic-SEO-Venues--The-Google-network-Tying-it-together/Page1.html> (“Getting a press release or story into Google News can drive a huge amount of traffic to your site in very short order.”).

a catch-22. Part C raises two concerns regarding the interplay between fair use and public policy. This section then cautions against unconsciously assigning too much weight to policy based on how courts have recently defined “transformative.”

A. *The Role of Public Policy in Fair Use*

Perfect 10 noted that courts should be flexible in their analysis of fair use.¹³³ Courts need this flexibility because “the endless variety of situations and combinations of circumstances that can [a]rise in particular cases precludes the formulation of exact rules in the statute.”¹³⁴ Nimmer underscored the point with regard to public policy: “Still, the public interest, even if not as a separate factor, continually informs the fair use analysis”¹³⁵ Given how *Kelly*, *Field*, and *Perfect 10* have defined “transformative,” it appears that courts, rather than treating policy as a separate factor, take policy into account concurrent with their analysis of the four factors.

Public policy’s influence on fair use precedes the digital age. For example, *Time, Inc. v. Bernard Geis Associates*¹³⁶ held that fair use protected a party who copied parts of a home video of President Kennedy’s assassination because of the “public interest in having the fullest information available”¹³⁷ The Second Circuit also addressed this issue in *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹³⁸ finding that the public interest, in some cases, subordinates the original copyright holder’s financial interest.¹³⁹ The court added that, “[w]hether the privilege may justifiably be applied to particular materials turns initially on the[ir] nature . . . [and] whether their distribution would serve the public interest in the free dissemination of information. . . .”¹⁴⁰

¹³³ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007) (noting that courts “must be flexible in applying a fair use analysis[.]”).

¹³⁴ H.R. REP. NO. 94-1476, at 66 (1976).

¹³⁵ NIMMER, *supra* note 7, at § 13.05(A)(5)(c).

¹³⁶ 293 F. Supp. 130 (S.D.N.Y. 1968).

¹³⁷ *Id.* at 146; see NIMMER, *supra* note 7, at § 13.05[B][5] (discussing how the court in *Time, Inc.* justified the copying of motion picture frames because it was in the public’s interest to have the information).

¹³⁸ 366 F.2d 303 (2d Cir. 1966).

¹³⁹ *Id.* at 307 (“[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science and industry.”) (quoting *Berlin v. E.C. Publ’ns*, 329 F.2d 541, 544 (2d Cir. 1964)).

¹⁴⁰ *Id.* The court did qualify this statement by describing how the privilege typically applied to scientific, legal, medical, historical, and biographical works, but *Rosemont’s* list does not appear to be exhaustive and was compiled prior to the Internet. *Id.*

As the Internet's role in society has grown, so has the interplay between public interest and fair use, particularly within the first factor. Take, for example, how the definition of "transformative" has changed. Traditionally, transformative meant using part of a work to create a new one,¹⁴¹ whereas now a work is transformative if it facilitates access to information.¹⁴² *Kelly*, in finding that the first factor favored the defendant, emphasized how a search engine greatly improved the public's access to information while doing minimal damage to the original work.¹⁴³ Similarly, *Perfect 10* held that Google's display of thumbnail images through a search engine was beneficial as an electronic reference tool.¹⁴⁴

B. The Catch-22

The news industry finds itself in a catch-22 for two reasons. First, there is virtually no precedent addressing whether news headlines and excerpts are copyrightable, not to mention whether the display of that content is protected under fair use.¹⁴⁵ That uncertainty coupled with the current, troubled financial state of the print news industry¹⁴⁶ makes the option to sue companies like Google both risky and economically unfeasible.

Second, even if a company brought suit and a court found headlines and excerpts to be copyrightable, three policy benefits of Google News

¹⁴¹ See for example, *Campbell v. Acuff-Rose Music, Inc.*, which addressed whether a parody of 2 Live Crew's version of Roy Orbison's song "Oh, Pretty Woman" was protected under fair use. 510 U.S. 569, 571-72 (1994). The Court ultimately remanded the case and in doing so, found that 2 Live Crew's version was transformative because of its critical additions and social commentary. *Id.* at 594; *NXIVM Corp. v. Ross Institute*, also found that a work was transformative because of its secondary use as a criticism. 364 F.3d 471, 479 (2d Cir. 2004).

¹⁴² See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (defining transformative to be an improved access to information); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007) (recognizing the benefit of electronic reference tools); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1118 (D. Nev. 2006) (finding the increased "functionality" of being able to access inactive web pages through Google's cache transformative).

¹⁴³ See *Kelly*, 336 F.3d at 818.

¹⁴⁴ See *Perfect 10*, 487 F.3d at 721.

¹⁴⁵ Google settled with AFP, but did lose its case against Copiepresse, in a decision handed down by the Court of First Instances in Belgium. See generally Castle, *supra* note 4; *AFP/Google Settlement*, *supra* note 5; see also Clay Calvertclub, Kayla Gutierrez, & Christina Locke, *All the News That's Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture*, 10 WAKE FOREST INTELL. PROP. L.J. 1, 28-29 (2009) ("When a court finally addresses the actual merits of [news misappropriation cases] on the five specific elements of the hot news misappropriation doctrine, it will trigger an opinion meriting a further scholarly analysis.").

¹⁴⁶ See Paul Gillin, *The Future of Journalism, Part IV*, NEWSPAPER DEATH WATCH, Nov. 3, 2009, <http://www.newspaperdeathwatch.com/> ("We've always argued that the problem with newspapers today isn't that they have no value, it's that they no longer have a sustainable business model."); Seth Korman, *Citizens United and the Press: Two Distinct Implications*, 37 RUTGERS L. REC. 1, 7-8 (2010) ("The collapse of the hardcopy Seattle Post-Intelligencer, the near-closure of the Boston Globe, and the bankruptcy of the Tribune Company, among other examples, serve as monthly reminders of the national financial state of traditional media stalwarts.")

supplement Google's already strong case for fair use. First, Google's aggregation of news increases access to information by bringing the world's news to the fingertips of the user.¹⁴⁷ As Google indicates, "[i]t does not tell the story, but tells people how to find the story."¹⁴⁸ Second, after offering this information, Google facilitates the parsing process, allowing users to find related news stories from several news sources that are of interest.¹⁴⁹ Third, Google News has not only shaped a new model for information consumption, but also created a new market for information aggregation.¹⁵⁰ As a result, Google News has placed news companies in a difficult position. Google has supplemented newspapers as the original source of the article and controls, in a sense, what the user reads based on Google's search algorithm.

The response to this apparent catch-22 from some of the industry's most influential players has varied.¹⁵¹ Tom Curley of The Associated Press, who has yet to take any action, found that, "[w]e content creators have been too slow to react to the free exploitation of news by third parties without input or permission[.]"¹⁵² In contrast News Corp's Rupert Murdoch asserted that, "[t]he aggregators and plagiarists will soon have to pay a price for the co-opting of our content[.]"¹⁵³ He backed up those words in November 2009 by threatening to restrict news content controlled by News Corp. to Microsoft's new search engine, Bing.¹⁵⁴ This play could be effective

¹⁴⁷ See Google, Inc's Resp. and Opp'n to AFP's Mot. to Dismiss Google's First and Third Countercls. and to Strike Google's Tenth Affirmative Defense at 1, *Agence France Presse v. Google, Inc.*, No 1:05cv00546 (D.C. Cir. June 22, 2005) [hereinafter Google's Response], available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2005cv00546/113951/18/> ("Google News is a tool for the organization and dissemination of ideas—it does not tell the story, but tells people how to find the story." (citing *Kelly*, 336 F.3d at 818)); Same Protocol, More Options for News Publishers, <http://googlenewsblog.blogspot.com/2009/12/same-protocol-more-options-for-news.html> (Dec. 2, 2009, 8:10 AM) ("Google News is a great source of readers, sending publishers about 1 billion clicks every month.").

¹⁴⁸ *Google's Response*, *supra* note 148, at 1.

¹⁴⁹ While a reader can similarly search through sections within one newspaper to find a topic of interest, the content available within one newspaper as compared to the several sources Google News offers is much less diverse and less informative.

¹⁵⁰ I mention a new market for information aggregation because Google's success with aggregating news has, at the very least, created awareness that there may be a market for the aggregation of other types of information. See George Anders, *Why Google Inspires Diverging Case Studies*, WALL ST. J., Aug. 15, 2007, at A2 (drawing attention to Google's "rapid entry" into the new market of news aggregation).

¹⁵¹ See Kosova, *supra* note 2 (citing news organization executives voicing displeasure over Google stealing their content.); see also Dirk Smillie, *Murdoch Wants A Google Rebellion*, FORBES.COM, Apr. 3, 2009, <http://www.forbes.com/2009/04/03/rupert-murdoch-google-business-media-murdoch.html> (quoting various opinions of influential players in the industry, including Wall Street Journal Managing Editor Robert Thomson and Director of the Online News Association Anthony Moor)

¹⁵² Kosova, *supra* note 2.

¹⁵³ *Id.*

¹⁵⁴ See *Kennedy*, *supra* note 1 (exhibiting that Murdoch is cozying up with Google's main

because some of Murdoch's newspapers such as The Financial Times and The Wall Street Journal contain specialized, financial information that still commands value. As Murdoch confirms,

[i]n the new business model, we will be charging consumers for the news we provide on our Internet sites. The critics say people won't pay. I believe they will, but only if we give them something of good and useful value. Our customers are smart enough to know that you don't get something for nothing.¹⁵⁵

Yet Murdoch's attempt to regain control has been the exception to the rule. Google does direct a large amount of readers to news websites, and newspapers do not want to lose that reader base. For many news organizations, their print arm has become a financial deadweight. Online ad-revenue has failed to yield enough profit to offset what the classified section used to provide.¹⁵⁶ If news organizations actually had a choice, they could create a "robot.txt" file to restrict Google's access to their web pages.¹⁵⁷ Yet the majority of major newspapers have failed to restrict Google, signaling that they have little choice but to go along with Google aggregation of news because "[n]ewspaper publishers do not want to cut off the traffic they get from Google's search and news services"¹⁵⁸

C. Filtering and Weighing Public Policy

This note's introduction raises two concerns regarding the interplay between fair use and public policy: 1) how will courts filter legitimate public policy considerations from convenient ones and 2) how much weight should courts afford those policies? Addressing the first issue in this case is troubling for two reasons. First, the same policy position can be

competitor); see also *Bing Tries to Sign Up Newspapers: Web-Wide War*, THE ECONOMIST, Nov. 28, 2009, available at <http://www.economist.com/node/14955213> (stating that news has emerged that Microsoft and News Corp. are talking about an exclusive deal.)

¹⁵⁵ Rupert Murdoch, Editorial, *Journalism and Freedom*, WALL ST. J., Dec. 8, 2009, at A21, available at <http://online.wsj.com/article/SB10001424052748704107104574570191223415268.html>.

¹⁵⁶ See *More Ad Troubles for Papers*, CHI. TRIB., Sep. 8, 2010, at C26. This loss can also be attributed to web sites such as Craigslist, which only charge for certain types of advertisements. See Eric Pfanner, *Craigslist Circles the Globe With Online Classifieds, One City at a Time*, N.Y. TIMES, Jan. 17, 2005, at C3, available at <http://www.nytimes.com/2005/01/17/technology/17craigslist.html>. However, the exact amount of loss is impossible to gauge given that Craigslist only charges for some types of ads. *Id.*

¹⁵⁷ A correctly written robot.txt file does not prevent everyone from accessing a website. So for example, to stop the Googlebot from seeing your /admin directory on your webserver, you would write: "User-Agent: Googlebot
Disallow: /admin/". See Matthew D. Lawless, *Against Search Engine Volition*, ALB. L.J. SCI. & TECH. 205, 219 n.70 (2008).

¹⁵⁸ Helft, *supra* note 19.

both legitimate and convenient. A policy position is legitimate when a company's action directly benefits society in some way. A policy position is convenient when it benefits the company equally if not more so than society, making it difficult for a court to see the policy's true beneficiary. For example, one legitimate policy benefit of Google News is that it has given people greater access to information via several different news sources. Yet this policy is convenient for Google because, as a search engine and information aggregator, increasing access to information through its own products benefits Google just as much as the public.

Second, a court's acceptance of convenient policy benefits sets precedent that companies in the future could abuse. This is especially true given how *Kelly*, *Field*, and *Perfect 10* have collectively defined "transformative" as facilitating access to information. As Google and other companies further organize and aggregate information on the web, they will have an opportunity to invoke the public benefit of increased access to information to their own advantage. As a result, fair use's protection will expand, giving people less incentive to produce original work. To be fair, that incentive does not disappear. Newspapers, for example, still make some revenue from advertisers when users click on an article's link displayed by Google News. But as fair use questions arise online, courts should be mindful of the precedent they set by accepting convenient policy benefits. These policies factor into a court's determination of whether a work is transformative and provide companies like Google with an advantage within fair use's first factor.

Once a court identifies a policy benefit, it must next decide how much weight to afford that benefit. But that task is more complicated than one would imagine. *Kelly*, *Field*, and *Perfect 10* took policy into account concurrently within their analysis of a work's transformative nature and did not treat policy as its own factor. In addition, because courts have found that policy benefits, such as increased access to information, contribute to a work's transformative nature,¹⁵⁹ courts have already assigned a great deal of weight to policy without realizing it. Finally, when a work does benefit the public, it is more likely that a court will find it be transformative, giving the infringing party an advantage in the fair use analysis. This type of analysis unfairly tilts the balance of a fair use analysis in favor of an

¹⁵⁹ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 818, 819 (9th Cir. 2003) (defining transformative to be an improved access to information); see also *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000) (explaining that a newspaper's purpose to provide context for its articles was one factor in holding that a newspaper's reproduction of a model's photograph from her portfolio was transformative).

infringing party who can show the public benefits of its work. Before reaching a settlement, AFP even encouraged the court not to “be taken in by Google’s efforts to wrap itself in a ‘public interest mantle[.]’”¹⁶⁰ Courts should assign some weight to policy, but they first must realize when they are doing so. Too much emphasis on this unofficial, yet relevant influence risks further blurring the line of what is and what is not protected under fair use. After all, search engines are only beneficial if there is something to search for.

CONCLUSION

As the Internet’s role in society continues to expand, news organizations will continue to display content that companies will organize and aggregate. When copyrightability and infringement concerns arise, fair use will inevitably come into the picture. This, in turn, will give courts more opportunities to interpret and understand the interplay between fair use and public policy in an online arena. Yet with this opportunity comes responsibility. As *Harper* pointed out, fair use does not “empower[] a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.”¹⁶¹ Given the recent definitions of “transformative” set forth in *Kelly*, *Field*, and *Perfect 10*, public policy greatly contributes to a work’s “transformative” nature. Courts must still balance all four factors in their analysis. But they must treat policy with caution and with the understanding that it wields great influence over fair use’s first factor.

¹⁶⁰ *AFP’s Response in Opposition*, *supra* note 50, at 4.

¹⁶¹ *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)).

