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INTENT IN FAIR USE

by
Eva E. Subotnik*

This Article explores the role of intent in the context of fair use. Specifically, it examines whether a claim of fair use of a copyrighted work should be assessed solely from an “objectively reasonable” vantage point or should, additionally, allow for evidence from the subjective perspective of the user. Courts and scholars have largely sided with the former view but have failed to explain fully why this should be the case or whether there might be countervailing benefits to considering evidence of subjective intent. Crucially overlooked is the possibility that taking the user’s perspective into account would serve copyright’s utilitarian structure by stimulating socially beneficial uses that would not otherwise occur. In addition, formal recognition of the role intent plays in fair use would bring needed transparency to judicial practices in this area. This Article first develops a framework for evaluating the degree to which courts, parties, and scholars have deemed a user’s conscious compliance with fair use principles relevant to the fair use analysis. It then argues for a limited role for evidence of subjective intent, proposing criteria for when such evidence should, and should not, be weighed in the fair use calculus.

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INTRODUCTION

Copyright laws, it is often said, exist to advance social welfare. The mechanisms for ensuring that they do so, however, are largely external to the application of the laws to individual cases. This absence of rigorous, individualized assessment of cultural outputs is by design. Departing from the realm of patents, Congress and the courts have eschewed heightened scrutiny of the contribution to the store of knowledge made by each work for which copyright protection is sought. Under this approach, courts have not flinched from protecting everything from pornographic films to phonebook yellow pages in the vast churn that, it is hoped, inures to the overall benefit of the public.¹

Perhaps surprisingly, these same institutions have revealed a greater propensity for individualized assessment with respect to what we might term copyright inputs—that is, the motivations of individual creators. This propensity has at times taken the form of interest in the mental processes of the relevant actors. For example, whether such sundry articles as heart-shaped measuring spoons are eligible for copyright protection may turn on whether the designer was inspired by artistic, rather than functional, considerations.²

Such willingness to engage with intentionality in so serious a fashion—even in the limited circumstances in which it appears—may strike some as strange or outmoded. Literary theory long ago demoted authorial intent from its privileged perch when it comes to the interpretation of works.³ Furthermore, to the extent that copyright is premised around a

¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (determining yellow page advertisements protectable); *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 854, 859–60 (5th Cir. 1979) (determining adult film protectable). *But see* *Mazer v. Stein*, 347 U.S. 201, 220–21 (1954) (Douglas, J., concurring) (raising an eyebrow on the question of whether door knockers, piggy banks, and ash trays are protectable “writings”).

² *See* *Bonazoli v. R.S.V.P. Int'l, Inc.*, 353 F. Supp. 2d 218, 225–26 (D.R.I. 2005).

³ *See, e.g.,* ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 148 (Stephen Heath trans., 1977) (“[A] text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author.”); Michel Foucault, *What Is an Author?*, in

rational creator model,⁴ actual creative experiences are often seen as beside the point.⁵ Accordingly, if there is a policy justification for considering the subjective processes of copyright participants in individualized settings, it must be that doing so will somehow further copyright's welfare-enhancing goals.

This Article tests that justification in a particular context, the fair use doctrine, and argues—perhaps counterintuitively—that evidence of a user's subjective intentions should be considered under certain conditions as a way of securing the ends of copyright. Fair use presents an ideal case study in part because the legal treatment of user knowledge and intent is in flux. A principled basis for nudging the doctrine in one direction or the other is therefore in order.

From one perspective, the fair use inquiry appears solely objective in nature. In a case brought against Google's image-based search engine, for example, the court found the purpose and "social benefit" of displaying thumbnail versions of copyrighted images in response to search queries to be self-evident.⁶ In concluding that Google had used the plaintiff's images "in a new context to serve a different purpose," the court made no reference to Google's internal goals.⁷ Another court recently put the matter more bluntly, ruling that a "stated intention" to fall into step with the elements of fair use is not a prerequisite for fair use.⁸ What is critical, the court said, is how the challenged work "appears to the reasonable observer, not simply what an artist might say" about the work.⁹

TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 159–60 (Josué V. Harari ed., 1979) ("Although, since the eighteenth century, the author has played the role of the regulator of the fictive . . . it does not seem necessary that the author-function remain constant in form, complexity, and even in existence."); W.K. Wimsatt, Jr. & Monroe C. Beardsley, *The Intentional Fallacy*, in W.K. WIMSATT, THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY 3, 5 (1954) ("The poem is not the critic's own and not the author's (it is detached from the author at birth and goes about the world beyond his power to intend about it or control it). The poem belongs to the public.").

⁴ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 57 (2003) (describing copyright using economic theory).

⁵ Professor Jessica Silbey has recently challenged this indifference by providing a qualitative, interview-based account of the influence of intellectual property laws and other motivating factors upon creators and inventors. JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (forthcoming Dec. 2014); see also Jessica Silbey, *Patent Variation: Discerning Diversity Among Patent Functions*, 45 LOY. U. CHI. L.J. 441, 443–45 (2013).

⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

⁷ *Id.*; accord *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 292 (S.D.N.Y. 2013) (granting summary judgment in favor of Google Books project on basis of fair use and de-emphasizing any weight that might be given to Google's underlying profit motivations).

⁸ *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

⁹ *Id.*

From another perspective, however, issues relating to the intentions of parties invoking fair use have proven to be a recurrent theme in copyright litigation.¹⁰ Indeed, a number of scholars have expressed the concern that, in actuality, courts too often focus on the subjective intentions of fair use defendants. Professor Laura Heymann, for example, claims that courts sometimes fasten not on how a challenged work is “perceived or interpreted but [on] what the [secondary] author intended or hoped to achieve.”¹¹ More enlightening, she contends, is evidence of reader response to the second work and the degree to which a “distinct and separate discursive community” has arisen around it.¹² If such communities have arisen, that is some indication that “the meaning of the expression has been transformed”¹³ and that the second author’s activities have “promote[d] the delivery of new works to the public, the ultimate goal of copyright law.”¹⁴

These peripatetic interpretations of the law are occurring alongside social developments that, additionally, make examination of the role of user intent in fair use especially timely. This is an era of unprecedented effort to educate the American public about copyright law.¹⁵ Of more particular relevance, there are a number of areas in which individuals, organizations, and communities are being encouraged to internalize fair use principles and sensibilities. Universities and other large institutions have provided their faculties and other employees with training sessions on copyright law and armed them with checklists for making fair use determinations.¹⁶ Likewise, the movement to encourage creative communi-

¹⁰ See, e.g., *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173 n.6 (9th Cir. 2012) (applying “the general rule that a party claiming fair use must act in a manner generally compatible with principles of good faith and fair dealing” (quoting *Perfect 10*, 508 F.3d at 1164 n.8) (internal quotation marks omitted)); *Davis v. Walt Disney Co.*, No. Civ. 04-1729 DWF/SRN, 2004 WL 1895234, at *5–6 (D. Minn. Aug. 23, 2004) (declining to grant motion to dismiss on fair use grounds without evidence of defendants’ intent in using plaintiffs’ copyrighted material).

¹¹ Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 448, 452 (2008).

¹² *Id.* at 449.

¹³ *Id.* at 455.

¹⁴ *Id.* at 448–49.

¹⁵ See, e.g., Anne Flaherty, *Music, Movie Industry to Warn Copyright Infringers*, AP: BIG STORY (Feb. 26, 2013), <http://bigstory.ap.org/article/music-movie-industry-warn-copyright-infringers> (describing copyright alert system meant “to educate the average Internet user”).

¹⁶ See, e.g., *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1219–20 (N.D. Ga. 2012) (describing mechanisms for ensuring copyright compliance at Georgia State University that “explicitly make[] professors responsible for determining whether a particular use is a fair use”), *rev’d on other grounds sub nom.* *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Building on Others’ Creative Expression: Fair Use of Copyrighted Materials*, COPYRIGHT CRASH COURSE, <http://copyright.lib.utexas.edu/copypol2.html>; *Checklist for Conducting a Fair Use Analysis Before Using Copyrighted Materials*, CORNELL UNIV.: COPYRIGHT INFO. CENTER, http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf; *Fair Use Checklist*, COPYRIGHT

ties of practice, such as documentary filmmakers, to “reclaim” fair use by developing and adhering to codes of best practices reflects a drive toward more conscious engagement with fair use principles.¹⁷ It therefore seems inevitable that evidence of user intent is increasingly going to be tendered in fair use litigation.

Against the backdrop of these phenomena that manifest newfound encouragement to engage with fair use, this Article formulates, for the first time under one umbrella, a framework for addressing the various ways in which issues of user intent and knowledge hover at—and sometimes pass through—the gates of fair use. What is even meant by terms such as “intent,” “good” or “bad” faith, and “willfulness”? In one context, we might mean the degree to which a user intended to comply with the law of fair use. For example, a user of copyrighted materials may have sought out legal counsel about a contemplated use and proceeded with the use on the basis of a favorable recommendation. In another context, we might mean the degree to which a user—without having any specific understanding of the law—intended to use copyrighted sources in ways that in fact complied with fair use principles.

Categorizing the types and ranges of intent that might be relevant makes it possible to pose the next logical question, which is whether one or more forms of user intent should play a role in the analysis. At first glance, the view that fair use should be judged according to objective standards alone has much to recommend it. Most critically, it readily squares with Supreme Court precedent suggesting that the relevant inquiry is whether the transformative character of a use may “reasonably be perceived.”¹⁸ On a theoretical level, it also coheres with the view that fair use is not simply a “bizarre” exception to the copyright monopoly, but a “necessary part of the overall design” of a system charged with promoting the progress of science and the useful arts.¹⁹ If such is the case, then fair use should principally turn on whether a use advances that cause as measured on some objective scale.²⁰ Indeed, scholars have advocated, toward this end, that courts take account of—along with reader response to the use²¹—the views of “reasonable audience members”;²² the “meaning-

ADVISORY OFFICE, COLUM. UNIV. LIBRARIES (Mar. 22, 2013), <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>.

¹⁷ E.g., PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 127 (2011).

¹⁸ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994).

¹⁹ Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

²⁰ See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998) (“The ultimate test of fair use . . . is whether the copyright law’s goal of ‘promot[ing] the Progress of Science and useful Arts,’ U.S. Const., art. I, § 8, cl. 8, ‘would be better served by allowing the use than by preventing it.’” (alteration in original) (quoting Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992))).

²¹ Heymann, *supra* note 11, at 449.

making that occurs as individuals and interpretive communities engage the work”;²³ and the facilitation of “creative engagement with intellectual products.”²⁴

While an objective approach has undeniable virtues, an approach that is solely objective in nature has significant drawbacks as well. First, it may mask the degree to which courts inevitably inquire into user intent in certain kinds of cases. Second, and at the heart of this Article, an exclusively objective approach does not take into account the way in which the “breathing space”²⁵ afforded by fair use is experienced by potential users of copyrighted works. This is unfortunate because the anticipated need to rely on fair use entails a fair amount of risk taking by users. Accordingly, to the extent that copyright law can signal to users that their good faith in making a use—in the sense that they contemplate not just their own contributions but also the potential harms to the copyright owners of the underlying works—will factor positively into a fair use defense, the net effect should be to stimulate socially beneficial uses that would not otherwise occur.

The relevance of a user’s good faith in making a use, however, has not been fully theorized in the case law or scholarship to date.²⁶ As Professor Anthony Reese has put it, the debate over “a user’s mental state in determining fair use . . . has generally centered on whether someone who *cannot* demonstrate that she acted in good faith should nonetheless be entitled to claim fair use, rather than on whether demonstrated good faith should affect the fair use decision.”²⁷ There are several possible explanations for this gap. Evidence of subjective processes is notoriously hard to discern and document in a reliable way and is subject to manipulation. Opening such an inquiry, in addition, may be viewed as detrimental to a flourishing fair use doctrine, since putting weight on user intent risks barring uses by those unable to express—or to afford competent legal counsel to help them express—legally compliant goals.

²² Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 *LAW & LITERATURE* 20, 28 (2013).

²³ H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 *HARV. J.L. & TECH.* 335, 338 (2011).

²⁴ William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1768 (1988).

²⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁶ Professor Lloyd Weinreb addressed this issue, to some extent, by calling for an inquiry into “fairness” and “the community’s established practices and understandings” as part of the fair use analysis. See Lloyd L. Weinreb, *Commentary, Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 *HARV. L. REV.* 1137, 1161 (1990).

²⁷ R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 *COLUM. J.L. & ARTS* 133, 179 (2007); see also Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 *FLA. L. REV.* 107, 121–22 (2001) (noting that courts have largely held “immaterial” intent in the sense of whether a “defendant holds a good faith belief that the appropriated work is free for all”).

This Article bridges the gap in the literature by exploring the questions of whether there is an underappreciated and valuable role for the consideration of user intent in fair use, and how that role might be constituted.²⁸ It goes beyond the discrete contexts of parody and appropriation art, where much of the recent judicial and scholarly attention has focused, to map the different ways in which intent and knowledge are alluded to, if not specifically invoked, by parties and courts. Its contributions in this regard are to deconstruct the concept of intent in this area and to explore what it might mean to be a “well-intentioned”²⁹ user and whether being so should afford any benefits.

In Part I, the Article examines the current treatment of intent in copyright law generally and in fair use specifically. It demonstrates that issues of knowledge and intent are by no means foreign to copyright law. This Part also provides a classification of the forms of intent that have been addressed in copyright litigation over fair use.

In Part II, the Article offers a normative account of the relevance of intent in fair use, which is grounded on two primary justifications: the encouragement of socially beneficial uses and the need for transparency. With respect to the first justification, even if uses can be clustered in ways that bring a degree of predictability to the fair use analysis,³⁰ some creators are clearly chilled from making borderline uses because they want to steer well clear of the boundary between fair use and infringement.³¹ Thus, in accordance with the utilitarian principles that animate copyright law, the law should give credit to users who conscientiously attempt to comply with fair use as a way of encouraging reasonable risk taking that both benefits the public and mitigates harm to copyright holders. With respect to the second justification, formally recognizing the role that the artistic intentions of the user–author play would bring needed transparency to fair use adjudication.

Part III proposes criteria for determining when the consideration of subjective intent is appropriate as a supplement to the objective evidence. Specifically, where a user of a copyrighted work demonstrates an attempt to conform to resources that reasonably reflect the law of fair use, such a use should more readily qualify for fair use protection in close cases. Im-

²⁸ Professor Wendy Gordon has suggested the need for further research in this area. See Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 90 (2004) (“[T]he perspective I suggest here [in fair use cases] puts more focus and importance on the defendant’s ordinary expectations regarding market involvement.”).

²⁹ See *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring) (maintaining that fair use is “not, as its label may connote, a privilege conferred on the well-intentioned”).

³⁰ Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009).

³¹ See, e.g., PATRICIA AUFDERHEIDE ET AL., COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 48 (2014).

portantly, however, and as will be discussed below, failure to make this showing should not prejudice a fair use claim. In addition, evidence that bears on whether a user (whether aware of the law or not) intended to accomplish goals that are consistent with fair use should be deemed relevant. But courts must be careful to assess the user's intentions in their full context and not to be swayed by "gotcha" evidence in this regard. Applied in individual cases, the approach taken by this Article can be justified on the ground that, across the board, it "promote[s] the Progress of Science and useful Arts."³²

I. BACKGROUND ON THE ROLE OF INTENT

The principal statute governing fair use requires, among other things, consideration of the "purpose and character of the use" claimed to be fair.³³ It does not employ terms such as "intentionally" or "knowingly" or "willfully." But the failure to specify whether any such "purpose" or "character" could be interpreted to include the subjective goals of the user, in addition to being judged by objective criteria, should not be dispositive. Indeed, as this Part first lays out, courts adjudicating various copyright issues have frequently resorted to examining the intent of parties in the face of varying levels of statutory prompting.

A. *Intent in Copyright Law*

While more familiar in the realm of criminal law, fraud, and the like, questions of intentionality are not totally foreign to copyright law, and, in some areas, they have been raised by courts as helpful glosses on the statute.³⁴ For example, while one does not need to intend to be an author in

³² U.S. CONST., art. I, § 8, cl. 8.

³³ 17 U.S.C. § 107 (2012). The text of the full statute is as follows:

"Notwithstanding the provisions of sections 106 and 106A, 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."

³⁴ See, e.g., Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 391–410 (2002) (cataloging instances of use of intent in copyright cases). This is so even though some describe copyright as an area

order to produce a copyrightable work, one does need intent in order to be a co-author. Specifically, by statute, a “joint work” requires an “intention” by both authors that their contributions be combined into a unified work.³⁵ Some courts have gone further to require explicit proof of an intent “to be co-authors” as a way of weeding out anemic claims.³⁶ A different sort of intent, as mentioned above, is considered in connection with the copyright protection available for industrial articles.³⁷ Again without specific statutory prompting, a number of courts have inquired into whether the features under consideration were the product of artistic rather than functional goals of the designers, with greater protection available for the former.³⁸

By contrast, on the fundamental issue of liability,³⁹ the intent—to copy or to infringe—of one accused of ordinary copyright infringement is not formally relevant.⁴⁰ Indeed, many scholars have criticized the ease with which one unwittingly may become an infringer of copyright,⁴¹ and a number have argued that the strict-liability casting of the infringement analysis should be reformed.⁴² And yet, even this statement about the

of law largely devoid of reference to intent. See Simon J. Frankel & Matt Kellogg, *Bad Faith and Fair Use*, 60 J. COPYRIGHT SOC’Y U.S.A. 1, 7–8 (2012).

³⁵ 17 U.S.C. § 101 (defining “joint work”).

³⁶ *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998). The court described the relevant standard as a “nuanced inquiry,” with room for both subjective and objective evidence. *Id.* at 201. For an interesting examination of these issues, see Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 VA. L. REV. 1683 (2014).

³⁷ 17 U.S.C. § 101 (defining “pictorial, graphic, and sculptural works”).

³⁸ See, e.g., *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 927 (7th Cir. 2004); *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145–46 (2d Cir. 1987); see also Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741 (1983).

³⁹ The provisions relating to liability for criminal copyright infringement do require willful infringement, 17 U.S.C. § 506, but are outside the scope of this Article. The Ninth Circuit recently interpreted “willfully” to require proof that the “defendant knew he was acting illegally rather than simply that he knew he was making copies.” *United States v. Liu*, 731 F.3d 982, 985 (9th Cir. 2013).

⁴⁰ See 17 U.S.C. § 501(a). Furthermore, the threat of liability for “subconscious” copying—copying of which the copier was consciously unaware and did not intend to do—persists. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482–84 (9th Cir. 2000); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976).

⁴¹ See, e.g., John Tehranian, Introduction, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 547–48.

⁴² See, e.g., Ciolino & Donelon, *supra* note 34, at 354–55; Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1028–32 (1990) (book review). But see Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTELL. PROP. L. REV. 1, 2 (2013) (challenging “the orthodox view that copyright infringement is strict liability” and arguing that “due to the important role played by the fair use doctrine, copyright infringement, properly understood, already employs a fault standard”) (emphasis removed); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1497 (2007) (same).

conditions for infringement may oversimplify things. For one thing, the very concept of copying, a critical element of infringement, seems to imply some degree of intentional activity for most situations beyond the accidental-clicking-of-the-mouse (perhaps the modern cousin to the accidental-sitting-on-the-photocopier of yesteryear).⁴³ Indeed, the absence of “volitional conduct” has recently been used to shield defendants from direct liability for copyright infringement.⁴⁴

Furthermore, issues of intent and knowledge, as they bear on a party’s liability, are increasingly being taken into account in the realm of secondary liability. Largely as a matter of judicial—rather than statutory—authorization,⁴⁵ a party’s liability for contributory copyright infringement has long turned, in part, on its knowledge of third-party infringing activity.⁴⁶ More recently, the Supreme Court has put a spotlight on a defendant’s liability premised upon its subjective “intent” to induce third-party infringement.⁴⁷

In addition, courts have interpreted the safe harbors from liability available under the Digital Millennium Copyright Act (DMCA)⁴⁸ in ways that focus squarely on the extent to which the defendant service provider knew or was aware of instances of infringement by its users. The courts interpreted the statutory term “actual knowledge” to refer to the service provider’s subjective knowledge of specific infringement on its system as

⁴³ *Liu*, 731 F.3d at 991 (“Copying is of necessity an intentional act.”). Indeed, the Ninth Circuit’s recent criminal copyright jurisprudence appears to be importing an “intent to copy” requirement into ordinary civil copyright infringement. *See United States v. Anderson*, 741 F.3d 938, 946 (9th Cir. 2013) (“[T]he key distinction between civil and criminal copyright liability is that civil liability requires the general intent to copy, whereas criminal liability requires the specific intent to violate the law.”).

⁴⁴ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131–32 (2d Cir. 2008).

⁴⁵ *See, e.g., Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434–35 (1984) (“The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.”). Some argue that the wording of the 17 U.S.C. § 106 exclusive rights, which includes the right “to authorize” the exercise of rights, furnishes a statutory basis for secondary liability. *See Sony Corp.*, 464 U.S. at 435 n.17; 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A] (2013) (citing sources).

⁴⁶ *See, e.g., Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁴⁷ *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37, 940 n.13 (2005); 3 NIMMER & NIMMER, *supra* note 45, § 12.04[A][4][b] (discussing rule of *Grokster*). The Court also suggested how such intent may be imputed to a corporate entity, including statements made in internal company documents and the advertising and distribution of software products that reflect an “aim[] to satisfy a known source of demand for copyright infringement.” *Grokster*, 545 U.S. at 939.

⁴⁸ These safe harbors are codified at 17 U.S.C. § 512.

one basis for disqualifying the provider from a DMCA safe harbor.⁴⁹ By contrast, an “aware[ness] of facts or circumstances from which infringing activity is apparent”—so-called “red flag” knowledge—is to be measured by an “objective” standard that nevertheless inquires into subjective perception, asking whether the provider was “subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”⁵⁰ For one court, this latter scenario was potentially triggered where employees of a service provider reviewed videos uploaded by users showing people lip-syncing to the entirety of well-known, copyrighted songs.⁵¹

Turning to fair use, one could argue, at a conceptual level, that intent *to make a fair use* entails a corresponding intent *not to infringe* and that it would be more efficient to frame the role of good-faith intent, if at all, as intent not to infringe. This Article focuses, instead, on the role of intent as part of the substance of the fair use analysis. Textually, the fair use statute’s inquiry into the “purpose” of the use provides a supportable foundation for doing so. This approach also correlates with the trend in favor of educating users of copyrighted materials to think, positively, in terms of “fair using” those materials, as opposed to, negatively, in terms of “not infringing.”⁵² In addition, fair use also offers a number of discrete criteria with which users might attempt to comply and which can be used as a basis for determining whether a subjective claim of fair use is plausible.

At present, the most directly identifiable phase at which intent plays a role in fair use is at the stage of remedies. Specifically, section 504(c) of the statute provides for statutory damages, and it explicitly mandates remittitur of such damages where an “infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was

⁴⁹ *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013) (citing *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012)).

⁵⁰ *Viacom Int’l*, 676 F.3d at 31 (alteration in original) (quoting 17 U.S.C. § 512(c)(1)(A)(ii)) (internal quotation marks omitted); *see also* *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013) (an email from a user of a service to the service provider “could act as a red flag”). In *Viacom*, for example, the Second Circuit suggested that internal correspondence of YouTube’s founders and employees, which referred to “clearly infringing” and “blatantly illegal” clips on the system, might be sufficient to demonstrate disqualifying knowledge or awareness by YouTube. *Viacom Int’l*, 676 F.3d at 34 (internal quotation marks omitted). On remand, however, the plaintiffs were unable to carry their burden of proving YouTube’s knowledge or awareness of specific infringement. *Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

⁵¹ *See Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 546 (S.D.N.Y. 2013) (denying summary judgment to defendant video-sharing platform in such instances).

⁵² *See* AUFDERHEIDE & JASZI, *supra* note 17, at 127 (describing “how to fair use” works protected under copyright).

a fair use under section 107.⁵³ This directive, however, applies only to very narrow categories of infringers.⁵⁴

More commonly at issue is an adjacent provision, which provides for a court's discretionary increase of statutory damages where the "infringement was committed willfully" or decrease where the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."⁵⁵ While intent in this provision is couched in terms of "infringement,"⁵⁶ the evidence before courts often relates to whether the infringer reasonably thought that she was making a fair use of the copyrighted materials.⁵⁷ The Sixth Circuit, for example, has stated that it would allow "a good-faith belief in fair use to negate willfulness only if a defendant has taken reasonable steps to assure fair use before infringement, not as a 'post-hoc rationalization concocted to skirt liability.'"⁵⁸

⁵³ 17 U.S.C. § 504(c)(2).

⁵⁴ The categories include circumstances in which copies of copyrighted works are made by nonprofit educational institutions, libraries, or archives, and in which public performances of "published nondramatic literary work[s]" are made by public broadcasting entities. *Id.* The full provision provides: "In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work."

⁵⁵ *Id.*

⁵⁶ *Id.*; see also *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (noting that for purposes of section 504(c)(2), "willful copyright infringement requires evidence that a defendant has knowingly or recklessly infringed on the copyright"); 5 NIMMER & NIMMER, *supra* note 45, § 14.04[B][3][a] (indicating that "'willfully' means with knowledge that the defendant's conduct constitutes copyright infringement").

⁵⁷ See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) ("The plaintiffs do not contest the good faith of Mr. Smith's belief that his conduct constituted fair use; only the reasonableness of that belief is challenged. . . . [W]e cannot say that the defendants' belief that their copying constituted fair use was so unreasonable as to bespeak willfulness.").

⁵⁸ *Bridgeport*, 585 F.3d at 279 (quoting *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 584 n.9 (6th Cir. 2007)). Subjective belief that a use was fair was unavailing to set aside a jury award of enhanced statutory damages for willful infringement where: "[T]here is no dispute that [defendant] failed to respond to

These types of references to intent and knowledge, as a basis for adjusting statutory damages, are illuminating because they suggest methods by which courts can assess subjective claims of fair use. Nevertheless, an award of damages is, of course, predicated on the underlying liability of a defendant. There are, however, compelling reasons to focus on the role of intent at the liability phase itself. First, even a reduced damage award could amount to a large dollar figure, especially to a struggling artist, if many copyrighted works are at issue. But more importantly, a threat of liability may affect the uses of works that are undertaken in the first place. And a determination of liability likewise may affect the ability to exploit a secondary work in downstream markets. In short, factoring in good-faith intent solely at the remedial phase risks depriving the public of uses of works that courts, to some extent, deem forgivable.

B. *Intent in Fair Use*

The issue of intent in fair use emerges in several key contexts: court opinions, litigant statements, and materials aimed to guide fair use decision making. Those who invoke user “intent” in these contexts are often not precise in what they mean by that term and related concepts, such as “good faith.” An analysis of the case law and rhetoric surrounding fair use reveals at least three separate dimensions to user intentions. These dimensions can be measured on the following spectrums: intent to communicate new meaning, intent to comply with the law of fair use, and intent to be a good citizen.

The first spectrum reflects the degree to which the user intends to critique, comment on, report on, parody, or otherwise transform an earlier work (“*intent to communicate new meaning*”), as opposed to intending merely “to get attention or to avoid the drudgery in working up something fresh.”⁵⁹ That is, a user might intend to convey new meaning in a way that is generally compatible with fair use principles even if the user did not, or could not, frame his expressive goals in legal terminology. User intent along this spectrum is sometimes invoked because having the right purpose—a transformative purpose⁶⁰—can make the difference be-

[plaintiff] after receiving letters notifying them of possible infringement. Nor is there any evidence that the defendant made an effort to compare the two songs and evaluate whether the use of elements of “Atomic Dog” was actually “fair,” as contrasted with the defendant in *Princeton University Press*, who studied the fair-use doctrine and consulted an attorney prior to creating university course packs with infringing material.” *Id.* (citing *Princeton Univ. Press*, 99 F.3d at 1384, 1392).

⁵⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

⁶⁰ Transformativeness measures “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579 (alteration in original) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4,901)). The transformativeness analysis is usually introduced under the first statutory factor, which examines “the purpose and character of the use.” 17 U.S.C. § 107(1). Previously, the “purpose and

tween a work that “transforms” an earlier work, but infringes as a derivative work, and a work that qualifies as a fair use.⁶¹ Indeed, Professors Anthony Reese and Neil Netanel have documented that courts tend to focus on whether the use of copyrighted material reflects a distinct expressive purpose, rather than an alteration of content, in determining transformativeness.⁶²

In other settings, the invocation of intentionality appears to refer to the user’s intentions to make a lawful fair use (“*intent to comply*”)—that is, to the user’s conscientious attempt to adhere to the four statutory factors plus case law,⁶³ as opposed to an intention to usurp an economic interest of a copyright holder without any corresponding desire to contribute some new expression or meaning. In an important sense, this second spectrum measures a user’s intentions not only to communicate new meaning but also to mitigate the potential economic harms to the copyright owners of the underlying material. To expect evidence of such intent in the ordinary case would be surprising. After all, even if some creators are savvy enough to stake out positions on copyright policy,⁶⁴ one nevertheless does not expect the casual user of copyrighted works to consider actively whether his use would be infringing or might instead qualify as a fair use.⁶⁵ The case may be different, however, for those whose professions or projects have made them aware of the risks of copyright litigation. Those working for larger companies or institutions, for instance, may have access to legal counsel and trainings on how to determine whether a use is likely to be deemed fair.

Courts have occasionally also deemed relevant to the fair use analysis the moral context surrounding a user’s conduct—conduct that may bespeak intentions to act with good moral character (“*intent to be a good citi-*

character” of a use had inquired into “whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.” *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992).

⁶¹ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998).

⁶² Professor Reese, reviewing appellate cases, concluded that courts have tended to focus on a defendant’s *purpose* rather than *alteration of content* in the transformativeness inquiry. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 494 (2008). This suggests, he posits, an “inescapably comparative” approach between the plaintiff’s and defendant’s respective purposes, but leaves open whether to focus on the actual purpose each had in mind; a reasonable author’s purpose; or something else. *Id.*; accord Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 747 (2011).

⁶³ Of course, to be more precise, one would look for attempted adherence to the law as interpreted by courts in the relevant federal circuits.

⁶⁴ See, e.g., Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 536 (2009) (describing statements of some creators of fanworks).

⁶⁵ See generally Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1500–03 (describing the explosion of creativity facilitated by the internet); Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 303–09 (2006) (same).

zen"). In this regard, courts sometimes suggest that maintaining certain standards with respect to conduct that is ancillary to the normal contours of the fair use inquiry is relevant to that inquiry. Intent with respect to that ancillary conduct is what this Article calls "intent to be a good citizen." In *Harper & Row v. Nation Enterprises*, for example, the Court rejected *The Nation* magazine's fair use claim with respect to its quotation from President Ford's unpublished manuscript in part based upon its poor showing on this third spectrum.⁶⁶ *The Nation* had obtained the manuscript "secretly," from an "unidentified person," and its editor "knew that his possession of the manuscript was not authorized."⁶⁷ This conduct was incompatible with fair use, said the Court, because "[f]air use presupposes 'good faith' and 'fair dealing'" and "the propriety of the defendant's conduct" is "relevant to the 'character' of the use."⁶⁸

There is, to be sure, overlap among the activities to which each spectrum pertains, and evidence of intentionality may implicate more than one spectrum. Nevertheless, in order to determine whether one or more forms of intent should (or should not) be relevant to the fair use analysis, it is crucial to categorize each form with more analytical clarity than is usually employed.

1. *Intent to Communicate New Meaning*

Courts often draw upon authors' artistic or expressive purposes to inform their fair use analyses.⁶⁹ Perhaps the classic case reflecting reliance on user intent to communicate new meaning—in support of fair use—was *Blanch v. Koons*.⁷⁰ Jeff Koons had copied Andrea Blanch's photograph and incorporated an altered portion of it into a large-scale painting.⁷¹ The court quoted extensively from Koons's affidavit, in which he set

⁶⁶ Intent on the part of *The Nation* also measured low on the intent to comply spectrum, for *The Nation*'s use had not only the "incidental effect" but also the "stated" and "*intended purpose*" of usurping the copyright holder's valuable right of first publication. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (*italics in original*).

⁶⁷ *Id.* at 543.

⁶⁸ *Id.* at 562 (citations and internal quotation marks omitted). In his dissent, Justice Brennan objected to the Court's reliance on *The Nation*'s "putative bad faith" which, for him, consisted merely of a user's wrong guess as to the ultimate outcome in a hard case. *Id.* at 593–94 (Brennan, J., dissenting).

⁶⁹ See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001) (describing Alice Randall's *The Wind Done Gone* as "principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of" *Gone With the Wind*). The court also expressed interest in Randall's statement that she needed to use a scene in which "a black child [is] given to two white children as a birthday present," which she found to be "perhaps the single most repellent paragraph in Margaret Mitchell's novel." *Id.* at 1272–73 (quoting Randall's sworn declaration) (*internal quotation marks omitted*).

⁷⁰ 467 F.3d 244 (2d Cir. 2006).

⁷¹ The photograph was a sensual depiction of a woman's feet adorned in strappy sandals that had appeared in *Allure Magazine*. *Id.* at 248. Koons depicted those feet,

forth his artistic purposes, in substantiating its own conclusion that the first factor—indeed the overall fair use analysis—favored Koons’s use.⁷² For example, the court interpreted Koons’s statement that “I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives”⁷³ as reflecting the acceptable purpose of creating “new information, new aesthetics, new insights and understandings.”⁷⁴

In many ways, *Blanch* heralded an expansion of transformative fair use to include uses directed broadly toward the genre to which the copyrighted work belonged.⁷⁵ This easing of the conditions under which one might use a copyrighted work coheres with Professor Peter Jaszi’s suggestion that *Blanch* might represent a postmodern turn in the direction of copyright law insofar as “it may signal a general loosening of authors’ and owners’ authority over, by now, not quite so auratic works, allowing greater space for the free play of meaning on the part of audience members and follow-up users who bring new interpretations.”⁷⁶ Indeed, the Supreme Court had indicated that some aspects of the transformative-ness inquiry were to be governed by standards that strayed from intentionality: the Court had stated that the threshold question is whether the allegedly infringing work’s “parodic character may *reasonably* be perceived.”⁷⁷

There is another way to read *Blanch*, however, and that is as fully conforming to the old Romantic author-genius view that many see as informing the development of copyright law.⁷⁸ This is on account of the

along with three other pairs, dangling over piles of sweet treats in his painting, *Niagara*. *Id.* at 247–48.

⁷² *Id.* at 247–48, 252, 255, 258.

⁷³ *Id.* at 252 (quoting Koons’s affidavit) (internal quotation marks omitted).

⁷⁴ *Id.* at 253 (citation and internal quotation marks omitted).

⁷⁵ *Id.* at 254. Earlier opinions had largely prioritized uses of a copyrighted work that were directed back at the work itself. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400–01 (9th Cir. 1997); Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).

⁷⁶ Peter Jaszi, *Is There Such A Thing As Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 116 (2009). *See also* Heymann, *supra* note 11, at 461 (reading *Blanch* in similar fashion).

⁷⁷ Campbell, 510 U.S. at 582 (emphasis added). Whether the use of the word “reasonably” was meant to refer to the decision-maker’s view, to a type of reasonable person standard, or to yet other guideposts has been addressed by later cases and scholarship. *See, e.g.,* David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 UTAH L. REV. 779, 783–84 (arguing that the Court’s formulation made clear that it is the reasonable perception of the parodic nature of a work, rather than a judge’s or jury’s personal view, that should carry the day).

⁷⁸ *See, e.g.,* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 456; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 291 (1992). In a sense, Jaszi gets at this “least interesting” reading of *Blanch* by acknowledging the possibility that the decision reflects the Second Circuit’s evolving respect for Koons as a bona fide “author” whose right to exercise “creative genius” must be afforded sufficient room

opinion's persistent reliance on Koons himself as the premier interpreter of his own work and intentions.⁷⁹ Indeed, the court in *Blanch* acknowledged the degree to which it was relying on Koons's stated artistic goals in buttressing its decision that his use was fair.⁸⁰ As Professor Rebecca Tushnet phrases it, "fair use was determined not on the basis of potential audiences' understandings of new meanings from the accused work, but on the ability of the artist to express his intentions."⁸¹ In this sense, *Blanch*-style fair use is arguably what Jaszi claims it is not: "a matter of weighing competing authorship claims" between the author and user.⁸²

Thus, on the one hand, *Blanch* seemed to represent an expansion of transformative fair use. On the other hand, it arguably made a fair use claim all the more precarious because it appeared to depend so heavily on the effective articulation of an acceptable intent by the user. Nevertheless, this approach had at least one virtue—it suggested a clear roadmap for a user attempting to mount a fair use defense: the inclusion of a statement of intent to communicate new meaning that squared with the doctrinal contours of fair use.⁸³

One way to evaluate the merits of the approach in *Blanch* is to consider the alternatives. Such an opportunity presented itself in the recent *Cariou v. Prince* case.⁸⁴ Briefly stated,⁸⁵ defendant Richard Prince, another successful "appropriation artist," incorporated approximately forty of plaintiff Patrick Cariou's photographic portraits into a series of thirty large-scale collages entitled *Canal Zone*.⁸⁶ At first the case proceeded, as in

alongside that of the authors of the source material he uses. Jaszi, *supra* note 76, at 114–15.

⁷⁹ As Professor Rebecca Tushnet puts it, in "[s]hifting to a particular expert, the artist himself, the court left the structure of expertise intact." Tushnet, *supra* note 22, at 22.

⁸⁰ *Blanch*, 467 F.3d at 255 n.5. "Koons's clear conception of his reasons for using [Blanch's photograph], and his ability to articulate those reasons, ease our analysis in this case. We do not mean to suggest, however, that either is a *sine qua non* for a finding of fair use—as to satire or more generally." Much of the Second Circuit's analysis turned on its view that Blanch had left Koons's statements unopposed. See, e.g., *id.* at 255 (quoting lengthy statement from Koons that had been offered "without contradiction").

⁸¹ Tushnet, *supra* note 22, at 22.

⁸² Jaszi, *supra* note 76, at 115. Compare this with Tushnet, *supra* note 22, at 23 ("Thus, rather than accepting that multiple meanings and interpretations can coexist, the court picked a side in a contest about true meaning, not unlike a ruling in a contracts case.").

⁸³ This was true even for a statement, like those taken from the Koons's affidavit, which had been offered "post hoc" in the context of litigation.

⁸⁴ 714 F.3d 694 (2d Cir. 2013).

⁸⁵ *Id.* at 698–704.

⁸⁶ Given the initial doubts about photography's status as a full-fledged artform, see generally Walter Benjamin, *Little History of Photography*, in *THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY AND OTHER WRITINGS ON MEDIA* 274 (Michael W. Jennings et al. eds., Edmund Jephcott et al. trans., 2008), there is a certain irony in the district court's description—echoing the Second Circuit's in

Blanch, with judicial interest in the proffered intent of the defendant artist: the district court sought evidence of intent to communicate new meaning and quoted extensively from the defendant's testimony to support its conclusion that fair use had not been established.⁸⁷ It concluded that:

Prince did not intend to comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos, and Pri[n]ce's own testimony[] shows that his intent was not transformative within the meaning of Section 107, though Prince intended his overall work to be creative and new.⁸⁸

In other words, as stated by the district court, the defendant's motivations did not measure well on the intent to communicate new meaning spectrum. The purpose of his use seemed to be the "avoid[ance of] the drudgery in working up something fresh."⁸⁹

The Second Circuit, however, rejected a large swath of the district court's operating premises. In particular, it stated flatly that "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative."⁹⁰ Furthermore, as to the notion that a defendant artist must himself supply an adequate statement of transformative purpose, the appellate court similarly stated that while such an explanation "might have lent strong support to his defense," Prince's failure to do so was not dispositive.⁹¹ Rather:

Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992)—of the plaintiff's creative and painstaking efforts to create the photographs over the course of six years of gaining his subjects' trust. See *Cariou v. Prince*, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011), *rev'd in part and vacated in part on other grounds*, 714 F.3d 694 (2d Cir. 2013). By contrast, the defendant, a self-described "artist," had testified, "I like to paint a painting and finish it within a day, day and a half tops. I like instant painting . . . [S]ome of them took two hours." Richard Prince Deposition at 7, 273–74 (Oct. 6, 2009), *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (No. 08 Civ. 11327) [hereinafter *Prince Deposition*].

⁸⁷ *Cariou*, 784 F. Supp. 2d at 349 (citing Prince's various stated intentions of paying homage to certain Modernist artists, creating artwork, emphasizing "themes of equality of the sexes," and conveying a "contemporary take on the music scene"). It is interesting to note that the testimony in *Cariou* was taken from the rough and tumble of a deposition rather than from a smoothly polished affidavit, as in *Blanch*.

⁸⁸ *Id.* While it did acknowledge that there "may be some minimal transformative element intended" in Prince's use of the photos, the district court stated that any such element was simply too minimal and too inconsistent among the *Canal Zone* paintings to aid in Prince's defense. *Id.* at 350. Ultimately, for the district court, Prince's works failed to constitute fair use on all four factors. *Id.* at 353–54.

⁸⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

⁹⁰ *Cariou*, 714 F.3d at 706. Earlier in its opinion, the Second Circuit phrased the ruling as follows: "the law does not require that a secondary use comment on the original artist or work, or popular culture . . ." *Id.* at 698.

⁹¹ *Id.* at 707. Judge Wallace viewed Prince's deposition (and presumably other) statements as potentially relevant to the transformativeness analysis, and he disagreed

[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature.⁹²

Somewhat controversially, the majority then undertook the transformative use analysis itself. Looking at the "artworks and the photographs side-by-side," the court decided that most of the artworks were transformative "as a matter of law."⁹³

While it is therefore true that the majority in *Cariou* largely eschewed reference to Prince's statements of artistic intent, it is critical to note that it did not completely reject the usefulness of these kinds of statements. Indeed, the majority itself cited Prince's deposition testimony⁹⁴ as "further demonstrat[ing] his drastically different approach and aesthetic from Cariou's."⁹⁵ The court additionally stated that a fair use defendant's explanation of intent "might have lent strong support to his defense"; that fair use should turn "not simply" on what a defendant says; and that the fair use inquiry should not be "confin[ed]" to such statements.⁹⁶ Taken together, this language signals the continued relevance of intent to communicate new meaning.

In this regard, while the labeling of a secondary work as a "parody," for example, is not formally necessary in order for fair use protection to attach,⁹⁷ courts have not hesitated to pounce on artistic statements, book

with the majority's apparent disinterest in their evidentiary value. *Id.* at 713 (Wallace, J., concurring and dissenting).

⁹² *Id.* at 707 (majority opinion).

⁹³ *Id.* at 707–08. The court focused heavily on the differing "aesthetics" of the works—indeed, it invoked the term "aesthetics" (or a related variant) six times throughout the opinion. Strikingly, the same appeals court had remarked in *Blanch* that it preferred not to "depend on [its] own poorly honed artistic sensibilities" in performing the first factor analysis in favor of deference to Koons's own explanation of his work. *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006). Koons's use "was intended to be—and appears to be—'transformative.'" *Id.* at 256.

⁹⁴ Prince's quoted testimony was to the effect that he "[doesn't] have any really [sic] interest in what [another artist's] original intent is because . . . what I do is I completely try to change it into something that's completely different. . . . I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene." *Cariou*, 714 F.3d at 706–07 (quoting Prince Deposition, *supra* note 86, at 338–39 (first and third alteration are in original)).

⁹⁵ *Id.* at 706. Arguably contradictorily, the court in the same portion of the opinion also described Prince as not going to "great lengths to explain and defend his use as transformative" as one might have normally expected an alleged infringer to do. *Id.* at 707.

⁹⁶ *Id.*

⁹⁷ The Supreme Court stated that one using a copyrighted work to create a parody need not actually "label" the resulting work a "parody"—an action that might

jackets, and other marketing materials that reflect intentions running counter to fair use goals.⁹⁸ The unauthorized *Seinfeld Aptitude Test*, for example, a trivia quiz book about the television show, was held to run afoul of copyright law.⁹⁹ The court rejected arguments by the defendants, offered during litigation, that the quiz book was “created to educate *Seinfeld* viewers or to criticize, ‘expose,’ or otherwise comment upon *Seinfeld*.”¹⁰⁰ Instead, transformativeness was found wanting because of pre-litigation statements on the back cover of the book that promoted it as a way for people “to satisfy [their] between-episode [*Seinfeld*] cravings.”¹⁰¹ Similarly, the label of “sequel” on the recent unauthorized *Catcher in the Rye* takeoff doomed the secondary author’s claim of transformative critique.¹⁰²

In sum, measuring highly on the intent to communicate new meaning spectrum (as in *Blanch*) can help the fair use claimant; measuring neutrally (as was mostly the case in *Cariou* for the appellate court) does not appear to harm the fair use claimant’s chances of success; and measuring poorly (as in the *Seinfeld* case) will harm the fair use claimant’s defense.

2. *Intent to Comply*

Clearly, the most straightforward way in which to demonstrate intent to comply with fair use principles is consultation of the law—typically through seeking out and adhering to the advice of legal counsel—in advance of a use. Parties on the receiving end of litigation sometimes point to such guidance, but reliance on the advice of counsel is usually insuffi-

reflect subjective intentions about the secondary work—in order to make a fair use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 n.17 (1994).

⁹⁸ The district court evaluating Alice Randall’s *The Wind Done Gone* found the fact that an earlier book cover did not mention the term “parody”—but rather, stated that Randall’s work “supplies the story that has been missing”—to undermine her fair use defense. *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1376–78 (N.D. Ga. 2001) (internal quotation marks omitted). The appellate court disagreed, perhaps because the earlier cover did not go so far as to label Randall’s book a “sequel.” See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1273 n.27 (11th Cir. 2001) (vacating the judgment of the district court).

⁹⁹ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998).

¹⁰⁰ *Id.* at 142.

¹⁰¹ *Id.* (alterations in original); see also *id.* (“The SAT’s purpose, as evidenced definitively by the statements of the book’s creators and by the book itself, is to repackage *Seinfeld* to entertain *Seinfeld* viewers.”); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 955 F. Supp. 260, 270 (S.D.N.Y. 1997) (attributing author’s statement to the “defendants['] boast[ing] before the onset of this litigation”).

¹⁰² The defendant’s comments in a newspaper interview were to the same effect. *Salinger v. Colting*, 607 F.3d 68, 72–73, 83 (2d Cir. 2010); see also *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 628–29 (9th Cir. 2003) (relying heavily on defendants’ packaging of their Elvis Presley documentary to support conclusion that significant portions of the film were not transformative), *overruled on other grounds* *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir. 2011) (per curiam).

cient to render an otherwise unfair use fair.¹⁰³ Nevertheless, courts sometimes use language that gestures toward intentional decisions by parties that, in the court's eyes, bolster the case for fair use—for example, identifying choices that were “by design” or “tailored” to comport with fair use standards.¹⁰⁴ One appeals court recently drew oblique, but notable, support for a fair use defense from the defendants’ “good faith in believing that the uses of the [copyrighted work] in [their] Documentaries were non-infringing fair uses.”¹⁰⁵

Besides one-on-one guidance on a contemplated use, many institutions and companies provide more generalized guidance for their employees, contractors, and affiliates. Presumably, in most cases, the purpose of doing so is principally to help the organization, rather than the affiliate, avoid liability. In the educational sphere, for example, university lawyers have tried to simplify the contours of fair use in ways that their faculties and staffs can readily understand. Columbia University’s Copyright Advisory Office informs members of the academic community that “[b]ecause you are most familiar with your project, you are probably best positioned to evaluate the facts and make the [fair use] decision,” and it provides a fair use checklist by which to do so.¹⁰⁶

Interestingly, one can distill a two-pronged basis for an institution providing such a checklist beyond its general desire to be perceived as a good citizen.¹⁰⁷ At the level of the employee, the purpose of supplying the checklist appears to be that use of it will foster an intent by the employee to comply with fair use in a way that is more likely to produce a use that is later deemed fair.¹⁰⁸ Even armed with the checklist, however, it is not self-evident why faculty and staff—like other non-legally trained employees of

¹⁰³ Cf. *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 522 (S.D.N.Y. 2008) (discussing participant’s change of heart about publishing activity after being assured that it was legal).

¹⁰⁴ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612–13 (2d Cir. 2006). It is not always clear, of course, how much stock to put in a court’s turn of phrase.

¹⁰⁵ *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 942 (4th Cir. 2013). The plaintiff had asked the court to infer bad faith from the defendants’ previous infringement. *Id.*

¹⁰⁶ *Fair Use Checklist*, *supra* note 16.

¹⁰⁷ That is, one possible purpose in encouraging use of the checklist by individual faculty members is the portrayal of the university as a good citizen in the event of a lawsuit—activity measured on the third spectrum, intent to be a good citizen. Professor Kenneth Crews, an architect of the Columbia fair use checklist, suggested this possibility—in another context—with respect to universities’ adoption of the controversial Classroom Guidelines. Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 683 (2001). See *infra* Part III.C.2.

¹⁰⁸ *Fair Use Checklist*, *supra* note 16 (“First, [proper use of this checklist] should help you to focus on factual circumstances that are important in your evaluation of fair use. The meaning and scope of fair use depends on the particular facts of a given situation, and changing one or more facts may alter the analysis. Second, the checklist can provide an important mechanism to document your decision-making process.”).

any organization—would be best equipped to mold a use into a fair use. Accordingly, another possibility is that in equipping its employees with a checklist, an institution is signaling an intent on its part to comply with fair use in a way that it hopes will bear on any later fair use defense it tries to mount.

If such is the hope, it failed to carry the day in *Cambridge University Press v. Becker*, in which Georgia State University's policies governing its electronic reserves system came under attack by academic publishing houses.¹⁰⁹ The university essentially attempted to mount an institutional defense by adopting a "fair use checklist," modeled on Columbia's,¹¹⁰ that was to be used by individual faculty members to determine whether a contemplated use was fair.¹¹¹ But any attempt by University officials, through the institution of these mechanisms, to be vindicated by demonstrating intent to comply with fair use fell short. The district court stated that it "believe[d] that Defendants, in adopting the 2009 [copyright] policy, tried to comply with the Copyright Act. The truth is that fair use principles are notoriously difficult to apply. Nonetheless, in the final analysis Defendants' intent is not relevant to a determination whether infringements occurred."¹¹²

Of course, the evidence in a case may not reveal any intent that relates to fair use. Such circumstances might arise where there is simply no documentation of particular choices or processes that were employed

¹⁰⁹ 863 F. Supp. 2d 1190, 1201 (N.D. Ga. 2012), *rev'd on other grounds sub nom. Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014). Although the district court held that Georgia State's Copyright Policy caused five instances of infringement (out of an alleged 74), it ultimately deemed the Georgia State defendants to be the prevailing party given the corresponding number of non-infringements and it awarded them attorney's fees and costs. *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 123154, at *20–23 (N.D. Ga. Aug. 10, 2012). Because of Eleventh Amendment and sovereign-immunity issues, monetary damages for the five instances of infringement were not available. *Cambridge Univ. Press*, 863 F. Supp. 2d at 1205–10. On appeal, the Eleventh Circuit rejected various aspects of the district court's fair use analysis and vacated the relief, including injunctive relief, awarded by the district court. *Cambridge Univ. Press*, 769 F.3d at 1283–84.

¹¹⁰ Fair Use Checklist, *Cambridge Univ. Press*, 863 F. Supp. 2d 1190 (No. 1:08-cv-01425-ODE), ECF No. 225-5 (filed July 26, 2010); *see also Cambridge Univ. Press*, 769 F.3d at 1242 n.9.

¹¹¹ *Cambridge Univ. Press*, 863 F. Supp. 2d at 1202. At trial, professors were called by both sides to testify about their use, understanding, and training in the use of these checklists, and other methods for making fair use assessments. *Id.* at 1204–05; *see also Cambridge Univ. Press*, 769 F.3d at 1242–43.

¹¹² *Cambridge Univ. Press*, 863 F. Supp. 2d at 1363. While such a statement may be taken to reject the relevance of intent to comply, the district court primarily faulted the university for not establishing precise parameters for use similar to those the court itself derived during the litigation, namely: 10% where a book is not divided into chapters or has fewer than 10 chapters, or up to 1 chapter where a book has 10 chapters (or more). *Id.* at 1243. The appellate court later held that the district court's "blanket 10 percent-or-one-chapter benchmark was improper," *Cambridge Univ. Press*, 769 F.3d at 1271, but it likewise gave no weight to the defendants' intentions.

along the way in order to comply with fair use. Thus, further along the intent-to-comply spectrum we can identify a position reflecting an absence of intent. A line of questioning apparently pursued in order to reveal absence of intent can be seen in the recent *Authors Guild v. HathiTrust* litigation, in which the University of Michigan's partnership with Google to create a vast digital repository of works, many under copyright, was challenged.¹¹³ Plaintiff copyright holders tried to paint a picture in which fair use should be rejected. "Defendants," they argued, "permitted Google to back trucks up to university library loading docks, empty every book from every shelf," and scan and digitize each of these millions of books.¹¹⁴ In the process, they claimed, "[n]one of the 'fair use' factors set forth in 17 U.S.C. § 107 were considered."¹¹⁵ The courts did not engage with this line of argument, however, and thus far the defendants have succeeded in their fair use defense.¹¹⁶

Absence of intent can be distinguished from an intent that actually runs counter to fair use compliance—an intent to usurp an economic interest of a copyright holder without any desire to contribute some new expression or meaning.¹¹⁷ Thus, anchoring the far end of the intent to comply spectrum are instances where a user proceeds with a frame of mind that is incompatible with or contrary to fair use.¹¹⁸ Perhaps the clearest articulation of this mental state could be drawn from the realm of criminal copyright infringement, which requires a "voluntary, intentional violation of a known legal duty."¹¹⁹ That is, a defendant "must have known that the copying was illegal."¹²⁰ One example might be where a de-

¹¹³ 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff'd in part and vacated in part*, 755 F.3d 87 (2d Cir. 2014). Other universities were also involved in the project.

¹¹⁴ Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 1, *Authors Guild, Inc.*, 902 F. Supp. 2d 445 (No. 11 Cv. 6351 (HB)), ECF No. 115 (filed June 29, 2012).

¹¹⁵ *Id.* at 5 (There is heavy redaction in the plaintiffs' brief around this statement, but it is clear that this is a line of argument, or at least an attempt to provide context, that is made by them.). By way of proof of this claim, the plaintiffs relied on deposition testimony to try to illustrate that project participants had not considered the fair use factors prior to handing any particular book over for scanning. Plaintiffs' Statement of Undisputed Material Facts at 7, *Authors Guild, Inc.*, 902 F. Supp. 2d 445 (No. 11 Cv. 6351 (HB)), ECF No. 116 (filed June 29, 2012).

¹¹⁶ *Authors Guild, Inc.*, 755 F.3d at 105.

¹¹⁷ *Cf.* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 n.8 (9th Cir. 2007) (identifying those "who intentionally misappropriated the copyright owners' works for the purpose of commercial exploitation" as abusing principles of good faith and fair dealing).

¹¹⁸ *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("In evaluating character and purpose we cannot ignore The Nation's stated purpose of scooping the forthcoming hardcover and Time abstracts.").

¹¹⁹ *United States v. Liu*, 731 F.3d 982, 990 (9th Cir. 2013) (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)) (internal quotation marks omitted); *United States v. Moran*, 757 F. Supp. 1046, 1050–51 (D. Neb. 1991) (quoting *Cheek*, 498 U.S. at 201) (internal quotation marks omitted).

¹²⁰ *United States v. Anderson*, 741 F.3d 938, 946 (9th Cir. 2013).

fendant is shown to have proceeded with a use despite his counsel's advice that the use was under no circumstances fair. Evidence of these kinds of intentions is rare, but where established, weighs against fair use.¹²¹

In sum, measuring highly on the intent to comply spectrum (as in *Cambridge University Press*) does not guarantee success for the fair use claimant; measuring neutrally (as in *HathiTrust*) does not appear to harm the fair use claimant's chances of success; and measuring poorly will likely harm the fair use claimant's defense.

3. *Intent to Be a Good Citizen*

A number of courts have considered a user's bad faith—in the sense of measuring poorly on the morality spectrum of intent to be a good citizen—under the first statutory factor. As in *Harper & Row*, the means by which a user accessed a particular copy of a copyrighted work have sometimes been held up as indicative of “bad faith” that should preclude a fair use defense.¹²² But the importance of this subfactor appears to be waning.¹²³ Indeed, one of the most thorough opinions to address the issue stated both that the “good or bad faith of a defendant generally should be considered” and that such evidence “generally contributes little to fair use analysis.”¹²⁴

Intent to be a good citizen is often hard to distinguish from the other forms of intent because when courts use fluid terms like “good faith” or “bad faith,”¹²⁵ they are sometimes referring to what this Article has

¹²¹ See, e.g., *United States v. Slater*, 348 F.3d 666, 668–69 (7th Cir. 2003) (affirming district court's denial of fair use jury instruction in internet piracy case).

¹²² *Harper & Row Publishers*, 471 U.S. at 562–63; *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992). See generally Kai B. Falkenberg, *The Relevance of Bad Faith to Fair Use Analysis*, 24 COMM. LAW. 7 (Summer 2006).

¹²³ One commentator has argued that courts' discussion of good or bad faith is a needless diversion since it has no bearing on the ultimate outcome of the fair use analysis. Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. COPYRIGHT SOC'Y U.S.A. 477, 508, 511 (2012). Donaldson objects to courts' continued reference to bad faith because “in doing so, they reinforce the distracting notion that bad faith is a sub-factor that needs to be considered.” *Id.* at 511; accord Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 607–08 (2008) (“The data suggest that considerations of fairness, propriety, and good or bad faith have not played a significant role in our fair use case law . . .”).

¹²⁴ *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 n.2 (2d Cir. 2004); accord *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 861 F. Supp. 2d 336, 340–41 (S.D.N.Y. 2012), *aff'd*, 756 F.3d 73 (2d Cir. 2014).

¹²⁵ For an example of just how fluid, consider Judge Dennis Jacobs's statement that, just as a movie critic who reveals the ending should not be deprived of the fair use defense on account of malice or spite, “a hotelier who stocks each room with photocopies of a newly copyrighted translation of the Bible is not saved from infringement by his piety.” *NXIVM Corp.*, 364 F.3d at 486 (Jacobs, J., concurring). Good faith in the form of piety is clearly far afield from the sort of good-faith intentions discussed above in connection with intent to comply. The example would implicate that spectrum if the hotelier had purchased a copy of the new translation

framed as intent to comply or intent to communicate new meaning. For example, it may be considered “bad faith” to engage in a use that the user is convinced is not covered by fair use and amounts to infringement, demonstrating intentions contrary to intent to comply. The Court’s analysis in *Campbell v. Acuff-Rose Music* in some respects used the terminology of “faith” in that way.

A question there was whether the 2 Live Crew defendants, in seeking—but failing—to obtain a license to parody “Oh, Pretty Woman,” should for that reason have had a strike against their fair use claim.¹²⁶ The Court first linked the issue of “good faith” to whether the defendants’ request for permission “suggest[ed] that they believed their version was not fair use,” thus seeming to implicate the intent to comply spectrum.¹²⁷ But the Court also linked the term “good faith” more generally to whether the defendants’ offer was made in a courteous or strategic effort to avoid litigation, implicating a more vague and generalized mental state—what this Article terms intent to be a good citizen.¹²⁸

By disaggregating these analytically disparate forms of intent, we are in a better position to consider the potential justifications for each. A general good-faith desire by the user to avoid litigation (or for that matter, a user’s commitment to accessing copyrighted works through virtuous means), while commendable in many respects, seems at most tangentially related to the question of whether the use is sufficiently beneficial to the public to qualify as a fair use. By contrast, a user’s attempt to secure a license as part of her fair use calculation—behavior registering on the intent-to-comply spectrum—seems more closely tied to the sort of upfront decision making that we would want to encourage among potential users.

Why then did the Supreme Court cast doubt upon the formal status of user intentionality?¹²⁹ The reason, it is submitted, is that activities purporting to manifest intent are so often framed in a negative, rather than positive, light by courts.¹³⁰ The Court in *Campbell*, for instance, was willing

and had made his photocopies thinking that religious works were exempted from copyright laws, had sought out the advice of counsel, etc.

¹²⁶ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 n.18 (1994).

¹²⁷ *Id.*

¹²⁸ *Id.*; accord *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (describing a request for permission in general terms as a “modest show of consideration”). For a recent example of the vague standards that are insisted upon, see *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173 n.6 (9th Cir. 2012) (affirming “the general rule” that successful invocation of the fair use defense requires “good faith and fair dealing” by defendant but failing to specify exactly what such a rule requires and, as is so common, examining the relevant conduct in terms of what would undermine, rather than substantiate, good faith).

¹²⁹ “[R]egardless of the weight one might place on the alleged infringer’s state of mind,” the Court stated at one point. “Even if good faith were central to fair use,” the Court stated in a pointedly subjunctive mood later on. *Campbell*, 510 U.S. at 585 n.18.

¹³⁰ See, e.g., *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (“We are aware of no controlling authority to the effect that the failure to seek permission for copying,

to consider only that seeking but failing to obtain permission “does not weigh against a finding of fair use.”¹³¹ If seeking a license is treated as invariably reflecting the user’s sense that his use is infringing, the Court’s hesitation to put weight on intentionality makes sense since doing so would discourage license-seeking. But another possibility, rarely acknowledged, is that such activity should sometimes weigh in favor of fair use by reflecting the user’s investigation of the nature and limits of the market for the copyrighted work—an investigation that makes all the more sense since the user will bear the affirmative burden of demonstrating that he did not unduly harm the copyright holder’s market.¹³²

II. JUSTIFICATIONS FOR THE RELEVANCE OF INTENT

The role of knowledge of fair use law, and intent to comply with it, touches on a deeper debate over the role that knowledge of copyright law more generally plays, and should play, in shaping artistic, authorial, and educational practices. This Part offers a normative account of the relevance of intent in fair use.

A. *Utilitarian in Furtherance of the Public Good*

The dominant conception of contemporary copyright policy is economic: the law provides the grant of a limited monopoly in order to encourage the creation and distribution of expressive works that might not otherwise be undertaken.¹³³ This conception, especially as implemented, has been challenged on the grounds that individuals create for many reasons; would still create even without the expansive set of exclusive rights afforded by copyright; and, indeed, are hampered more than helped by the constraints on unrestrained creativity that copyright imposes.¹³⁴ But

in itself, constitutes bad faith.”); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008) (concluding that failure to seek permission to use song “Imagine” for film, where permission for all other music used in film was obtained, did not reflect bad faith).

¹³¹ 510 U.S. at 585 n.18. *But see* Kevin J. Hickey, *Consent, User Reliance, and Fair Use*, 16 YALE J.L. & TECH. 397, 401 (2014) (favoring limited consideration of copyright owner’s consent as an additional fair use factor).

¹³² For a challenge to the burdens of proof in fair use, see generally Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781 (2010).

¹³³ *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

¹³⁴ The critiques are too numerous to recount here. *See, e.g.*, Tushnet, *supra* note 64, at 515 (arguing that the “incentive model largely bypasses a persuasive account of

even accepting the utilitarian rationale for copyright, there is an implicit—and perhaps, ironic—tension in the degree to which society actually wants authors to be fully cognizant of the copyright regime. On the one hand, a system premised on incentives fundamentally requires awareness of those incentives by the participants in order to be successful. On the other hand, that system of incentives should not overly distort authorial or pedagogical practices in ways that detract from the “organic” communicative or educational messages of the creator.¹³⁵

Arguably the current structure of copyright law attempts to mitigate this tension with respect to the creation (and distribution) of original works. On the one hand, while awareness by the general public of the promised rewards of copyright is likely no greater than awareness of other laws, those affiliated with creative industries are likely to know about, and actually be encouraged by, these laws. Furthermore, creators benefit from the regime regardless of whether they were initially aware of it or not.¹³⁶ Thus, the average member of the public who unwittingly creates a valuable expressive work may, through *ex post* attempts to prevent the copying of that work, learn about the copyright system in ways that incentivize her future creations. On the other hand, with respect to the concern about copyright’s distortive influence, the system does not require that creative actors craft works to meet exacting requirements:¹³⁷ almost any expressive work inscribed on paper, canvas, or computer chip will be protected.

Turning to fair use, there is no necessary reason why the conditions for coming within copyright protection should mirror the conditions for coming within fair use protection; after all, one stands as a system of incentives, and the other as an affirmative defense to copyright infringement.¹³⁸ And yet we can detect a similar tension. On the one hand, if fair use is meant to provide “breathing space” from the enforcement of copyright’s exclusive rights, then foreknowledge of the contours of that safety

creativity that emphasizes a desire for creation, grounded in artists’ own experiences of creation”).

¹³⁵ See, e.g., Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1536 (2011).

¹³⁶ See 17 U.S.C. § 102(a) (2012).

¹³⁷ But see Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 458 (2009) (arguing for a heightened threshold for attachment of copyright protection); Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1507 (2009) (arguing for a tiered approach that calibrates the rights and liabilities of authors to the degree of originality in their works).

¹³⁸ Many do, however, argue in favor of fair use’s utilitarian underpinnings. See, e.g., *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 945 (4th Cir. 2013) (noting “[s]ociety’s interest in ensuring the creation of transformative works incidentally utilizing copyrighted material”); Leval, *supra* note 19, at 1126 (arguing that fair use inquiry should ask whether use is “of the type that should receive” that protection—namely, whether it is “productive and transformative and whether it causes excessive injury to the market for the original”). But see Weinreb, *supra* note 26, at 1141 (arguing that fair use analysis should not be restricted to utilitarian considerations).

valve would be useful to potential users of copyrighted works.¹³⁹ On the other hand, while no scholar would say outright that too much knowledge about fair use is a bad thing, there is some concern that counseling rigid adherence to uses that have been blessed by the courts will stifle or artificially shape “organic” uses that may well—if any ensuing litigation is allowed to play itself out—be deemed fair by future courts.¹⁴⁰ Put more colorfully, there is concern that more fair use education would in actuality scare off otherwise blissfully ignorant users whose uses might ultimately squeak by as fair.¹⁴¹

There are ways to ease this potential tension, too. One might, for example, characterize the chief virtue of fair use not in terms of its role in stimulating (or discouraging) certain uses *ex ante* but in terms of the shield it serves *ex post* in resolving any litigation that ensues.¹⁴² Its utilitarian aspect, from this viewpoint, lies in permitting the otherwise transgressive work to remain on our screens, walls, and airwaves in the face of legal action. From such a perspective, foreknowledge of fair use principles by potential users is not theoretically necessary to give life to the doctrine. Nor is the confinement of uses to ossified categories a worry since—under this *ex post* conception of fair use—the individuals engaging in uses do not know of, and are therefore not constrained by, the doctrine in the first place.

The problem with an emphasis that is limited to uses that have already occurred is, of course, that many users, especially in established

¹³⁹ The legislative history of the fair use doctrine, as codified in the 1976 Copyright Act at 17 U.S.C. § 107, does not appear to fully appreciate this aspect, laced as it is with statements to the effect that “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.” H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

¹⁴⁰ See Leval, *supra* note 19, at 1135 (“A definite standard [for fair use] would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives.”); Zahr Said Stauffer, *‘Po-Mo Karaoke’ or Postcolonial Pastiche? What Fair Use Analysis Could Draw From Literary Criticism*, 31 COLUM. J.L. & ARTS 43, 55–56 (2007) (discussing the possibility that authors would be encouraged to “artificially graft[] a parody onto their satire” simply to “meet the fair-use friendly definition of a parody”). In a related vein, Professor Wendy Gordon has suggested that, for certain noncommercial transformative uses, the very obligation to stop everything and negotiate for a license prior to use might distort the artistic process to the detriment of society. Gordon, *supra* note 28, at 82, 89–90.

¹⁴¹ See, e.g., MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, *WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* 55 (2005) (noting concern by some that “more information about fair use can produce a chilling effect”).

¹⁴² As Professor Michael Carroll has phrased it, “[t]he conventional wisdom is that this *ex ante* uncertainty is simply the price that policymakers must accept for choosing a standard over a rule.” Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); cf. Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 131 (2004) (arguing more broadly that an “optimal intellectual property regime may look very different under an *ex post* approach than under an *ex ante* approach”).

creative industries, need to know upfront whether a contemplated use is likely to be deemed fair. Furthermore, less-established authors and artists face gatekeepers who require documentation as to the likelihood of a lawsuit.¹⁴³ For these groups, the ability to predict with some degree of certainty whether a use will be treated as fair may well determine whether the use is undertaken at all.¹⁴⁴ Moreover, even if broader education about fair use did deter (or cause the refinement of) some uses, it would likely also encourage other uses—and unleash creative expression—that would not otherwise have been made.¹⁴⁵

Thus, an incentives-based response can be given to Professor Michael Madison, who says the following about fair use:

[W]hy the “good faith” of the infringer should matter here is unclear. To the extent that copyright policy is informed by a utilitarian calculus maximizing social welfare in terms of “creativity” and “creative” works of authorship, the question ought not to be whether the defendant believed that he or she was acting legitimately, but whether the outcome of the defendant’s efforts was more socially valuable than the outcome produced by allowing the copyright holder to enjoin the use or obtain payment.¹⁴⁶

Madison’s line of reasoning is persuasive insofar as it addresses the spectrum of intent to be a good citizen. That is because there is only an attenuated nexus between an actor’s general moral character and the encouragement of socially valuable fair uses.

To the extent that intentionality registers on the intent-to-comply spectrum, however, the nexus is strengthened. Given the primary justification of copyright policy on incentive-based, utilitarian grounds, the law should take into account the ways in which it affects pertinent decisions being made at every turn—including with respect to whether and how to use copyrighted works.¹⁴⁷ Users (even those with legal counsel) often find

¹⁴³ See, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 893 (2007).

¹⁴⁴ Professor James Gibson has been somewhat despairing of the possibility of counseling clients, with any degree of certainty, that a contemplated use would be treated as fair. See *id.* at 889. Others have taken a more sanguine view. See *infra* text accompanying notes 151–56.

¹⁴⁵ See, e.g., Michael C. Donaldson, *Fair Use: What a Difference a Decade Makes*, 57 J. COPYRIGHT SOC’Y U.S.A. 331, 335 (2010) (describing how, armed with the *Documentary Filmmakers’ Statement for Best Practices in Fair Use*, filmmakers are now less likely to view any failure to license source material as a deal-breaker for the making of a film); cf. Carroll, *supra* note 142, at 1129–30 (reflecting the reality that users must often adapt their uses to legal constraints).

¹⁴⁶ Michael J. Madison, *A Pattern-Oriented Approach To Fair Use*, 45 WM. & MARY L. REV. 1525, 1555–56 (2004).

¹⁴⁷ In this way, this Article shares common ground with Madison’s larger project of ensuring that fair use “take account of the broader social contexts in which the accused work was prepared and is being consumed.” Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 408–09 (2005).

themselves unable to predict with confidence whether a use would be deemed fair. Courts exacerbate this difficulty when they persistently refuse to adopt firm safe harbors or rules of thumb for fair use.¹⁴⁸ In the face of these uncertainties, risk aversion will lead some to abandon projects rather than come close to the boundary line between fair use and infringement.¹⁴⁹

This choice to abandon projects—made on a widespread basis—deprives the public of works that might well have qualified as fair uses. To counteract this phenomenon, the law should encourage reasonable risk-taking by users who have intended not only to communicate new meaning but also to shape a use so that it mitigates the potential harms to the underlying copyright holder. If the law thus signals that users who can demonstrate intent to comply will receive a thumb on the scale in favor of their fair use claims, that should cause users to engage in more uses that come close to the line while, at the same time, take copyright holders' interests into account—a process that, on net, should maximize social welfare. It is true that additional judicial resources may be required to adjudicate the existence and effects of a user's intent to comply in those cases that are brought. However, to the extent that users come to internalize the fair use inquiry—a trend, admittedly, that would be more likely among legally sophisticated, well-financed parties—their newfound self-restraint should produce less copyright infringement litigation across the board, which, in turn, should at least partially offset the costs in those cases that are brought.¹⁵⁰

At a certain level, the utilitarian justification offered here for recognition of intent to comply can be seen as a logical extension of recent attempts in the legal scholarship to make fair use less of a morass.¹⁵¹ Professors Barton Beebe and Pamela Samuelson have brought some clarity to the doctrine by looking for patterns in fair use decisions themselves,¹⁵² and Madison has done so by looking for patterns in social and cultural practices.¹⁵³ These studies and the information they reveal could, of

¹⁴⁸ See *supra* note 112 (discussing the Eleventh Circuit's recent rejection of the lower court's 10 percent-or-l-less benchmark as part of the fair use analysis). This refusal also makes fair use adjudication more time- and labor-intensive for courts themselves. Surely no one envies the daunting marching orders issued to the district court by the appellate court in *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

¹⁴⁹ See, e.g., AUFDERHEIDE ET AL., *supra* note 31, at 48–49; NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 66 (2008); Gibson, *supra* note 143, at 895.

¹⁵⁰ I thank Professor Robert Brauneis for helping me crystalize this point.

¹⁵¹ E.g., Beebe, *supra* note 123, at 554; Netanel, *supra* note 62, at 719 (tracing the recent historical development of fair use to demonstrate “greater consistency and determinacy in fair use doctrine”); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 48–49 (2012); Samuelson, *supra* note 30, at 2541.

¹⁵² Beebe, *supra* note 123, at 565–66; Samuelson, *supra* note 30, at 2542–43; see also Sag, *supra* note 151, at 51 (using the case law to predict fair use outcomes from facts that were known prior to judicial determination).

¹⁵³ Madison, *supra* note 146, at 1624–25.

course, be employed after a use has been made to determine whether to proceed with, or settle, litigation that has been brought. But chief among the potential merits of these scholarly contributions, it is submitted, is the important data they have distilled for putative users and their lawyers, these parties make predictions early on about how courts would view their contemplated uses.¹⁵⁴ Indeed, at least some scholars and commentators explicitly have as a goal the providing of information about fair use *ex ante* to those considering a use.¹⁵⁵ They are concerned that potential users (and distributors) will be over-deterred from making a use by the vagueness of the relevant standards and the substantial risks that are often incurred without corresponding returns¹⁵⁶—concerns shared by this Article.

1. *Treatment of Intent in the Early Fair Use Cases*

While explicitly giving weight to intent to comply with fair use may seem a novel approach, there is at least some evidence that, in its nascent development, the fair use doctrine reflected such considerations. In his highly influential article on fair use, Judge Pierre Leval argued against the consideration of good or bad faith, labeling it a “false factor”¹⁵⁷ that is irrelevant to what should be the dispositive question: Has the secondary use sufficiently benefited society, without causing undue harm to the market for the original work, to be deemed fair?¹⁵⁸

In part, Judge Leval’s argument was historical in nature, drawing upon early British and American precedents. He recognized that some courts had employed the term “piracy” and the Latin phrase “*animus furandi*”—the intention to steal¹⁵⁹—in their discussions of fair use.¹⁶⁰ He contended, however, that these terms were applied to the conclusion of a

¹⁵⁴ Netanel, *supra* note 62, at 719 (reviewing recent trends in the case law to derive greater predictability with respect to the likely approach of courts generally and in specific cases); Sag, *supra* note 151, at 49 (“[T]here are . . . consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.”).

¹⁵⁵ See, e.g., AUFDERHEIDE & JASZI, *supra* note 17, at xi; Carroll, *supra* note 142, at 1090 (proposing an advisory opinion mechanism that would provide *ex ante* certainty as to the fairness vel non of particular uses under contemplation); Donaldson, *supra* note 123, at 482 (“This Article also introduces the concept of a fair use spectrum, which practitioners can use to assist clients in making their uses safer if they intend to seek the protection of the fair use doctrine.”); Madison, *supra* note 147, at 410; Parchomovsky & Goldman, *supra* note 42, at 1488 (“Carefully tailored, safe harbors would provide much needed certainty to users and potential creators . . .”); Samuelson, *supra* note 30, at 2542.

¹⁵⁶ See Carroll, *supra* note 142, at 1096; Parchomovsky & Goldman, *supra* note 42, at 1498.

¹⁵⁷ Leval, *supra* note 19, at 1125–26.

¹⁵⁸ *Id.* at 1126. This framing is in line with Michael Madison’s view as reflected *supra* note 146.

¹⁵⁹ BLACK’S LAW DICTIONARY 103 (9th ed. 2009).

¹⁶⁰ Leval, *supra* note 19, at 1126–27.

court's legal analysis rather than as tools for making the determination.¹⁶¹ To support the claim that, traditionally, fair use did not require "honest intentions," Judge Leval trained his attention on *Folsom v. Marsh*, the seminal American case that gave rise to the fair use doctrine.¹⁶²

In that case, the defendants had used a number of George Washington's letters, in which the plaintiffs claimed copyright, to create a competing biography of Washington.¹⁶³ Despite the "very meritorious labors" of the defendants, and the absence of "bad intentions" on their part, Justice Story had "no doubt whatever, that there [was] an invasion of the plaintiffs' copyright."¹⁶⁴ Thus, the defendants' intentions to make "a perfectly lawful and justifiable use of the plaintiffs' work" had nevertheless not produced "a fair and bona fide abridgment."¹⁶⁵ For Judge Leval, Justice Story's opinion reflected the irrelevance of a user's intentions.¹⁶⁶

Professor Anthony Reese, however, reads the historical record somewhat differently. While agreeing that, by the close of the nineteenth century, courts had moved away from considerations of intent in fair use, he argues that the earlier cases did rely to some extent upon user intent.¹⁶⁷ Unlike today, copyright notices on works were mandatory, but (like today) such notices were ineffective at delineating the bounds of a copyright owner's rights and, concomitantly, the conditions under which the quotation or abridgment of a work—dual limitations on copyright rights that had become established over time—was fair.¹⁶⁸ To aid in this problem, which afflicted both potential users of works and the courts tasked with evaluating uses that were in fact made, Reese reports that courts "looked at least in part to the defendant's intent."¹⁶⁹

Reese sees evidence of this in, among other places, the courts' repeated references to whether the quotation or abridgment was "bona

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Folsom v. Marsh*, 9 F. Cas. 342, 345 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4,901).

¹⁶⁴ *Id.* at 349.

¹⁶⁵ *Id.*

¹⁶⁶ Leval, *supra* note 19, at 1127.

¹⁶⁷ Reese, *supra* note 27, at 171; accord Lloyd L. Weinreb, Lecture, *Fair Use*, 67 *FORDHAM L. REV.* 1291, 1296 (1999). For example, in *Webb v. Powers*, 29 F. Cas. 511, 520 (Woodbury, Circuit Justice, C.C.D. Mass. 1847) (No. 17,323), the court noted that the "intent not to be guilty of piracy . . . would not be material, if much had actually been copied, and the new work was a mere substitute. But if this be doubtful, the intent not to pilfer from another, colorably or otherwise, for the substantial portions of the new work, may be important."

¹⁶⁸ Reese, *supra* note 27, at 136–37, 168. On the costs of distilling what precisely is the protected expression in a copyrighted work, see Clarisa Long, *Information Costs in Patent and Copyright*, 90 *VA. L. REV.* 465, 508–12 (2004).

¹⁶⁹ Reese, *supra* note 27, at 168.

fide,” that is, in good faith.¹⁷⁰ By good-faith intention, courts seemed to mean an intention to *quote* a work in order to review or critique it, or an intention to *abridge* a work (rather than merely to omit “some unimportant parts”)—in contrast to an intention to “supersede” the original work.¹⁷¹ Thus, while Judge Leval reads the words “bona fide” in *Folsom* as having an objective character (equated with transformativeness),¹⁷² Reese interprets the permeation of this term throughout the early cases as reflecting the courts’ interest in an “accused infringer’s mental state.”¹⁷³

A few helpful points emerge from these competing views. First, with respect to *Folsom* itself, which has continued to influence fair use doctrine in the contemporary era, Judge Leval correctly notes that the perceived lawful intentions of the defendants were not enough to secure for them a successful fair use defense. Nevertheless, it is clear that Justice Story viewed *Folsom* as a difficult case.¹⁷⁴ Doubtless this view was mostly due, as Judge Leval suggests, to the usefulness of the defendants’ biographical work and to Justice Story’s “regret” at interfering with their endeavors.¹⁷⁵ But, it is at least conceivable that one of the factors making it such an “intricate and embarrassing” inquiry was Justice Story’s strong sense of the defendants’ good-faith intentions in undertaking their biography in the face of such a complex and nuanced area of the law.¹⁷⁶

Furthermore, while Judge Leval and Reese disagree in their readings of the early case law, both interpretations spring from common normative ground. Specifically, consideration of user intent by the early courts, as described by Reese, encouraged people to engage in quotation and abridgment of copyrighted works with the comfort that, in close cases, a court would later take into account their good-faith intentions. Similarly, although Judge Leval focuses on a case (*Folsom*) in which good faith could not convert a use into a fair use, his broader goal was ensuring that

¹⁷⁰ *Id.* (“The principle that quotations or abridgment must be bona fide, in *good faith*, suggests that the knowledge or intent of the defendant played a role in determining infringement.”).

¹⁷¹ *Id.* at 168–69 (quoting *Gray v. Russell*, 10 F. Cas. 1035, 1038 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 5,728) and surveying cases).

¹⁷² Leval, *supra* note 19, at 1127.

¹⁷³ Reese, *supra* note 27, at 169.

¹⁷⁴ *Folsom v. Marsh*, 9 F. Cas. 342, 344 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4,901) (“This is one of those intricate and embarrassing questions . . . in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion . . .”).

¹⁷⁵ Leval, *supra* note 19 at 1127 (internal quotation marks omitted).

¹⁷⁶ Indeed, in another part of the opinion, Justice Story implies that the user’s intentions could sometimes be relevant. *Folsom*, 9 F. Cas. at 344–45 (“[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his *design be really and truly* to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, *with a view*, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.” (emphasis added)); *accord* Reese, *supra* note 27, at 168 & n.143.

fair use serve as a stimulant of secondary uses in appropriate circumstances. Accordingly, both perspectives appear to share an interest in a robust fair use doctrine.

2. *Considerations of Good Moral Character Distinguished*

In contrast to intent to comply, intentions that are ancillary to the legal bases for copyright and fair use—which implicate the intent to be a good citizen spectrum—should not be given weight because their relevance is simply too remote from the issue at hand.¹⁷⁷ In addition, the considerations in the “good citizen” context tend to be one sided, with most cases questioning whether bad faith should weigh against fair use, and not whether good faith should favor fair use.¹⁷⁸ That is, the issue that troubles courts is generally that transformative works will not be created or disseminated if the specter of bad faith is permitted to haunt fair use; it is *not* that otherwise unfair uses will be deemed fair if the users, for example, obtained the underlying material in a lawful, proper manner.¹⁷⁹ Accordingly, as a practical matter, a focus on intent to be a good citizen risks thwarting congressional incentives for “creative output, including the output of transformative quotation,”¹⁸⁰ which enriches society as a

¹⁷⁷ See *supra* Part I.B.3.

¹⁷⁸ On rare occasion, courts discuss good faith in a way that gives content to the concept. In *Field v. Google Inc.*, for instance, the district court added a fifth fair use factor that pertained to Google’s “good faith” in operating its system cache, that is, the system by which users click onto archival copies of websites. 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006). The court gave credit to Google for ensuring both that website owners had multiple opportunities to opt out of caching and that users could readily determine whether they were viewing a live website or a cached version. *Id.*; see also *Kane v. Comedy Partners*, No. 00 Civ. 158 (GBD), 2003 WL 22383387, at *7 (S.D.N.Y. Oct. 16, 2003) (putting weight on “evidence of defendants’ good faith effort to initially seek [plaintiff’s] informed consent”), *aff’d*, 98 F. App’x 73 (2d Cir. 2004).

¹⁷⁹ See, e.g., *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring). Judge Jacobs does invoke the refrains that “[f]air play is no defense to infringement.” and that fair use is not “earned by good works and clean morals.” *Id.* at 485, 486. Nevertheless, he does not explore the implications of formally encouraging good-faith attempts to comply with fair use, which is the focus of this Article. The expression of concern about the role of good or bad faith—but with an actual focus on the perniciousness of considerations of bad faith—is shared by several commentators. See, e.g., Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 334–36 (1988); Frankel & Kellogg, *supra* note 34, at 4; E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1525 (1993); cf. Weinreb, *supra* note 26, at 1153 (noting that “if there is present a strong element of fairness (or, more likely, unfairness), it will probably be taken into account”).

¹⁸⁰ *NXIVM Corp.*, 364 F.3d at 485 (Jacobs, J., concurring). Interestingly, even as he dismisses the relevance of good or bad faith with respect to means of access to a work, Judge Jacobs continues to refer to user intent in the context of the transformativeness inquiry under the first statutory factor. *Id.* at 483 (agreeing with the majority that defendants’ use reflected “a literary intention and effect that differed sufficiently from that of the original to be transformative”); see also *id.* at 485 (“Two closely-related inquiries are crucial: Does the secondary work quote or copy the first with the same literary intention as the original or with a new, transformative purpose?”).

whole. As has been said elsewhere, considerations bound up in the “morality” test of bad faith can be dealt with through criminal prosecution or tort suit (if, for example, the user has employed unlawful means to access the copyrighted work) or through the tailoring of an appropriate remedy.¹⁸¹

Furthermore, putting weight on bad faith—in the form of the mode of access employed by the secondary user—has broad implications in the internet age. In particular, determining what might constitute *knowing* use of “purloined” materials in the vast world of online content calls for careful, nuanced judgment.¹⁸² Taking it as a given that making a copy of everything found online in which copyright is claimed is equivalent to stealing obviously could produce undesirable chilling effects among users.¹⁸³

B. Enhancement of Transparency

As described above,¹⁸⁴ there still appears to be room, albeit limited, for evidence of a user’s intent to communicate new meaning. A persuasive justification for formally accepting this evidence is that it would bring needed transparency to judicial approaches to certain kinds of fair use cases. The Court in *Campbell*, for example, despite highlighting the objectively-oriented “reasonabl[e]” perception standard in connection with the transformativeness analysis, itself recognized the value of an author’s “choice” of parody as a permissible kind of use to make.¹⁸⁵ This subjective-

¹⁸¹ Leval, *supra* note 19, at 1126. The view that fair use should not be a morality test is shared by most commentators who weigh in on the issue. See, e.g., Dratler, *supra* note 179, at 336; Fisher, *supra* note 24, at 1783 & n.533; Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 245 (2005); Ames, *supra* note 179, at 1525; Joseph J. Raffetto, Note, *Defining Fair Use in the Digital Era*, 15 U. BALT. INTELL. PROP. L.J. 77, 83 (2006); cf. Okediji, *supra* note 27, at 122 (arguing against the “moral inquiry” of the good faith of the alleged infringer).

¹⁸² See, e.g., Randall P. Bezanson & Joseph M. Miller, *Scholarship and Fair Use*, 33 COLUM. J.L. & ARTS 409, 441 (2010) (suggesting that a scholar’s use of materials found online is the legal equivalent of “knowingly quoting published work”).

¹⁸³ At least one court has held that the issue of bad faith did not apply where the alleged infringer copied materials found on the copyright holder’s publicly available website. *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 553 F. Supp. 2d 680, 698–99 (N.D. Tex. 2008) (relegating bad faith to the means by which materials were accessed rather than the purpose for which they were used); accord *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008) (finding use of unauthorized electronic copies of Harry Potter books to prepare reference guide, made by improperly scanning books, not sufficient proof of bad faith since material was already publicly available). Perhaps one parallel to the *Harper & Row* context in the digital era is the circumvention of technological protection measures controlling access to copyrighted materials. See 17 U.S.C. § 1201 (2012).

¹⁸⁴ See *supra* Part I.B.1.

¹⁸⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994); accord *Heymann*, *supra* note 11, at 452 (reading *Campbell* as focusing on the “authorial activity” of fair use claimants).

leaning aspect was further developed under the third statutory factor, “the amount and substantiality of the portion used,” where the Court acknowledged the parodist’s need to conjure up the original work—even the heart of the original work—“which the parodist can be sure the audience will know.”¹⁸⁶ This line of analysis suggested, at least in the case of parody, that what courts should look for is some tangible evidence of a user’s parodic purpose. After all, it is not at all clear that one can accidentally parody another work;¹⁸⁷ indeed, Justice Kennedy’s concurrence strongly suggests that an unintentional parody is a contradiction in terms.¹⁸⁸

Although they have thus acknowledged the relevance of an author’s decision to communicate through parodic means, courts are increasingly looking to whether the author, in their view, has succeeded in that endeavor.¹⁸⁹ With more avant-garde arts, however, one could imagine that author-generated expressions of purpose and meaning might provide guidance to courts. After all, such works, especially those involving the visual arts, by their very nature often elude the narrative structure that is the hallmark of literary works.¹⁹⁰ The process of determining whether a challenged use alters a copyrighted work with “new expression, meaning, or message” is made all the more difficult when one is seeking to translate from the realm of nonverbal expression into the verbal expression that litigation demands.¹⁹¹ Nevertheless, even here courts are increasingly comfortable in assessing meaning.¹⁹²

¹⁸⁶ *Campbell*, 510 U.S. at 586, 588. The Court was drawing upon a rich inquiry by the lower courts into the degree to which a permissible parody primarily needed to be driven by the desire to target the underlying work. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

¹⁸⁷ See *Davis v. Walt Disney Co.*, No. Civ. 04-1729 DWF/SRN, 2004 WL 1895234, at *5 n.8 (D. Minn. Aug. 23, 2004) (noting that defendants’ arguments in the alternative “beg the question of whether one can unintentionally parody another’s work”).

¹⁸⁸ Justice Kennedy argued against fair use protection for uses that are only “rationalized *post hoc* as a parody.” *Campbell*, 510 U.S. at 600 (Kennedy, J., concurring); see *id.* at 599 (“We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original.”).

¹⁸⁹ At least one court has ruled that such a call is one that it could make as a matter of law. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003).

¹⁹⁰ Rebecca Tushnet, Rob Kasunic, and others have written about the difficulties in arriving at the appropriate analysis of visual images in copyright law. See, e.g., Rob Kasunic, *The Problem of Meaning in Non-Discursive Expression*, 57 J. COPYRIGHT SOC’Y U.S.A. 399 (2010); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012); cf. Leval, *supra* note 19, at 1126 (arguing against giving into the temptation to take the easy way out by relying upon a user’s good or bad faith in difficult cases).

¹⁹¹ Kasunic, *supra* note 190, at 405–06. Kasunic paints a picture of the difficulties by posing a series of important questions, such as: “[W]hose translation is to be credited as the meaning or purpose of the work?” *Id.* at 400. Does an author claiming

There are reasons to be sanguine about this development. Deference to authorial statements of meaning risks “credit[ing] the author with a work’s primary and intrinsic meaning,” when in all reality, authors are not the only source of the meaning of their works.¹⁹³ One danger, then, is that successful fair use claims might come to depend upon the “extrinsic fame and credibility” of the user–author, together with “magic words of justification”¹⁹⁴—neither of which may be available to many users who nevertheless may have made socially beneficial fair uses. Another danger is, of course, that statements of interpretation can be manufactured for purposes of litigation strategy. The risks entailed by focusing primarily on the subjective intentions of the secondary user, rather than on the objective characteristics of the secondary use itself, are at the center of a group of scholarly critiques. Professors Laura Heymann, Brian Holland, and Mary Wong have argued, to some extent, against deference to the intentions of the secondary author.¹⁹⁵

As mentioned above, Heymann sees courts as currently engaged in a mode of analysis that unduly emphasizes “what the [secondary] author intended or hoped to achieve.”¹⁹⁶ She places *Campbell*—both in its formulation of the transformativeness standard and in its application of that formulation—in the category of prioritizing “authorial intent” above considerations of whether the defendant “has transformed the meaning of the work.”¹⁹⁷ The latter is the more relevant inquiry, she argues, and probative of that inquiry is “how the [secondary] work is perceived or interpreted.”¹⁹⁸ Thus, she would look to evidence of whether a “distinct and separate discursive community” has arisen around the second author’s work.¹⁹⁹

Heymann’s approach draws upon a literary theory critique, in which an author’s interpretation of his work is treated as simply one of many possible interpretations and is not—by virtue of its source—to be privileged over competing interpretations.²⁰⁰ While Heymann is careful to

fair use need to possess some discursive (that is, verbally articulable) intent with respect to his use and, if so, at what point? *Id.* at 412–13.

¹⁹² See *Cariou v. Prince*, 714 F.3d 694, 706–08 (2d Cir. 2013). On the other hand, the Second Circuit remanded with respect to five of the challenged uses. *Id.* at 711.

¹⁹³ Kasunic, *supra* note 190, at 414. Transposed to the context of this Article, the author at issue is the secondary author, that is, the fair use claimant.

¹⁹⁴ *Id.* at 414 n.40.

¹⁹⁵ See, e.g., Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1109 (2009).

¹⁹⁶ Heymann, *supra* note 11, at 448.

¹⁹⁷ *Id.* at 452. Heymann acknowledges that the Supreme Court’s invocation of a reasonable perception standard for determining if a secondary work is a parody cuts in the other direction, and, indeed, she applauds the Court’s incorporation of language of perception (as opposed to intention). *Id.* at 452–53.

¹⁹⁸ *Id.* at 448.

¹⁹⁹ *Id.* at 449.

²⁰⁰ See, e.g., BARTHES, *supra* note 3, at 147–48.

state in several places that she is not advocating complete disregard for all statements of authorial interpretation offered by the fair use claimant,²⁰¹ she also makes plain that she views such statements as simply an “invitation to consider a work in a particular way.”²⁰²

Building on Heymann’s work, Holland favors a social-semiotic approach to fair use, which would look for evidence of social value as “manifested in interpretive communities, and through the cultivation of new and expansive cultural meanings, messages, and insights.”²⁰³ His case study for this type of social value is the *Fairey v. Associated Press* litigation over Shepard Fairey’s Obama “Hope” posters.²⁰⁴ The posters produced social value, Holland says, through the discourse they evoked in interpretive communities that ranged from the “young, smart, and hip” (whose take was “radical, ironic, and idealistic, and distinctly not anti-capitalist”) to those who viewed them as suggesting the rise of a “dominant, totalitarian government that would threaten basic liberties” and elevate Obama in a “cult-like” fashion.²⁰⁵ Similar to Heymann, Holland underscores that he is not trying to displace conventional attempts to lodge the transformativeness inquiry in the authorial intent and effort of the user, but rather to “open[] additional lines of inquiry” into what constitutes acceptable fair use.²⁰⁶

Implicit in both Heymann’s and Holland’s critiques, however, is doubt about what the authorial intentions and purposes of the putative fair user can reveal about the meaning of a work. In a legal setting, their concern is that fully embracing user intention to communicate new meaning will curb, rather than facilitate, socially valuable fair use claims because user–authors may not have intended the full value that their new expression has produced.²⁰⁷

²⁰¹ Heymann, *supra* note 11, at 449.

²⁰² *Id.* at 456; accord Simon, *supra* note 77, at 809.

²⁰³ Holland, *supra* note 23, at 364.

²⁰⁴ See Amended Complaint for Declaratory Judgment and Injunctive Relief, *Fairey v. Associated Press*, No. 09 Cv. 1123 (AKH) (S.D.N.Y. Nov. 13, 2009), ECF No. 59.

²⁰⁵ Holland, *supra* note 23, at 374–75.

²⁰⁶ *Id.* at 365. Holland may diverge from Heymann here since although Heymann would still admit evidence of author intent, she would do so for the limited purpose of exploring how that manifestation of intent was likely to provoke a response. See Heymann, *supra* note 11, at 449 & n.23, 456–57.

²⁰⁷ There is no better support for this concern than the district court’s opinion in *Cariou v. Prince*, which seemed to turn on the defendant’s inability to articulate an artistic vision that squared with what the district court was looking to hear. 784 F. Supp. 2d 337, 349–50 (S.D.N.Y. 2011), *rev’d in part and vacated in part*, 714 F.3d 694 (2d Cir. 2013). Another concern takes on a more postmodern flavor: the notion that by forcing a defendant artist to identify and testify as to the singular meaning of his artwork, the judicial process is effectively forcing him to “destroy” his “intentionally meaningless” work in an important way. See Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 2–4, 19–20 (2013).

There are certainly reasons, as stated above, to be skeptical about exclusive deference to the user–author’s interpretation as either the ultimate meaning of her work or as the deciding factor in whether her use should be deemed fair. Nevertheless, there are yet other problems entailed in an approach that substantially downplays the user’s account of her contribution. First, such an approach undervalues evidence of the ways in which authors and artists actually engage with the materials around them. The district court in *Cariou v. Prince*, for example, cataloged all of the ways in which the defendant had expressed the meaning behind his work—much of it differing quite substantially from the plaintiff’s approach—and yet the district court failed to engage with those statements²⁰⁸ or explain why the defendant’s “intent was not transformative within the meaning of Section 107.”²⁰⁹ Instead, the district court appeared to penalize the defendant for answering “No” to questions such as whether he had been using the plaintiff’s works to “comment on any aspects of . . . culture.”²¹⁰

Such an approach risks conflating the intent-to-communicate new-meaning spectrum with the intent-to-comply spectrum: it permits the analysis of meaning to depend on the halted answers to a few deposition questions rather than on the overall interpretive picture of his work that a defendant is trying to paint. The Second Circuit’s opinion, which also quoted the defendant’s expressed intentions,²¹¹ came much closer to fairly incorporating into the analysis the overarching message that the defendant was trying to communicate. For example, it engaged with the defendant’s claims that his work explored the relationships among men and women and was meant to provide a “contemporary take on the music scene.”²¹² On that basis, the appellate court’s mode of analysis is more compelling.

Second, validating a role for the user–author’s expressed intentions of meaning is important because fair use is supposed to turn, at least in part, on the degree to which the creation of new meaning was attempted—even if it is not fully achieved.²¹³ Relegating authorial intent to lesser

²⁰⁸ One possible exception was the district court’s view that the defendant’s statements reflected a shared artistic message with the plaintiff: “a desire to communicate to the viewer core truths about Rastafarians and their culture.” *Cariou*, 784 F. Supp. 2d at 349. The defendant’s full testimony, however, reveals that this does not appear to be one of his principal aims.

²⁰⁹ *Id.* The district court found the defendant’s intentions wanting even though it concluded that the defendant “intended his overall work to be creative and new.” *Id.*

²¹⁰ *Id.*

²¹¹ See *supra* notes 94–95 and accompanying text.

²¹² *Cariou*, 714 F.3d at 707 (quoting Prince Deposition, *supra* note 86, at 339) (internal quotation marks omitted).

²¹³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582–83 (1994) (quoting *Yankee Publ’g Inc. v. News Am. Publ’g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”) (internal quotation marks omitted)); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (“While

status, by contrast, threatens to afford fair use protection only to those works whose conveyance of new meaning is a success by majoritarian standards.

Furthermore, in many instances it may be that no discursive community has yet arisen to receive and respond to the secondary work.²¹⁴ Even if guaranteed leeway for the recontextualization of copyrighted works is paramount among the uses that the fair use doctrine should permit, there is no reason why the existence of a critical reception in the community should be a prerequisite—that is, there is no apparent reason why one should not be able to fairly recontextualize for oneself. Surely, to the extent that Andy Warhol's images of Marilyn Monroe are accepted as fair use, they would also have been fair use before anyone but him first saw them.²¹⁵ And yet, Heymann suggests that where the “copyrighted work goes unrecognized in the second work” by the audience—a state of affairs that may well have initially applied in *Cariou* before the dispute became so high profile—transformative fair use may be foreclosed.²¹⁶

Chief among the risks of treating user intent as a distinctly inferior source of information about a work, however, is that courts will purport to disavow interest in user intent while at the same time rely on it heavily. The reason for this is that it seems inevitable that evidence of authorial intention will continue to seep into litigation over allegedly infringing uses where the interpretation of meaning is involved. Indeed, the expansion of the fair use doctrine to include not only physically transformed content but also recontextualized (though unmodified) content²¹⁷ opens up opportunities for second-comers to explain, and be asked about, their recontextualizations.

Thus, courts are presented with tantalizing interpretive resources that they find hard to resist even where they adopt an “objective” analysis. This was true in *Cariou* where, despite the appellate court's supposed indifference to intent, it could not refrain from invoking the defendant's articulation of his artistic vision to substantiate its own finding of transformativeness for the vast majority of his works.²¹⁸ Even in *Blanch*, a case

individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection.”).

²¹⁴ In those cases, Heymann appears to prefer that a court act as a “reasonable reader” than that it defer to the user's voice. Heymann, *supra* note 11, at 457. Such a role for the court could, however, make it the arbiter of expressive meaning in a way analogous to that which Justice Holmes so famously decried. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

²¹⁵ Of course, given Warhol's work style—accompanied in the Factory, not solo in the garret—that hypothetical period of time might not have lasted for long. See ARTHUR C. DANTO, *ANDY WARHOL* 49 (2009) (describing Warhol's work style).

²¹⁶ Heymann, *supra* note 11, at 462.

²¹⁷ See *supra* text accompanying notes 60–62.

²¹⁸ *Cariou v. Prince*, 714 F.3d 694, 706–07 (2d Cir. 2013). For this reason, the degree to which the Second Circuit can be said to have dispensed with intent arguably has been overstated. See, e.g., Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88, 96–97 (2013) (arguing that

in which Heymann argues that the court's analysis finally reflected an openness to the multiplicity of meanings, the secondary author's voice could not have been more pervasive in the court's analysis.²¹⁹ Indeed, although the court made general reference to Koons as the "the subject of much critical commentary,"²²⁰ it did not refer to any emergent discursive communities responding to the particular work that was the subject of the litigation.²²¹ In this sense, *Blanch* and *Cariou* represent opportunities to view authorial statements of purpose as potentially helpful to the cause of fair use, rather than necessarily as a hindrance.

These authorial explanations have the potential to be useful since, from a "trickle up" perspective, wide-scale evidence of secondary authors' perceptions of their creative processes may shed light on the ways in which works are in fact being used by downstream creators. The emergence of these narratives of creative reuse may, in turn, be a helpful basis for reforming copyright.²²² Other proposals share some of these features. Professor Michael Carroll, for example, has proposed that Congress create a Fair Use Board in the U.S. Copyright Office that would consider petitions for rulings on particular uses of copyrighted works.²²³ One beneficial externality of this proposal, he claims, is that it would "provide a focal point for public discussion of the critical role that fair use plays in the creative spheres."²²⁴ The justification advanced here is similar in that regard: by making explicit what courts are already doing, it would provide a forum for eliciting the ways in which users understand their creative and expressive processes.

III. PROPOSAL FOR THE TREATMENT OF INTENT

As technology develops, copyright owners will seek to exploit their copyrights in ever-new markets. As they do so, users of copyrighted works

"*Cariou* wisely takes the highly manipulable question of artistic intent out of the picture").

²¹⁹ See *supra* Part I.B.1. This is true even if, as Rob Kasunic insightfully points out, Koons's narrative of meaning and purpose immediately projects outward—to the reaction of his hoped-for audience member. See Kasunic, *supra* note 190, at 421 ("In a sense, Koons carefully refused to infuse particular meaning to the work, but rather empowered the viewer with establishing his or her own relative meaning.").

²²⁰ *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

²²¹ Arguably the only such community invoked was the court itself. *Id.* at 253 (describing what makes Koons's *Niagara* painting transformative).

²²² Cf. Gordon, *supra* note 28, at 85 (noting the "long tradition among fine artists and composers of tolerating each other's uses" and that "[m]ore documentation of these customs and their limits is needed"); William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 269–77 (2012) (providing Shepard Fairey's views on use of underlying source material).

²²³ Carroll, *supra* note 142, at 1123.

²²⁴ *Id.* at 1130; see also *id.* at 1137 ("[T]he costs of monitoring fair use petitions would be offset in some measure by the useful data the petitions would yield concerning how a work of authorship is being used and valued.").

will seek ways to avoid liability for infringement in these new venues. Both of these trends—while somewhat at odds—are fully compatible with the goals of copyright policy. Copyright owners may legitimately feel that the law could do even more to encourage their participation in new markets. For users of works, however, it is clear that copyright law as it stands is not optimal insofar as it deems uses fair or unfair only at the tail end of high-stakes litigation. Such an approach risks over-deterring conscientious users of copyrighted works and depriving the public of socially beneficial uses. Instead, the law should reward users for seeking guidance on copyright compliance and conforming their activities to reasoned, *ex ante* predictions about fair use.

This Part offers a concrete vision for the role that intent should play in fair use determinations, anticipating some of the principal concerns about doing so. First, this Part calls for more transparency with respect to the ways in which courts attempt to discern the meaning of the secondary uses that come before them. In this regard, it argues that evidence reflecting the degree to which a user of copyrighted materials intended to communicate new meaning is relevant to the determination. Importantly, however, courts must judge an author's intended meaning in its proper context. Second, this Part argues that evidence that a user of copyrighted materials attempted to comply with fair use principles should be given weight in the overall fair use analysis. Courts should not, however, penalize a party for a failure to demonstrate intent to comply.

A. *Intent to Communicate New Meaning*

As discussed above, courts continue to demonstrate interest in—and an inability to avoid discussing—the degree of user intent to communicate new meaning in certain kinds of cases. Accordingly, with respect to uses that register on that spectrum, courts should be more transparent about the ways in which they consider artistic statements of intent by users.²²⁵ So, for example, courts should make clear where they are relying on statements of artistic intent to complement their own understandings. Statements of intent to communicate new meaning may be disputed as to the ultimate meaning of a work. But they have the potential to offer useful insights into the ways in which the secondary author thought he was adapting the underlying material to foster new expressive meanings.

Nevertheless, certain parameters should guide the use of such intent by courts. Importantly, such interpretations are most probative when they reflect the overarching artistic message expressed by a user-author, rather than “gotcha” admissions (or book jacket blurbs) that may or may not be self-serving as a legal matter, as the *Cariou* appellate court implicit-

²²⁵ For an interesting discussion of the larger context of interpretive choice by courts in copyright litigation, see Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. (forthcoming Spring 2015), available at <http://ssrn.com/abstract=2472500> (calling for greater methodological transparency).

ly recognized.²²⁶ Such interpretations are also most probative when they have been formulated prior to or contemporaneously with the creative endeavor, rather than after litigation has been threatened. For example, artists and authors may document their creative purposes in making a particular use through memos that are sent to file or materials that accompany a gallery showing. Even if an interpretive statement has not been fully articulated by the user–author in advance of litigation, however, that should not preclude its possible relevance: the point is for a court to consider the intentions, rather than the expressions of those intentions, that were formulated when the secondary work was being created. Accordingly, evidence of contemporaneous intent that is later fleshed out during the onset of litigation can still be useful in providing courts with insights into creative processes.

Copyright proponents could rightly be concerned that, to some extent, anyone can manufacture a narrative that displays a desire to use older material in the creation of new expressive meanings. It is important to note, however, that other metrics used to gauge the degree of transformation achieved by a use are subject to similar critique. For example, in this era of nearly instantaneous “likes” and “group” formation online, the existence of evidence of a critical reception to almost any authorial act could likewise fail as a meaningful indicator of transformativeness. In both settings, the evidence of new meaning must be plausible to the decision maker.

Copyright minimalists might object to the proposal from another vantage point: they might be concerned that, rather than being used as a possible thumb on the scale in favor of a fair use defense, consideration of user intent to communicate new meaning will in practice become the opposite—an additional hurdle for all fair use defendants to meet.²²⁷ Indeed, there is evidence that when users cannot formulate an elegant, well-crafted expression of the meaning they intended to convey, they are penalized.²²⁸ Any attempt to provide additional avenues to users for substantiating a fair use claim risks this possible outcome.²²⁹ Importantly, this

²²⁶ See *Cariou v. Prince*, 714 F.3d 694, 706–07 (2d Cir. 2013). The appeals court faulted the district court for adopting too narrow a focus in this regard. *Id.* at 707.

²²⁷ See, e.g., Frankel & Kellogg, *supra* note 34, at 28, 32; see also Carroll, *supra* note 142, at 1138 (acknowledging a similar possibility in connection with a user’s failure to obtain a fair use ruling from proposed fair use board but arguing that the creation of the proposed board would nevertheless promote the “greater exercise of fair use rights”).

²²⁸ See *Rogers v. Koons*, 960 F.2d 301, 309–10 (2d Cir. 1992); *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011), *rev’d in part and vacated in part*, 714 F.3d 694 (2d Cir. 2013); *supra* notes 97–102 and accompanying text.

²²⁹ Others have likewise not refrained from analogous proposals in the face of that risk. Heymann’s and Holland’s preferred inclusion of evidence of critical reception of the secondary work, for example, could likewise create additional hurdles. See *supra* notes 196–206 and accompanying text; see also Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379, 1415 (2012) (“Where the equities are close in weight, library and archives’ salutary

proposal does not call for the predominance of authorial statements of intent above all other possible forms of evidence; it merely seeks to carve out a valid and balanced role for them in the analysis. In any event, since courts already rely on evidence of intent to communicate new meaning in cases that call for difficult, nuanced interpretation, formal acknowledgment of its role would bring needed transparency and consistency without necessarily entailing a seismic shift in judicial approach.

B. *Intent to Comply*

Attempts by users to inform themselves about fair use is a positive development that should be encouraged. To provide that encouragement, the law should, in close cases, give credit to one who has attempted to use a copyrighted work in a conscientious way, especially where she has tried to minimize her footprint in the underlying copyright holder's market. The case-by-case nature of fair use adjudication and the degree to which it can chill users from undertaking socially valuable projects underscore the need for such an approach.²³⁰ Importantly, on a widespread basis, such an approach will signal to users that their efforts to comply with the law will be taken seriously—a process that should lead to the broader internalization of fair use sensibilities by users that, in turn, will benefit society for the reasons previously stated.²³¹ So, for example, in close cases, where a user can demonstrate *ex ante*:

- that she intended her use of the underlying copyrighted work to foster new expression, meaning, or message in an attempt to comply with the first factor;²³²
- that she aimed to use the underlying copyrighted work for its factual or historical, rather than expressive, content in an attempt to comply with the first factor;²³³
- that she minimized use of the underlying copyrighted work in commercializing her subsequent work²³⁴ or sought to “pro-

social functions, together with the lack of probable harm that would arise from making orphans available, should tip such functions toward fair use.”).

²³⁰ Cf. *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 944 (4th Cir. 2013) (“The case-by-case nature of the inquiry offers the advantage of flexibility, but it also lacks predictability and clarity, which is often an impediment to free expression. As a result, fair use must give speakers some reasonable leeway at the margins.”).

²³¹ See *supra* Part II.A. In this way, while this Article focuses on the relevance of the individual experiences of users, it can also be viewed as suggesting an institutional shift. See Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 351, 359 (2010) (calling for a re-framing of fair use in institutional terms).

²³² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²³³ *Bouchat*, 737 F.3d at 940; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609–10 (2d Cir. 2006).

²³⁴ *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003), *overruled on other grounds*, *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d

duce[] a value that benefits the broader public interest” rather than commercially exploit the underlying work²³⁵ in an attempt to comply with the first factor;

- that she used an underlying copyrighted work that appeared to be factual or historical, rather than fictional, in nature in an attempt to comply with the second factor;²³⁶
- that she reduced the amount or scale of the underlying copyrighted work in an attempt to comply with the third factor;²³⁷ or
- that she considered the market for the underlying copyrighted work, and perhaps offered a reasonable license fee, in an attempt to comply with the fourth factor,²³⁸

courts should put a thumb on the scale in favor of fair use.²³⁹

Two clarifications are in order. First, the proposal offered here is not to amend the copyright statute.²⁴⁰ Rather, consistent with the approach taken in other copyright settings, courts can read the statutory factors fluidly to allow in evidence of intent to comply. The open-ended discretion afforded to courts to consider factors outside of the statutory four,²⁴¹ as

989, 995 (9th Cir. 2011) (per curiam); *see also* Bouchat v. Balt. Ravens Ltd. P’ship, 619 F.3d 301, 314 (4th Cir. 2010).

²³⁵ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994).

²³⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

²³⁷ *Bill Graham Archives*, 448 F.3d at 613.

²³⁸ *See, e.g., id.* at 614–15; *cf. Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (“Parodists will seldom get permission from those whose works are parodied. . . . Even though such gestures are predictably futile, we refuse to discourage them.”). In their recent article, Simon Frankel and Matt Kellogg argue against this approach: “By this logic, a secondary use that supersedes the copyrighted work and usurps its market will nonetheless be more likely to succeed as a fair use simply because the defendant thought to contact the plaintiff ahead of time. But the request for permission reveals nothing about the economic balance of interests at stake.” *See* Frankel & Kellogg, *supra* note 34, at 28. Frankel and Kellogg take an extreme case—a perfunctory (or insincere) attempt to secure a license in the face of statutory factors that point overwhelmingly in the other direction. In this regard, they are surely correct to express concern. However, in closer cases, where the constellation of factors is more complex, encouraging actors to seek out licenses—especially to explore the market for the underlying work—is sensible and in keeping with the goals of copyright.

²³⁹ Professor Jennifer Urban offers similar, process-oriented techniques for enhancing a fair use case. *See* Urban, *supra* note 229, at 1425–27.

²⁴⁰ For a proposal driven by similar concerns to those expressed here that does call for legislative amendment, *see* Tonya M. Evans, “Safe Harbor” for the Innocent Infringer in the Digital Age, 50 WILLAMETTE L. REV. 1, 6 (2013) (arguing that Congress should amend the Copyright Act to provide safe harbor protections for additional classes of innocent infringers in the online context). *See also* Jacqueline D. Lipton, *Cyberspace, Exceptionalism, and Innocent Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 767, 807 (2011) (arguing that legislative action would be preferable to a judicial carve-out of a general innocence defense in the copyright infringement context).

²⁴¹ *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–66 (1985) (adding an additional line of inquiry to the third statutory factor); *cf. Ned*

well as the reference within the first factor itself to the “purpose and character of the use,” amply permit consideration of intent to comply.

Second, the proposal is not meant to turn intent to comply into a new prerequisite for fair use. Rather, where it is shown that a user intended to comply with fair use in a way that is reasonably supported, such a demonstration should enhance the user’s claim to a fair use defense; failure to demonstrate that intent should not have a negative effect on her fair use claim.²⁴² Furthermore, the proposal is limited to close cases, where the evidence could go either way, since the animating goal is to encourage uses that come close to the line. A concern about the practical import is valid, however, because there is historical evidence that when avenues for making fair use are crystalized, they end up constricting, rather than expanding, the doctrine.²⁴³ As discussed above,²⁴⁴ this risk is to some extent unavoidable, and it should not be permitted to stand in the way of encouraging users to seek guidance in ways that benefit the public interest.²⁴⁵ Furthermore, taking full account of users’ good-faith attempts to comply with the law creates a kind of parity to the extent that, under the law as it stands, their activities reflecting intentions that run counter to fair use could count against them.²⁴⁶

Snow, *Copytraps*, 84 IND. L.J. 285, 327–28 (2009) (arguing that interpretation of Copyright Act by courts to protect innocent downloaders is permissible).

²⁴² Such a unidirectional role for intent is not unheard of in intellectual property law. The role called for here could be seen as analogous to—although the converse of—the role that intent plays in trademark infringement litigation. In that context, intent to confuse can serve as one factor in establishing the liability of an accused infringer, see, e.g., *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 354 (9th Cir. 1979), although the absence of such bad-faith intent is not relevant to the analysis, see Thomas L. Casagrande, *A Verdict for Your Thoughts? Why an Accused Trademark Infringer’s Intent Has No Place in Likelihood of Confusion Analysis*, 101 TRADEMARK REP. 1447, 1470 (2011) (collecting cases and describing intent as a “one-way ratchet that helps trademark plaintiffs *only*”). This Article similarly argues that an accused copyright infringer’s good-faith intent to comply should serve as a one-way ratchet that favors fair use.

²⁴³ AUFDERHEIDE & JASZI, *supra* note 17, at 146 (noting that “we know from bitter experience that codifying legal safe harbors for fair use is most likely to limit fair use to those safe harbors”); see *infra* notes 267–68 and accompanying text.

²⁴⁴ See *supra* notes 227–229 and accompanying text.

²⁴⁵ For example, the proponents of the best practices movement, described *infra* at Part III.C.2, argue in analogous fashion that compliance with the principles they set forth should provide a safe harbor from a charge of infringement but that failure to comply with these principles—which would allow users to “explore the wider, less-charted territory of fair use”—should not for that reason render the users bad actors. AUFDERHEIDE & JASZI, *supra* note 17, at 132; see also Parchomovsky & Goldman, *supra* note 42, at 1489 (“Uses that exceed these specified limits would remain subject to the current multifactor fair use analysis.”).

²⁴⁶ See *supra* notes 97–102 and accompanying text.

C. Sources of Legal Guidance

If a formal role in the fair use analysis is to be given to a user's intent to comply, what sort of guidance is to be credited in helping to establish such intent?

1. Advice of Counsel

Professor James Gibson has expressed doubt about the effectiveness of attempts to predict fair use outcomes with respect to any given use. "Presumably," he says, "[a potential user] and her lawyer could read the cases, extract those principles most relevant to her situation, and simply make the call. In reality, however, they would do no such thing, because the risk is too great."²⁴⁷ Furthermore, others have pointed out that "[e]ven users who believe they are infringing may eventually discover that in fact they are fair users."²⁴⁸ Despite these concerns and possibilities about some users, it is clear that some organizations and persons with means do, in fact, try to plot out the outlines of fair use. Undoubtedly the design of the "snippet view" for results produced by a user's search of the Google Books database reflects such counseling.²⁴⁹

One practitioner with an active fair use consultation practice has championed the utility of pre-use consultations with clients. Michael Donaldson reviewed fair use cases involving non-fiction works (such as documentary films or non-fiction books) that used copyrighted materials and distilled a series of questions that he now works through with clients.²⁵⁰ Focusing on whether the "new work use[s] only as much of the asset as is reasonably appropriate to illustrate or support the point being made," he argues, "moves the discussion away from the artist's point of view" and encourages thinking about whether third parties (or juries) would say that the amount used is appropriate.²⁵¹ For example, such a

²⁴⁷ See Gibson, *supra* note 143, at 890.

²⁴⁸ AUFDERHEIDE & JASZI, *supra* note 17, at 138.

²⁴⁹ See Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 286–87 (S.D.N.Y. 2013) (describing structure of snippet view and other aspects of Google Books project that contributed to fair use outcome).

²⁵⁰ Donaldson, *supra* note 123, at 482 (reviewing cases decided between January 1, 1978 and December 31, 2011). The questions are: "1. Does the asset illustrate or support a point that the creator is trying to make in the new work? 2. Does the creator of the new work use only as much of the asset as is reasonably appropriate to illustrate or support the point being made? 3. Is the connection between the point being made and the asset being used to illustrate or support the point clear to the average viewer?" *Id.* at 486. Indeed, Donaldson's intended audience for the simplified test he has distilled seems to include artists themselves—laymen: "[T]he three-question safe harbor test mentioned above reaches the same conclusion [as the statutory four-factor test] in language laymen can immediately understand, practitioners can confidently apply, and courts can comfortably use, to validate their viewpoints." *Id.* at 494–95.

²⁵¹ *Id.* at 489–90.

question deters uses that can be justified only by a client's view that the underlying work is "really cool" or good "filler."²⁵²

Whether or not all would go further and agree that the shaping of a work in response to the interposition of legal counsel is a positive development for the artistic integrity of the work,²⁵³ Donaldson's approach offers a blueprint for ways in which courts might later assess the user's intent to comply with fair use. While he suggests that one-on-one counseling can guide a client to mold a use that is objectively fair, his approach by definition calls for users (and their counsel) to make judgment calls as to whether the amount of the underlying work used is "reasonably appropriate," for example. To the extent such discussions and predictions are documented, they can provide evidence of the user's attempt to inch toward what would fall within the bounds of fair use—evidence, this Article argues, that should work in the user's favor in close cases.²⁵⁴

This is not to say that merely labeling one's work in a particular way—as "art" or as "parody"—should automatically qualify the use as fair.²⁵⁵ A bare, unsubstantiated claim that one tried to make a fair use should not be persuasive as to the ultimate merits of a fair use defense.²⁵⁶ But the law should better encourage attempts to comply with its evolving provisions, especially to the extent that the attempts reflect a conscientious desire not only to contribute meaningful new expression but also to minimize harm to the underlying copyright holder.²⁵⁷ Given the case-by-case approach to fair use, and the difficulties in predicting the outcomes

²⁵² *Id.* at 490.

²⁵³ *Id.* at 523.

²⁵⁴ *Cf.* AUFDERHEIDE & JASZI, *supra* note 17, at 138 ("In making a fair-use decision, inevitably people go through some reasoning process. As you do that, you might find it helpful to make a note of your reasons. . . . However, no one loses their right to claim fair use because of a failure to leave a record of their rationale."). In addition, giving weight to user intent to comply with fair use would allow the doctrine to reduce the *ex ante* uncertainty Gibson identified, but without some of the countervailing consequences he is concerned about: adding further complexity to the existing statute or requiring increased adjudication to solidify safe corners within the law. Gibson, *supra* note 143, at 935.

²⁵⁵ *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 379 (S.D.N.Y. 1993) ("If the subjective classification of an otherwise infringing work as 'art' automatically immunized such work under the fair use doctrine, the doctrine would virtually eviscerate the protection afforded by the Copyright Act.").

²⁵⁶ *See, e.g.,* Madison, *supra* note 146, at 1624 ("The individual defendant stands in for 'the public,' but the individual's claim to 'creativity' or 'Progress' in his or her output standing alone is a flimsy basis for distinguishing fair and unfair uses.").

²⁵⁷ *See, e.g.,* Diane Leenheer Zimmerman, *The More Things Change the Less They Seem: "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 268 (1998) (arguing in favor of a ground up, "slow, lawyerly process" of distilling fair use guidelines in the face of uncertainties produced by "reasoning down from highly generalized first principles"); *cf.* *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (weighing in defendants' favor that they had "acted with the advice of counsel" in their use of the Zapruder frames).

of particular cases, evidence that a user has sought out legal advice with respect to a contemplated use and has, if necessary, adjusted the work to conform to the demands of fair use should weigh in her favor.

Lawrence Lessig famously characterized fair use as “the right to hire a lawyer to defend your right to create.”²⁵⁸ Implicit are both the uncertainties about whether a fair use claim would ultimately be successful and, also, the fact that vindication of a fair use stance is often made possible only with legal assistance. Thus, a distributive-justice concern about privileging a claim of attempted compliance with the law is that it will favor those with resources over those without. Indeed, Professor Matthew Sag has found from his empirical work that “defendants who come to court with less experienced attorneys than their opponents are less likely to benefit from a finding of fair use.”²⁵⁹

Three responses are in order. First, the proposal offered here does not discriminate between those who have sought legal counsel and those who have sought to educate themselves through guidelines that serve as resources to users. Indeed, the animating purpose behind this Article is the notion that users should be rewarded for seeking out and trying to abide by guidance on fair use that, at the very least, emphasizes the dual need to contribute new expression and to mitigate economic harm to the copyright holder. Second, to the extent one is inclined to consult with a lawyer to structure a use so as to ensure, as best as possible, that the use will be deemed fair, such consultations should be encouraged.²⁶⁰ Third, given the disparities in access to counsel, no negative implications should be drawn from a party’s failure to seek out fair use guidance.²⁶¹

²⁵⁸ LAWRENCE LESSIG, *FREE CULTURE* 187 (2004); *see also* Carroll, *supra* note 142, at 1113 (“As one might imagine, potential fair users with fewer resources and/or greater risk aversion . . . would be far more likely to forgo a fair use in the face of potential litigation.”).

²⁵⁹ Sag, *supra* note 151, at 78.

²⁶⁰ *See* Carroll, *supra* note 142, at 1141 (discussing options to obtain fair use legal counsel through pro bono assistance and intellectual property clinics at law schools as a way to mitigate disparities).

²⁶¹ This Article argues that failure to demonstrate intent to comply should not be given weight in the fair use analysis. Depending on how the role of intent to comply evolves, however, it is possible that frequent demonstrations of good-faith intent to comply by savvy, well-heeled litigants could tempt courts into drawing negative inferences where such intent is not shown. If that day comes to pass, this Article recommends that the relevance of the preliminary vetting with counsel suggested here mirror the relevance of consumer survey evidence on the issues of secondary meaning and/or likelihood of confusion in trademark infringement litigation. In that setting, a trademark plaintiff’s failure to conduct a survey may give rise to a negative inference only if the plaintiff had the financial means to conduct one. *See* Charles Jacquin et Cie, Inc. v. Destileria Serralles, Inc., 921 F.2d 467, 475 (3d Cir. 1990); *see also* Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571, 583 (D.N.J. 1985). Such an approach would prevent less sophisticated user-authors from being punished for failing to obtain expensive counsel.

2. *Best Practices and the Intent of a Community*

Beyond the statute and case law, there has been a raft of guidance on fair use. To what extent might reliance upon one of these forms of guidance be taken as evidence of intent to comply? Guidelines that purport to offer instruction on, and interpretation of, fair use law are not new.²⁶² Traditionally, such guidelines have been received with varying degrees of skepticism, hostility, or enthusiasm depending on which are considered and who is asked. Most famously in the contemporary era, the so-called “Classroom Guidelines”—included in the House Report accompanying the 1976 Act,²⁶³ though not themselves enacted into law—provoked questions about their relevance in the context of educational fair use. Many saw the Classroom Guidelines as the product of partisan deal-making,²⁶⁴ as not responsive to the needs of actual educators,²⁶⁵ or as not reflecting the positive law of fair use.²⁶⁶ Importantly, although styled as a minimum safe harbor for fair use,²⁶⁷ the Classroom Guidelines have sometimes been treated as outlining the maximum extent of fair use.²⁶⁸ The Classroom Guidelines also began a trend in which other government-sponsored bodies tried to establish guidance on fair use.²⁶⁹

More recently, the past decade has seen the rise of the “best practices” movement: a movement, independent of government sponsorship, to create “best practices” as a way of eliciting, and codifying, the views on fair use in various creative communities that frequently use copyrighted materials.²⁷⁰ The project was spearheaded by academics at American University, who worked with documentary filmmakers to create (and vet through a legal advisory board) the first set of practices, the *Documentary Filmmakers’ Statement of Best Practices in Fair Use*, in 2005.²⁷¹ American Uni-

²⁶² See, e.g., Crews, *supra* note 107, at 609 (describing array of fair use guidelines that have emerged in the modern era).

²⁶³ Officially known as the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals,” the Classroom Guidelines are set out at H.R. REP. NO. 94-1476, at 68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681.

²⁶⁴ See, e.g., Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1918–19 (2007).

²⁶⁵ Crews, *supra* note 107, at 688.

²⁶⁶ *Id.* at 665.

²⁶⁷ H.R. REP. NO. 94-1476, at 68 (“The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223.”).

²⁶⁸ See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1536–37 (S.D.N.Y. 1991).

²⁶⁹ See generally Crews, *supra* note 107 (describing recent history of guidelines in connection with the 1976 Act).

²⁷⁰ See AUFDERHEIDE & JASZI, *supra* note 17, at 96–100.

²⁷¹ See *id.* at 95, 100.

versity's Center for Media & Social Impact now hosts an array of fair use best practices to guide a wide variety of uses.²⁷²

Professors Peter Jaszi and Patricia Aufderheide, two of the principal academic forces behind the movement, highlight the importance of an educated user base making reasoned, rather than indiscriminate, uses of materials.²⁷³ There is no evidence yet of judicial approval of reliance upon these best practices, but they apparently have facilitated the process by which documentary filmmakers obtain needed errors and omissions (E&O) insurance, with insurers more willing to insure films that have complied.²⁷⁴

Certain criticisms of the Classroom Guidelines could also be lodged against this new wave of best practices. One problem, as some have indicated, is that guidelines in general may have an attenuated relationship with the actual state of the law, and thus, reliance on them may not be fully meaningful.²⁷⁵ Furthermore, in most cases the best practices have been crafted with only certain groups of stakeholders at the table.²⁷⁶ The best practices themselves identify several sources for the principles arrived at, generally describing them as the reflections of the intent of a community as to what constitutes fair use (that have then been vetted by a panel of legal experts).²⁷⁷ But many of the reports accompanying the various best practices acknowledge that there is much divergence even in what members of a community think constitutes fair use within that area of creative practice.²⁷⁸

²⁷² These codes, best practices, and sets of principles are available at <http://www.cmsimpact.org/fair-use/related-materials/codes>. The areas include academic and research libraries, online video, poetry, OpenCourseWare (OCW), journalism, media literacy educational settings, scholarly research in communication, dance-related materials, media studies publishing, and film and media education.

²⁷³ AUFDERHEIDE & JASZI, *supra* note 17, at 133–35.

²⁷⁴ Donaldson, *supra* note 145, at 332; Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 371, 374 (2010).

²⁷⁵ See, e.g., Crews, *supra* note 107, at 605.

²⁷⁶ See, e.g., JUNE M. BESEK ET AL., KERNOCHAN CTR. FOR LAW, MEDIA AND THE ARTS, COPYRIGHT EXCEPTIONS IN THE UNITED STATES FOR EDUCATIONAL USES OF COPYRIGHTED WORKS 33 (2013), available at http://www.alrc.gov.au/sites/default/files/subs/291_org-3rdsupsubscreenrights.pdf (making this critique); see also GWEN HINZE ET AL., THE FAIR USE DOCTRINE IN THE UNITED STATES—A RESPONSE TO THE KERNOCHAN REPORT 7, 9–10 (July 26, 2013), available at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc> (countering that the provenance of the best practices is a strength not a weakness).

²⁷⁷ See, e.g., ASS'N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 2–3 (Jan. 2012), available at http://www.cmsimpact.org/sites/default/files/documents/code_of_best_practices_in_fair_use_for_arl_final.pdf.

²⁷⁸ *Id.*; see also PRUDENCE ADLER ET AL., FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES 18–20 (Dec. 20, 2010), available at http://www.arl.org/storage/documents/publications/arl_csm_fairusereport.pdf.

Should courts defer to users who claim to have relied upon such forms of guidance as substantiating intent to comply? Professor Jennifer Rothman has objected—on the grounds of both provenance and content—to the incorporation of such guidelines, as ostensible manifestations of custom, into fair use case law.²⁷⁹ For example, many of the best practices urge users to provide attribution (to the extent possible) for the underlying works,²⁸⁰ a requirement generally absent from black-letter fair use law.²⁸¹

Rothman's objections to the adoption of the best practices, and custom more generally, into fair use doctrine provide a helpful basis for isolating the broader question of the relevance of intent at all. For even if we could imagine a set of best practices that were the product of balanced and inclusive inputs and that perfectly summarized the elements of fair use, we would still be left with the question of whether a user's claim to have complied with those Platonic best practices should enhance the strength of a fair use claim.

If the answer is yes, then one way to resolve the tension between the dangers of outright incorporation of guidelines into fair use law, on the one hand, and the desire to equip users with readily digestible principles for making fair uses, on the other, is through intent. That is to say, to the extent a user can demonstrate intent to comply with some guideline that reasonably reflects fair use law, a court should give credit to the user in a close case. For example, in the case of journalistic incorporation of historical material into a secondary work, suggested limitations that the journalist "should contextualize the historical material to make clear its relevance to the current work" and "should take an appropriate amount that will provide the relevant historical context"²⁸² are fairly reflective of legal standards, and therefore compliance with them should inure to the benefit of the journalist-user and, thereby, to the public. By contrast, a user's proffer of intent to comply solely by showing attribution of the underlying source material should afford very limited—if any—benefits be-

²⁷⁹ See Rothman, *supra* note 274, at 372; Rothman, *supra* note 264, at 1904–05.

²⁸⁰ See, e.g., CTR. FOR SOC. MEDIA, AM. UNIV. SCH. OF COMM'C'N, SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM 10–15 (June 2013), available at http://www.cmsimpact.org/sites/default/files/documents/pages/principles_in_fair_use_for_journalism.pdf [hereinafter BEST PRACTICES FOR JOURNALISM]; CTR. FOR SOC. MEDIA, AM. UNIV. SCH. OF COMM'C'N, DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 5 (Nov. 18, 2005), available at http://www.cmsimpact.org/sites/default/files/fair_use_final.pdf.

²⁸¹ See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 88–89 (2007) (describing the handful of instances in which courts have incorporated attribution into the fair use analysis and proposing that attribution be formally added as a fifth statutory fair use factor).

²⁸² BEST PRACTICES FOR JOURNALISM, *supra* note 280, at 13.

cause the act of attribution itself, while commendable for many reasons, simply plays little to no part in the fair use analysis itself.²⁸³

This proposed treatment of intent to comply raises two parallel concerns about incentives: first, that authors may be discouraged from undertaking creative endeavors in the first place if it becomes easier for others to make a fair use of their works; second, that an intent-based standard will encourage individuals to engage in unnecessarily risky behavior because they will come to think that intent to comply will provide needed cover. On the first score, the proposal offered here conceives of making fair use easier, rather than easy, *in close cases*—that is, it would apply at the margins. Thus, the fear that wide-scale copying will become permissible seems unfounded. To the extent that users are more prepared to assert a fair use defense, that is simply part of the copyright bargain for which authors have signed up.

It is on the second score that there is reason to proceed cautiously. Much information about copyright law—including fair use—abounds, some of it misleading or erroneous. The proposal offered here would give credit for relying on plausibly accurate statements of fair use principles only. Thus, as mentioned, a claim to fair use premised solely on a user's understanding that she could use the underlying work in any way she pleased as long as she provided attribution would not be particularly persuasive. The hope is that in encouraging users to become educated fair users, they will avoid some of the traps for the unwary.

A final overarching challenge to the proposal relates to issues of predictability and integrity of the copyright law. One could argue that the opportunity afforded by section 504(c)(2) to take account of a user's mental state in connection with statutory damages—especially as it relates to a user's intent to infringe vel non—implies that intent in that regard is not relevant at the liability phase.²⁸⁴ As this Article has demonstrated, courts are already finding ways to consider user intent with respect to liability, so to some extent, this proposal is simply asking them to make more transparent that which they are already doing. Furthermore, for the reasons stated above, the statutory scheme admits room to consider subjective evidence of intent as part of the fair use analysis. And, in any event, statutory damages are not always at issue.

At the margins, however, the proposal outlined here has the potential to treat similar cases differently where the only variable is the added

²⁸³ Cf. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1272 (11th Cir. 2014) (“[E]ven if we accept that the 10 percent-or-one-chapter approach represents a general industry ‘best practice’ for electronic reserves, this is not relevant to an individualized fair use analysis.”). In this way, the proposal offered here would not excuse infringement on the basis of a mistaken interpretation of the fair use statute or case law. See, e.g., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010) (holding that bona fide error defense did not apply to a violation that resulted from mistake of law).

²⁸⁴ See *supra* text accompanying notes 53–58.

element of a defendant's good-faith intentions in one case. While it is possible that two identical cases could emerge that differed only in this respect, it seems unlikely that such would come to pass. If it did, one response is that such a result comes with the territory of a case-by-case doctrine. Where one user can show bona fide reasons for coming close to the line, courts should be more inclined to find that she did not step over it.

CONCLUSION

There should be a limited role for the consideration of user intent in fair use. As a practical matter, defendants raising fair use claims will continue to be asked by opposing counsel about their purposes and practices. While recognizing the concerns, from the one side, that expressions of user intent may sometimes be mere post hoc rationalizations,²⁸⁵ and from the other side, that such a move may have corresponding dampening effects on fair use where claimants cannot make a particular showing, this Article concludes that these concerns are surmountable. There are virtues in giving a formal role to expressions of authorial intent by the user, and public policy would be advanced by bringing transparency to judicial recognition of these virtues. In addition, public policy would be advanced by rewarding attempts to comply with a difficult yet ubiquitous area of law. Such a role correlates with exhortations by copyright holders for increased copyright literacy among the American public. Given the case-by-case nature of fair use, and the difficulties in predicting outcomes *ex ante*, evidence of a user's intent to make a fair use should weigh in favor of the defense.

²⁸⁵ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 600 (1994) (Kennedy, J., concurring).