Copyright Genius: The Case for a Fair-Use Classification for User-Generated Online Annotations and Commentary

Drew Jurgensen*

1. Introduction

On October 3, 2012, renowned investment firm Andreessen Horowitz wrote three recent Yale graduates a check for fifteen million dollars.¹ Inspired by their love of rap music and determined to create an online forum for the purpose of collectively deciphering rap lyrics, the young entrepreneurs had created Rap Genius,² a website that allows users to annotate hip-hop lyrics.³ Soon, the founders had a newer, larger, and ultimately much more valuable end-goal: to “annotate the web.”⁴ While the three founders’ desire to create a community of commentary landed them a big check, it simultaneously landed them in the middle of a national debate concerning copyright infringement, fair use, and the role of such legal doctrines in the emerging Internet Age.⁵

For the time being, that debate is on hold. On May 6, 2014, Rap Genius agreed to license lyrics from music industry publishers.⁶ Up until that date, Rap Genius had published lyrics to millions of songs on its website without permission from the copyright owners.⁷ User-annotations separate Rap Genius from other lyrics websites; any visitor to the site can click on a

---

³ Id.
⁵ Planet Money, supra note 2.
⁷ Planet Money, supra note 2.
specific line in a song and add an annotation (or comment) to the line, generally for the purposes of revealing the meaning of the line or deconstructing the structure of the prose. Users also enter the lyrics themselves with the website providing the forum to post and annotate. The Rap Genius software is particularly novel and valuable because the interface it generates is so polished and user-friendly. The interface allows users to easily annotate small parts of songs individually, while also letting viewers easily and selectively view annotations so as to avoid a cluttered webpage. Though the agreement to pay for song lyrics ended a long standoff between the site and a threatened law suit from the music industry, it left unanswered the question concerning the legality of the online annotations in which Rap Genius specializes.

The controversy concerning song lyrics detached from the music to which the lyrics belong has existed since the rise of the Internet. The pervasive question concerns which party involved

8 An example from the website is the first line from the Nas song, N.Y State of Mind: “Rappers, I monkey flip ‘em with the funky rhythm I be kickin,” is annotated, by a registered user of the website, writing “[t]he Monkey Flip is both a wrestling move and a breakdancing move. Nas is saying he monkey flips rap opponents with the funky rhythms of his lyrical flows,” and which is accompanied by a YouTube video of a wrestler executing the Monkey Flip. Nas: N.Y. State of Mind, RAP GENIUS (Oct. 1, 2014, 3:27 PM), http://rap.genius.com/Nas-ny-state-of-mind-lyrics. Later in the song, several of the lines are annotated by Nas himself. Id. Another example is from the Bad Meets Evil song, Lighters: “Ya’ll are doomed, I remember when T-Pain ain’t want to work with me, my car starts itself, parks itself and auto-tunes; cause now I’m in the Aston, I went from having my city locked up to being treated like Kwame Kilpatrick,” is annotated by several users writing

Goes with Pacquiao and everybody who fights him lately is bound to lose [referencing a line not listed]; [a] unusual since singer T-Pain provides hook-work for a lot of rappers, Royce’s feelings were hurt—especially since T-Pain is actually a computer; [a]parently Royce now drives an Aston Martin, [a] reference to the line above—while T-Pain is known for using ‘AutoTune’, and didn’t want to work with Royce, now Royce has so much money that his car ‘auto-tunes’ itself (as in gets a tune up); Kwame Kilpatrick is a former mayor of Detroit, currently in federal prison (i.e. locked up) stemming from scandals and corruption during his time as mayor; Royce is from Detroit as well—he once had the city locked up (in control), but caught a DUI and a beef with Eminem and wasn’t so hot anymore which is coupled with images of an Aston Martin and Kwame Kilpatrick at his trial. Bad Meets Evil: Lighters, RAP GENIUS (Oct. 3, 2014, 12:01 PM), http://rap.genius.com/Bad-meets-evil-lighters-lyrics. These two examples illustrate just a few of the purposes for the user-generated annotations: clarify, inform, entertain, connect, and even opine (rapper T-Pain is not really a computer, but the annotator clearly believes T-Pain’s work is robotic).


10 See id.

11 See Constine, supra note 4. Congress has classified computer software itself as copyrightable. JULIE E. COHEN, ET. AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 217 (3d ed. 2010). Congress noted that “some form of protection” was “necessary to encourage the creation and broad distribution of computer programs in a competitive market” and that patent and trade secret protections might restrict innovation too much by providing too much protection, whereas copyright protection would strike the proper balance between protecting the authors and facilitating more creation. Id. (quoting CONTU’s Final Report and Recommendations, in 5 COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD, 28 (Nicholas L. Henry ed., 1980)).

12 See About Genius, supra note 9.

13 Planet Money, supra note 2.

14 See id.
in the creation of the end product—the web page featuring the lyrics—should make money off of that product. The song writers seem to have the greatest claim to any profits earned from their lyrics because there would be no profitable webpage without the lyrical content. However, without the webpage as a host forum, there would be no extra profit earned from the lyrics in their textual form.

There is no question that copying song lyrics verbatim onto a webpage and making money off of that website is copyright infringement, and at least one fair-use expert argues that most lyrics websites are not protected by fair use. However, Rap Genius is not an ordinary lyrics website: It goes beyond posting verbatim copies of lyrics by adding a significant amount of original content in the form of annotations. Such an addition not only pushes Rap Genius’s annotated lyrics closer to fair use, but it also creates implications that go beyond the decoding of hip-hop lyrics. If what Rap Genius does is considered fair use, what would stop someone from posting complex copyrighted computer codes, in full, with annotations? What about entire movie scripts with Rotten Tomatoes-esque commentary in the margins? Such practices would allow infringement of highly creative work simply because the infringer added a few personal notes of their own. Even so, in the context of copyright law, user-generated online annotations should be considered fair use because they pass the modern, codified fair use “test.” Additionally, the goal of copyright law in general is furthered by allowing the freedom to comment on copyrighted works, and such a furtherance should strengthen the fair-use case for online annotation websites.

Part I of this Note discusses the legal background of copyright law, the fair-use defense, and how the defense has historically applied to annotations and commentary. Part II argues that the users annotating through Rap Genius have a fair-use defense to any claim of copyright infringement because they pass the statutory test and because the goals of copyright law are furthered by their commentating. Part III imagines a world in which a court denies fair use protection for the users and argues that in such a case, Congress should act to protect host
websites like Rap Genius from secondary liability by creating a new “safe harbor” for annotation platforms.

2. Background

To properly analyze user-generated online annotations in relation to copyright law, a basic understanding of the law itself is a necessity. Copyright law serves to advance society intellectually and artistically by incentivizing innovation.\(^{20}\) Similarly, one must understand the fair-use defense, its role in the copyright legal landscape, and its impact on the goals of copyright law. One must also be aware that fair use is a flexible doctrine, and that many legal scholars advocate for even broader fair-use protection as access to information increases. Finally, it is important to note the role of annotated works in an educated society and to understand why such works can receive fair-use protection.

2.1 Copyright Infringement

Copyright law in the United States is grounded in the Constitution.\(^{21}\) The Copyright Clause gives protection to authors for certain works, but it also proffers the reason for doing so: to “promote the Progress of Science and useful Arts.”\(^{22}\) The drafters of the Constitution thus acknowledged the importance of protecting works by authors as an incentive to create the works in the first place.\(^{23}\) Copyright law evolved over time and currently is codified in the Copyright Act of 1976,\(^{24}\) which governs everything from the duration of copyrights\(^ {25}\) to the responsibilities of the United States Copyright Office.\(^ {26}\) Examples of copyrightable material in the statute include “musical works, including any accompanying words.”\(^ {27}\) Though the statute is expansive, it is important to remember that copyright law may seem to be addressing competing interests:

\(^{20}\) See Elizabeth L. Rosenblatt, Intellectual Property’s Negative Space: Beyond the Utilitarian, 40 FLA. ST. U. L. REV. 441, 444 (2013) (“[T]he constitutional underpinnings of intellectual property law are explicitly incentive-based for copyright and patent law, and implicitly so for trademark law.”).

\(^{21}\) U.S. CONST. art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

\(^{22}\) Id.

\(^{23}\) See 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE, 24 (1994). James Madison wrote, “[t]he right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides . . . with the claims of individuals.” Id. (quoting THE FEDERALIST NO. 43, at 270-71 (Clinton Rossiter ed., 1961)).


\(^{25}\) See id. § 302.

\(^{26}\) See id. § 701.

\(^{27}\) Id. § 102(a)(2).
compensating individual authors versus society’s access to copyrighted work. But in reality, the interests are symbiotic, and copyright law aims to find the correct balance.

Copyright law is enforced, in part, by civil copyright infringement actions enabling a copyright owner to sue another party that unfairly uses the owner’s copyright. In general, there are only three elements that a plaintiff must prove to establish a prima facie copyright infringement claim: (1) that the plaintiff actually holds the copyright; (2) that the copyright is valid; and (3) that the defendant infringed the work. The law allows courts to issue injunctions and award monetary damages, including lost profits.

2.2 Secondary Liability

Courts have also extended liability to secondary infringers using the common law. Two doctrines have emerged in the copyright space: vicarious liability and contributory infringement. Vicarious liability focuses on the legal and practical control that a non-infringing party has over an infringing party. In Perfect 10 v. Amazon, the Ninth Circuit held that Google was not liable for directing users to websites that displayed images that violated Perfect 10’s copyrights because Google had no legal or practical ability to stop the infringement. The court

---

29 See id.
30 This does not mean the current law has found that perfect balance; Diane Kilpatrick-Lee argues that certain statutory proposals, specifically those that intend to criminalize copyright infringement, go too far in protecting authors at the expense of society. See Diane L. Kilpatrick-Lee, Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?, 14 U. Balt. Intell. Prop. L.J. 87, 117 (2005). She also comments on the purpose of copyright law, acknowledging the possibility of overprotecting authors. Id. at 118 (“The purpose of copyright law is to further knowledge and learning, not to further line the pockets of copyright owners.”).
32 Melville B. Nimmer & David Nimmer on Copyright § 13.01 (2003) (citing Feist Publ’s, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)). Proof of permission, or an absence of permission, from the author is not required; however, it can be used by the defendant as an affirmative defense. Id.
33 17 U.S.C. §§ 502(a)-504(b).
34 See Stephanie Berg, Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age, 56 J. Copyright Soc’y U.S.A. 265, 309 (2009). Secondary infringement occurs when a party controls or knows about direct copyright infringement taking place, for the purposes of benefiting (usually financially) from the direct infringement. Id.
35 Cohen et al., supra note 11, at 476.
36 See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007). “To succeed in imposing vicarious liability, a plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement. . . . [A] defendant exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” Id.
37 See id. at 1175.
held that Google did not contract with the infringing websites; thus, Google could not legally force the sites to cease infringement.\(^{38}\) Also, Google could not practically stop the infringement because that would require Google to analyze every photograph on the web and compare it to every other photograph on the web, which it was technologically incapable of doing.\(^{39}\) While Google was not considered a vicarious infringer,\(^ {40}\) the Ninth Circuit did attribute vicarious liability to the file-sharing service Napster.\(^ {41}\) The court held that because Napster could “police” its website by banning individual users, it maintained practical and legal control over those users.\(^ {42}\)

Contributory infringement, on the other hand, focuses on the level of involvement and knowledge that a third-party has with and about a direct infringer.\(^ {43}\) Contributory infringement requires both actual knowledge of infringement (knowledge)\(^ {44}\) and a material contribution to the infringement (causation).\(^ {45}\) In Amazon, the Ninth Circuit held that if Google had knowledge of the infringement of Perfect 10’s images through its search engine, and did not take “simple measures” to eliminate the infringement, then Google could be held liable as a contributory infringer.\(^ {46}\) In contrast, the court held in Perfect 10 v. Visa that profitability as an incentive to infringe was not enough to establish causation.\(^ {47}\) In Visa, Perfect 10 sued a collection of credit card companies that allowed online users to buy Perfect 10’s copyrighted material online.\(^ {48}\) The court held that in Amazon that Google made it “fast and easy” for third parties to infringe, but in the case at bar, the payment services just made it more profitable to infringe and thus added

\(^{38}\) See id. at 1173.
\(^{39}\) See id. at 1174.
\(^{40}\) See id. at 1175.
\(^{41}\) See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001).
\(^{42}\) See id. (holding that Napster had “the ability to locate infringing material listed on its search indices, and the right to terminate users’ access to the system” and was thus vicariously liable).
\(^{43}\) See Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). “One with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer.” Id.
\(^{44}\) Napster, Inc., 239 F.3d at 1027. “The mere existence of the Napster system, absent actual notice and Napster's demonstrated failure to remove the offending material, is insufficient to impose contributory liability.” Id.
\(^{45}\) See Gershwin Publ’g Corp., 443 F.2d at 1162. This has been interpreted to include when a third party has knowledge of infringement, but fails to act accordingly to stop the infringement. See Napster Inc., 239 F.3d at 1027.
\(^{46}\) Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007). The Court remanded the case for further factual findings. Id. at 1173.
\(^{47}\) See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 800 (9th Cir. 2007).
\(^{48}\) Id. at 793.
another step in the causal chain. Because payment was not necessary for the infringement to take place, such an addition was enough to deny liability on the defendant credit card companies. In the late nineties, Congress reacted to growing concerns involving the common-law, secondary-liability creations with the Digital Millennium Copyright Act, which introduced “safe harbors” to protect websites from contributory infringement lawsuits. The two most potentially applicable safe harbors for online annotation websites are the caching and storage of information harbors. Online Service Providers (OSPs) that automatically store copied information made available by a third party and sent directly to a recipient fall under the cache safe harbor. OSPs that “host” information on their servers on behalf of subscribers fall under the storage safe harbor as long as the OSP does not know of and ignore infringement on its servers. The safe harbors protect OSPs from monetary penalty, not injunctive relief, and represent Congress’s effort to influence the balance between overprotection of copyrights and technological innovation. Yet, safe harbors are not the only protections against copyright claims; the law also provides for some affirmative defenses like fair use.

49 See id. at 797.
50 For example, a website may allow infringement to occur for free, and then make money off of advertisements. Id.
51 See id. at 800.
52 There is an argument that imposing liability—sometimes hefty liability—on secondary infringers burdens society more than it benefits it. See Berg, supra note 34, at 310 (“Suing intermediaries may be cost-effective for the content industries because in a single lawsuit they can eliminate a mechanism that a large number of end-users are using to infringe; however, awarding statutory damages against the intermediary, which effectively shuts down the intermediary's company or technology, is not the socially optimal solution because it also eliminates the positive externalities of those technologies.”).
54 Id. § 202, 112 Stat. at 2877-78. “Section 512 exempts applicable ‘online service providers’ from monetary liability for copyright infringements of their users, but only to the extent that the infringements involve one of four functions of the ISP: transitory network transmissions of the user’s content, caching content provided by users, hosting or storing content on behalf of users (e.g., Web hosting, remote file storage), and linking to content (providing information location tools that users may use to link to infringing content such as providing links, directories, search engines).” Berg, supra note 34, at 318 (citing 17 U.S.C. § 512).
56 See id.
57 See id. The OSP must have “actual knowledge” that the material is infringing or be “aware of the facts or circumstances from which infringing activity is apparent.” Id. If the OSP does have actual knowledge, it must “act expeditiously to remove, or disable access to, the material.” Id. The OSP must not gain “a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” Id.
2.3 Fair Use

Fair use is one of the most prominent defenses to copyright infringement. Fair use allows a defendant being sued for infringement to admit to the infringement—or the “use”—but avoid liability by proving the use was “fair.” The justifications for fair use are grounded in the constitutional goal to promote the furtherance of the arts and sciences and the judicial desire to enjoy some level of flexibility when adjudicating copyright infringement lawsuits. Fair use also seeks to protect freedom of speech by mitigating some prior restraints. Fair use, according to some scholars, is a malleable doctrine that can and should change with the advancement of society in order to continue to balance the constitutional goals of copyright protection.

2.3.1 The Fair-Use Test

Since the inception of copyright law in America, there has been a necessity for some level of fair use. While its justifications arguably originated in the Constitution, Congress officially codified the modern fair-use test in 1976. The factors Congress chose to guide courts in reviewing the defense were taken mostly from the opinion in Folsom v. Marsh, written by Justice Joseph Story in 1841. Justice Story also opined the necessity for fair use in furthering the purpose of copyright protection as a way to advance the arts and sciences. The four codified considerations are not required elements, but are factors for reviewing courts to consider—on a case-by-case, fact intensive basis—when determining whether or not an infringing use is fair.

59 See Nimmer & Nimmer, supra note 32, § 13.05.
60 See id.
61 See U.S. Const. art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
62 See Stewart v. Abend, 495 U.S. 207, 236 (1990) (“[Fair use] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”).
65 See id. (quoting U.S. Const. art. 1, § 8, cl. 8).
67 See Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D Mass. 1841). “[L]ook to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Id.
68 See Emerson v. Davies, 8 F.Cas 615, 619 (C.C.D. Mass. 1845). “[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” Id.
The factors are (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the work used; and (4) the effect of the use on the market.\textsuperscript{70}

The first of the four statutory factors asks courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”\textsuperscript{71} Courts have categorized this factor in different ways with varying weight given to different parts,\textsuperscript{72} but it can be fairly divided into three subparts: (1) purpose of the use; (2) character of the use; and (3) commerciality of the use.\textsuperscript{73} The interplay of the subparts changes case by case, and while the artificial breakdown of the factor’s terminology may muddy the waters, the central aim of the factor overall is to determine if the infringing use “supersede[s] the objects’ of the original creation.”\textsuperscript{74}

While the character and purpose of the use are often combined into one factor,\textsuperscript{75} purpose can stand alone. Pamela Samuelson argues that “productive uses” is a class of uses,\textsuperscript{76} and such a class can only find its statutory footing in the “purpose” language.\textsuperscript{77} Samuelson further divides her “productive uses” category into six subcategories,\textsuperscript{78} including two focused on commentary,
echoing the statute’s preamble. She argues that productive uses are generally considered fair and are only found to be unfair in cases where the infringer took more from the original work than was necessary.

The Harry Potter Lexicon provides an interesting example of a productive use. In *Warner Bros. Entertainment v. RDR Books*, the Southern District of New York analyzed an online compendium of information related to the Harry Potter universe, compiled using large portions of the original seven novels as well as other companion books. Although the court eventually decided that large passages from the companion books were not used fairly, it noted that the Lexicon as a reference work would not “supplant demand” for the Harry Potter books and that the original author was “not entitled to control the market for reference works.” The court therefore saw the Lexicon reference work, limited to the original Harry Potter books, as a productive use that swung the first factor in favor of fair use.

While courts do not explicitly categorize transformative works under “character of the use,” it can be fairly surmised that any discussion relating to the transformation of a work is really focused on the character of the use. Courts have used “transformative” when referring to the purpose of the use, and courts have combined character and purpose into one “transformative factor.” It is clear that transformative works, whether defined as purpose or character, are generally deemed fair. However, a work need not be transformative to satisfy the first statutory factor as a whole.

---

79 17 U.S.C. § 107 (“[T]he 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.”).
81 See supra note 76, at 2570.
83 See Samuelson, supra note 76, at 2574-75.
84 See id. at 2575.
85 Id. (citing RDR Books, 575 F. Supp. 2d at 550).
86 See id. However, the court’s actual wording categorized any acceptable reference work into “character of the use” by labeling it transformative. See RDR Books, 575 F. Supp. 2d at 541 (“The purpose of the Lexicon’s use of the Harry Potter series as transformative.”). This Note places the “transformative” distinction clearly in the “character of the use” sub-category, see infra Subsection I.B.1.a.ii, however, courts vary in defining it, see supra note 72 and accompanying text.
87 Id. (discussing whether or not transformative can be included under the “character of the use” sub-factor).
88 See RDR Books, 575 F. Supp. 2d at 541 (implying that the secondary work had a transformative purpose).
90 See id.
The leading case for transformative works comes from the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*

The Court in *Campbell* focused on parody specifically, but reiterated some of the language from the fair use statute’s preamble in dictating that “other types of comment and criticism . . . traditionally have had a claim to fair use protection as transformative works.” In essence, the Court used the transformative label, but based its reasoning on the language from the statute itself. Since *Campbell*, various courts have labeled many uses transformative, and many others not. Like all of the statutory factors, deciding whether or not a work is transformative is a very fact-specific inquiry, and the “add something new” definition from *Campbell* is the proper starting point.

The final part of the first statutory factor asks courts to consider whether or not the infringer made money off of their use (i.e., commerciality of the use). In *Campbell*, the Court held that if a work was deemed to be transformative, then the commerciality of the use was less important. The Court seemingly eliminated a long-standing presumption that any commercial gain by the

---

91 Id.
92 Id. “The central purpose of this investigation is to see. . . whether the new work merely supersed[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; it asks, in other words, whether and to what extent the new work is transformative.” Id.
93 Id. Comment and criticism are both favored uses from the statute’s preamble. See Copyright Act of 1976, 17 U.S.C. § 107 (2012).
94 See *Campbell*, 510 U.S. at 583. The Court also justified “transformative works” being fair by referring to the Copyright Clause of the Constitution because the goal of furthering the arts and sciences is met when works are transformed into new works. Id. at 579 (citing U.S. CONST. Art. 1, § 8, cl. 8).
95 See, e.g., Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (holding that paintings that used many photographs of Rastafarians were transformative because the expression changed from natural beauty to “crude and jarring works” when the artist added cartoonish and outlandish graphics and colors to the photos); Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 611 (2006) (holding that by minimizing, angling, and adding text to photos, defendant changed the message of the work making it transformative); Kelly v. Arriba Soft Corp. 336 F.3d 811, 818 (9th Cir. 2003) (holding that thumbnails from a Google image search were created to “improve access to images on the internet” and thus were transformative); Dr. Suess v. Penguin Books USA, 109 F.3d 1394, 1399-1401 (9th Cir. 1997) (holding “The Cat Not in the Hat” was not a parody of “The Cat in the Hat,” and not transformative, because it commented on the OJ Simpson murder trial as opposed to Seuss’s poem).
98 17 U.S.C. § 107 (asking “whether such use is of a commercial nature or is for nonprofit educational purposes”).
99 See *Campbell*, 510 U.S. at 594. The *Campbell* Court actually overruled the lower court which deemed the use unfair solely because the infringer was making money off of their use. *Id.* The Court wrote, “the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against fair use.” *Id.* at 579.
infringer cut against fair use. 100 Though the Court eliminated a presumption, it retained its own prior language and held that “commerciality merely inclines against fair use, without giving rise to presumptive significance.” 101

Courts will also consider the motives of the infringer when examining a copyright infringement case, with non-commercial motives favoring fair use. The distinction between for- and non-profit uses provides some guidance. 102 but courts have also delved into the infringer’s motives. 103 The Supreme Court has made clear that though a “sole motive” to make money by infringing cuts against fair use, a lesser motive can qualify as well. 104 However, courts have found that making money off of the infringing work does not end the discussion. 105 Like the other statutory factors, a case-by-case factual analysis is necessary.

The second statutory factor asks courts to consider “the nature of the copyrighted work.” 106 This factor seeks to determine how protected an original work is with greater protection for certain works. 107 In essence, the more creative the work, the more protection it receives; 108 the more “productive” or “informational” the work, the weaker its protection when faced with a fair-

100 See Nimmer & Nimmer, supra note 32, § 13.05 (citing Campbell, 510 U.S. at 585).  
101 Id.  
102 See Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000) (holding that non-profit uses remove any presumption of unfairness).  
103 Compare Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (holding that defendant’s sculpture that closely resembled plaintiff’s painting was not much of a parody and that “copying of the photograph ‘Puppies’ was done in bad faith, primarily for profit-making motives” and therefore the first factor did not favor fair use.) with Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006) (holding that taking women’s legs off an advertisement for shoes and adding it to other legs and donuts as social commentary—as opposed to the advertisements commercial purpose—changed the purpose, even though both works made money).  
104 See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).  
105 See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006) (holding that a biographical book of the Grateful Dead with copyrighted photographs of the band used throughout used the images fairly, even though the book was a commercial venture, because “[b]y design, the use of BGA’s images is incidental to the commercial biographical value of the book”). The court quoted Campbell, and the Court’s movement away from the commerciality element: “nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . are generally conducted for profit.” Id. (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994)).  
107 See Campbell, 510 U.S. at 586 (“This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”).  
108 See Nimmer & Nimmer, supra note 32, § 13.05; cf. Bill Graham Archives. 448 F.3d at 612 (“[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.”).
use challenge.109 Use of an unpublished work is not per se unfair, but it does generally cut against fair use.110 While courts have analyzed various works under the second factor,111 song lyrics are considered highly creative works and thus earn a high degree of copyright protection.112

The third statutory factor asks courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”113 Courts should consider the amount taken from the original work and the amount of the infringing work made up of portions taken from the original work.114 Reviewing courts should also look to both the quantity of the work taken and the qualitative nature of the work taken.115 There is not a reliable line of case law to clarify the quantitative analysis,116 and even entire copies or takings have been held fair.117 For example, the Second Circuit held in *Graham v. Dorling Kindersley* that smaller—though entire—versions of copyrighted photographs of the band The Grateful Dead, which appeared in a

---

109 See NIMMER & NIMMER, supra note 32, § 13.05 (citing Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 531 (9th Cir. 2007); Diamond v. Am-Law Corp., 745 F.2d 142, 148 (2d Cir. 1984); Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190, 1225 (N.D. Ga. 2012)).


111 See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (giving more protection to an unpublished set of presidential memoirs because the memoir’s value was in its continued confidentiality); Robinson v. Random House, Inc., 877 F. Supp. 830, 841 (S.D.N.Y. 1995) (holding that the second factor cut towards fair use in an almost verbatim copy of a non-fiction, published, biographical work because “[a]lthough [the] biography certainly is a work involving creativity, the case law is clear that subsequent authors may rely more heavily on works of nonfiction than on works of fiction”); Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013) (holding that highly creative photographs of Rastafarians, even though published, did not command the upmost protection because the secondary work was ruled to be transformative); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977) (holding that an index of information was not highly creative and focusing on the “diligence” used over any “originality or inventiveness”).

112 Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1560 (2004). See also Leadsinger, Inc., 512 F.3d at 531 (“Original song lyrics are a work of creative expression, as opposed to an informational work, which is precisely the sort of expression that the copyright law aims to protect.”).


114 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587-88 (1994) (discussing the interplay between the amount of the original work used in the infringing work, and the first and fourth factors). The more of the original work used in the infringing work, the less transformative it is under the first factor, and the greater chance it has at replacing the original work in the market under the fourth factor. See id.


116 See Madison, supra note 112, at 1561.

117 Id. (“Even a one to one correspondence between the plaintiff’s work and the defendant’s copy, once assumed always to be infringing, may be excused as fair.”); see also Kelly v. Arriba Soft Corp. 336 F.3d 811, 818 (9th Cir. 2003) (holding that thumbnails from a Google image search of highly creative paintings which depicted the entire painting did not go against fair use because seeing the entire painting in the thumbnail was necessary for the searcher to identify the painting) (emphasis added).
biography about the band, were fair because the “transformative purpose” of the secondary work was furthered by the images depicted in their entirety, and the smaller photographs were not a true substitute for the original.\textsuperscript{118}

Just as the measurable amount of the work taken is considered, a reviewing court must also look toward the qualitative taking, requiring the court to determine whether or not the “heart” of the work was copied.\textsuperscript{119} What constitutes the “heart” is also unclear;\textsuperscript{120} courts have focused on the artistic heart of the work, as well as the economic heart of the work.\textsuperscript{121} Whatever analysis a court uses, and whatever amount of weight it gives to each analysis, the third factor in sum asks a court to decide whether or not the infringer took too much of the work, or at least in the fair use context, more than necessary.\textsuperscript{122}

The fourth and final statutory factor asks courts to determine the “the effect of the use upon the potential market for or value of the copyrighted work.”\textsuperscript{123} In the past, the Supreme Court has called this the most important factor,\textsuperscript{124} yet the Court has given it less weight when it determines that a secondary work is transformative.\textsuperscript{125} Under the fourth factor, courts generally look at whether or not the infringing work will reduce the market or potential market for the original

\textsuperscript{118}See Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006) (“[E]ven though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size. We conclude that such use by [defendant] is tailored to further its transformative purpose because [defendant’s] reduced size reproductions of [plaintiff’s] images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events. Accordingly, the third fair use factor does not weigh against fair use.”).

\textsuperscript{119}See Madison, supra note 112, at 1561 (noting that the “heart” analysis is also extremely unclear, sometimes referring to the creativity of the original work, and sometimes referring to the “portion of the work judges to be of the highest economic value”).

\textsuperscript{120}Id.; see also Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (holding that the infringing work took the artistic and economic heart of the work, writing, “[a] Time editor described the [copied] chapters on the pardon as ‘the most interesting and moving parts of the entire manuscript’” and “[c]onversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyright expression”).

\textsuperscript{121}See Madison, supra note 112, at 1561; see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994) (discussing the necessity for a parody to take large amounts, possibly even the “heart,” from the original work in order to serve its legitimate transformative purpose).


\textsuperscript{124}See Campbell, 510 U.S. at 584 (1994); see also Neil Weinstock Netanel, Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715, 743 (2011) (describing empirical data that shows courts give less weight to the fourth factor after finding the work to be transformative under the first factor).
While the consideration under the fourth factor looks similar to the commerciality element of the first factor, there is a critical distinction. The first factor asks whether or not the infringer made money,\textsuperscript{127} while the fourth factor asks if the original artist lost money.\textsuperscript{128}

Determining potential markets has proven difficult for courts and, like the other factors, is heavily dependent on facts in a case-by-case analysis.\textsuperscript{129} Because of the difficulties in determining potential markets, holdings are inconsistent.\textsuperscript{130} In general, potential licensing fees will weigh against fair use;\textsuperscript{131} however, the scope of potential licensing fees cannot be unreasonable\textsuperscript{132} nor come from an “abnormal or nontraditional” market.\textsuperscript{133} That being said, even the existence of established licensing markets does not guarantee the exclusion of fair use.\textsuperscript{134} In \textit{Graham}, the court held that even though a licensing market for copyrighted images already existed, the transformative nature of the secondary use created a new market that the original creator did not have a right to control.\textsuperscript{135} The court warned against ending the fair use calculus prematurely by broadening the scope of potential markets.\textsuperscript{136} Though normally weighty, the

\begin{itemize}
\item \textsuperscript{126} See Nimmer & Nimmer, supra note 32, at § 13.05. “[W]hether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for, or value of, the plaintiff’s present work.” \textit{Id.} (citing Wall Data Inc. v. Los Angeles Cnty. Sheriff’s Dept., 447 F.3d 769, 781 (9th Cir. 2006); Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).
\item \textsuperscript{127} See Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (holding that defendant’s infringement was “primarily for profit-making motives” under the commerciality sub-factor of the first factor).
\item \textsuperscript{128} See Nimmer & Nimmer, supra note 32, § 13.05.
\item \textsuperscript{129} See Madison, supra note 112, at 1562.
\item \textsuperscript{130} See id.
\item \textsuperscript{131} See Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994) (“It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work . . . and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.” (citing Copyright Act of 1976, 17 U.S.C. § 107 (2012))).
\item \textsuperscript{132} Cf. Nimmer & Nimmer, supra note 32, § 13.05 (“A danger of circularity is posed here—a potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff’s work, which use could in turn be defined in terms of the relevant potential market. In other words, it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar. For example, if the plaintiff complains that snippets of her rock-and-roll song lyrics have been appropriated by defendant for a quiz in its book of 1960’s trivia, one could define the supplanted potential market as the possibility of licensing rock song lyrics for quiz books.”).
\item \textsuperscript{133} See Wendy J. Gordon, \textit{Fair Use Markets: On Weighing Potential License Fees}, 79 GEO. WASH. L. REV. 1814, 1827 (2011) (“[T]hat fourth factor . . . would not take foregone license fees into account if the fees came from a market that was abnormal or nontraditional.”).
\item \textsuperscript{134} See \textit{Bill Graham Archives}, 448 F.3d at 614.
\item \textsuperscript{135} Id; see also Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008).
\item \textsuperscript{136} See \textit{Graham}, 448 F.3d at 614 (“[W]here a court automatically to conclude in every case that potential licensing revenues were impermissibly imposed simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would always favor the copyright holder.” (quoting \textit{Texaco}, 60 F.3d at 930)).
\end{itemize}
fourth factor does lose some importance when the secondary work is transformative under the first factor.\textsuperscript{137} That balancing test is just one example of the type courts must conduct in fair use cases. Courts must also balance the interests of the original author in protecting the work with society’s interest in using the work.

\textbf{2.3.2 Fair Use in the Technology Age}

Implicitly included within the statutory factors is a consideration of the underlying goal of copyright law and fair use to promote the useful arts.\textsuperscript{138} There is an argument that, because fair use is used to further the constitutional purpose of copyright law, the doctrine itself should evolve as society evolves.\textsuperscript{139} Particularly as technology advances, fair use has been forced to address new processes and devices.\textsuperscript{140} However, the progress of the doctrine and the law has lagged behind rapidly-advancing technology.\textsuperscript{141} While the Supreme Court and Congress have yet to provide clarity,\textsuperscript{142} some scholars argue that fair use should expand substantially.\textsuperscript{143} For example, at least one scholar advocates for the protection of online file sharing under fair use.\textsuperscript{144} While such a view may seem radical—Napster, a file sharing service, did lose definitively in court\textsuperscript{145}—others argue that gradual progression in society should be mirrored in the fair-use

\textsuperscript{137} See Weinstock, \textit{supra} note 125, at 743.
\textsuperscript{139} See Samuelson, \textit{supra} note 76, at 2617 (“Copyright also promotes the public good when subsequent authors are able to draw upon existing works in making and preparing to make new works, when members of the public are able to use copyrighted materials in a way that allows them to make a range of reasonable uses that pose no meaningful likelihood of harm to the markets for protected works, and when developers of new technologies provide new opportunities for the public to make such reasonable uses.”).
\textsuperscript{140} See generally Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 416 (1984) (revealing where the Supreme Court was forced to address a new Betamax technology that allowed users to record live television and play it back at a later time—effectively copying the live broadcast without permission).
\textsuperscript{141} See Samuelson, \textit{supra} note 76, at 2617.
\textsuperscript{142} See Sony, 464 U.S. at 430 (where the Supreme Court deferred to Congress, writing “[f]rom its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.”). However, in Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 956 (2005) (Breyer, J., concurring), Justice Breyer examined the Court’s decision in Sony by asking whether a modification of that decision was necessary due to new technologies changing the balance between furthering innovation and protecting copyright interests. So one justice has at the least acknowledged that new technologies may lead to a new perspective being required. \textit{Id.}
\textsuperscript{144} \textit{Id.} (“[C]yberspace and the economics of digital technology require the unbundling of the public’s interests in the creation and distribution of digital works. Once they are unbundled, the assumption that digital works are entitled to copyright protection is no longer warranted.”).
\textsuperscript{145} See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001).
doctrine. Specifically, at least one scholar argues that cases concerning new technologies should not just be judged strictly on the four statutory factors, but should also be influenced by the context of the technology within its pocket of society and the enhancement of the public good or benefit of enjoying the technology.

The Supreme Court has echoed these academic arguments to a certain degree, and in *Sony v. Universal* it embraced a pro-technology stance in the contributory infringement context. The Court drew a comparison between copyright law and patent law—the intellectual-property protection more often associated with technology. The Court adopted the “staple item of commerce” doctrine and applied it to copyright, holding that the creator of a machine used for copying should not be held liable as a contributory infringer if the machine could be used primarily for legitimate, non-infringing purposes. Though the holding in *Sony* was complex and, in the end, very narrow, it serves as an example of the Supreme Court interpreting the law in the face of advancing technologies and without explicit guidance from Congress.

---

146 Samuelson, *supra* note 76, at 2617.
147 Id. (‘‘When technological change has rendered an aspect or application of the Copyright Act ambiguous,’ the law should be construed in light of its public policies, such as the exclusion of functional designs.” (quoting Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527 (9th Cir. 1992))). And the Supreme Court has even supported this pro-technology stance. *See* 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. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”).
149 Id. “We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible.” *Id.*
150 Id. at 422. “The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.” *Id.*
151 *See id.* at 456 (reversing the Court of Appeal’s decision that Sony was liable as a secondary infringer, and holding that the “time-shifting” of live television was fair use).
152 *See id.* (“It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.”).
2.3.3 Online Annotations and Fair Use

Rap Genius and other online annotation websites are excellent examples of new, innovative technologies. These websites allow users to easily annotate copyrighted material. The annotations serve to clarify artistic expression, make connections between different works, and provide visitors of the site various multimedia related to the work. Genius, the umbrella project containing Rap Genius, describes its annotations as “mini-Wikipedia” pages that provide expert commentary while remaining enjoyable and interactive. Though anyone who creates an account can annotate, users are ranked against each other as they annotate to ensure that the commentary is reliable and entertaining. The site verifies certain users, and many artists themselves are verified and annotate their own lyrics.

Though the user-friendly interface introduced by Rap Genius is new, annotations in and of themselves are not. Annotations serve an important role in society: They can clarify complex ideas and prose, strengthen readers’ understanding of an author’s work, and even prove effective in teaching language. The importance of annotations has rarely been addressed by courts in the copyright context, though some jurisprudence points to annotations being fair. Of

---

153 See About Genius, supra note 9.
154 Id.
156 About Genius, supra note 9 (“Annotations are like miniature Wikipedia pages: constantly-improving distillations of the combined wisdom of potentially dozens of scholars . . . annotations are informative, first and foremost, but often also playful.”).
157 Id. (“[w]hen you write an annotation, when someone upvotes your annotation, when you moderate someone else’s work, etc., your Genius IQ goes up. Earn enough IQ and you might even make the leaderboard or become the Top Scholar on your favorite artist or author.”).
158 Id. (“‘Verified’ annotations are different—the goal of verified annotations is to give people who are closely associated with a piece of text a platform to explain their perspective. Often verified annotations come from the author of the document—as when Pulitzer prize-winner Junot Díaz added commentary to his novel, The Brief Wondrous Life of Oscar Wao—but they can just as easily be written by its subject.”). “Verification” is a common practice amongst community-based online platforms that serves to verify certain public figures as themselves, to avoid confusion and fraud. See, e.g., Help Center, TWITTER, https://support.twitter.com/articles/119135-faqs-about-verified-accounts (last visited Feb. 13, 2015).
159 See Lawrence v. Dana, 15 F. Cas. 26, 58 (C.C.D. Mass. 1869) (No. 8136) (featuring an annotated work of international law).
162 See Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1124-25 (9th Cir. 2000) (writing in dictum that an annotated religious work would have a different audience than the original version, and implying that such an annotation would be fair).
course, annotations require the same case-by-case application of the statutory factors, and the Supreme Court has not addressed annotations in any of its major fair-use cases. However, lower courts have addressed annotations directly, and in the unpublished *L.A. Times v. Free Republic*, a district court in California held that an annotation website very similar to Rap Genius was not protected by fair use. In *L.A. Times*, the defendant website posted full news articles to its “bulletin board” and allowed users to comment on the articles. The court rejected a fair-use defense in part because the initial post absent any comments, was not transformative.

Binding case law relating to annotations is scant, however, and fair use as applied to user-generated online annotations would be a novel issue for a higher court to review. The case law concerning fair use is varied, and there is not a reliable predictor for how a court will rule in any given fair-use case. This leaves defendants in the unenviable position of advocating with facts impossible to apply with any certainty and using overarching justifications in an attempt to convince a court to, in most cases, carve out a larger space for fair-use protection.

---

163 *See id.* at 1120 (writing “[w]e have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety,” and implying that commentary like annotations, absent criticism, is not automatically fair use.) The court said that all of the fair use factors must be considered. *Id.* (quoting REP. NO. 83, at 35 (1967)).


165 *See Worldwide Church of God, 227 F.3d at 1124; see also* Lawrence v. Dana, 15 F. Cas. 26, 58 (C.C.D. Mass. 1869) (No. 8136) (holding that an annotated work could be considered a new work, but before fair use was firmly established as an affirmative defense).


167 *Id.* at *1-2.

168 *Id.* at *8.

169 At least at the highest level. *See supra* note 164 and accompanying text. And with only one case from the late 1800’s, before the fair use doctrine had time to develop, and one unpublished case from a lower court in California, there is very little case law among the lower courts as well. *See Lawrence, 15 F. Cas. at 58; L.A. Times, 2000 WL 565200, at *1.*

170 For two examples of academic attempts to organize fair use cases in order to create more predictability, see Madison, *supra* note 112 (arguing for a “pattern-oriented approach”) and Samuelson, *supra* note 76 (arguing for fair use “clusters” in order to predict how a court will rule in certain types of fair use cases).

171 Samuelson, *supra* note 76, at 2540 (“Fair use is, however, often decried for the unpredictability said to attend the fact-intensive, case-by-case nature of fair use analysis and/or to result from the lack of judicial consensus on the fundamental principles that underlie fair use.”). Judge Learned Hand called fair use doctrine the “most troublesome in the whole law of copyright.” Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

172 *See Samuelson, supra* note 76, at 2570.
3. The Users’ Fair-Use Defense

When it comes to user-generated online annotations, more space for fair-use protection should be carved out. There is no question that songs are copyrightable and that the lyrics themselves are as well. There is also no question that publishing lyrics to a website without permission and making money off of that website is prima facie copyright infringement. In the case of Rap Genius, users do not just annotate the lyrics—they also enter the lyrics onto the website in the first place. Many lyrics websites work similarly, and presumably many future annotation sites of any content type would use a similar model in an attempt to sidestep direct liability for the managers of the website. The question yet to be addressed is whether or not individual users entering song lyrics onto a website for the purpose of informing other users and providing a foundation for annotation are protected by fair use. After considering the existing case law alongside the statutory factors—and along with the benefits to society that the use creates—it is evident that the law protects such users.

When this question is eventually litigated, the reviewing court will be required to apply the statutory factors to user-generated online annotations. These annotations pass the fair use test because the annotations are arguably transformative and productive and the users do not have a commercial interest in annotating. Further, even though song lyrics are highly creative and, in the case of lyrics websites, the entire work is used, the market for song lyrics is far less pervasive than the market for the songs themselves. Thus, online users who enter and annotate the lyrics are not liable for copyright infringement.

3.1 Purpose and Character

The first factor asks courts to analyze the purpose of the use, the type of use, and whether or not the use provided the infringer a commercial benefit. Users who post lyrics online and

---

174 See Planet Money, supra note 2.
175 About Genius, supra note 9.
177 See NIMMER & NIMMER, supra note 32, § 13.05.
179 Madison, supra note 112 and accompanying text.
180 See Copyright Act, 17 U.S.C. § 107 (1976) (“[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”).
generate annotations for those lyrics engage in a fundamentally productive use by enabling other users to not only decipher lyrics to their favorite songs, but also to make sense of those lyrics. Even if the work may not constitute a “creative transformation” — the favored and most judicially backed subset of the first statutory factor — productive uses are generally deemed fair. While the use may not be a “creative transformation,” its “productive transformation” is enough to satisfy the first factor. Additionally, a purpose to disseminate knowledge through commentary furthers the goal of copyright law, and should bolster a transformation claim under the first factor. The users also have little to no commercial motivation to engage in posting and annotating; thus, the commerciality aspect of the first factor favors a finding of fair use as well. A “productive transformation” with a favored purpose combined with a lack of commerciality is more than enough to swing the first factor in favor of fair use.

The first issue is whether or not the purpose of the use is justified. The purpose sub-factor asks courts to consider whether or not the secondary use has a productive purpose different from that of the copyrighted work. Online annotations of song lyrics have a very different purpose than that of the song itself. While the original song as a whole seeks to entertain, inspire, and musically stimulate the listener, annotations of the song’s lyrics seek to clarify, inform, and identify connections between the lyrics and the artist or other works. Even by separating the lyrics from the audial version of the song, many distinctions exist. The lyrics in text form,

---

181 See Samuelson, supra note 76, at 2570 (discussing the productive uses favored in the preamble, and creating a novel classification of “productive uses” which are generally deemed fair).
182 Id.
183 Commentary is a favored use in the fair use statutory preamble. See 17 U.S.C. § 107 (“[F]or purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” (emphasis added)).
184 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).
186 See Samuelson, supra note 76, at 2570 (implying that the favored uses of the preamble all add up to “productive” uses); see also 17 U.S.C. § 107 (“[F]or purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, [secondary use] is not an infringement of copyright.”).
187 See Thomas Schafer, et al., The Psychological Functions of Music Listening, 4 FRONTIERS IN PSYCH. AUG. 2013 at, 5-6 (2013) (evaluating the effects of music on listeners including arousal and mood regulation and finding that “music conveys feelings; music can lighten my mood; music helps me better understand [listeners’] thoughts and emotions”).
188 See About Genius, supra note 9 (describing the purpose of annotating to songs to inform the reader and identify connections within the lyrics).
standing alone, are a form of art similar to poetry. However, annotations of such art provide something very different to the reader in that the annotations inform the reader and break down very dense artistic prose into digestible and comprehensible language. If the lyrics themselves are supposed to inspire emotions within the listener or reader, then the annotations serve to ascertain and illuminate those emotions. The annotations therefore provide a productive purpose in guiding the consumer of the art through the art itself.

The Harry Potter Lexicon serves as a good example of how such “guiding” can be considered a fair purpose. The Lexicon, an amalgamation of various sources related to the Harry Potter universe, serves the productive purpose of organizing a complex fictional world into a user-friendly reference guide. Just as the Lexicon guides readers through the complex, fictional world of Harry Potter, online annotations of lyrics guide listeners through the complex and metaphorically dense lyrical construction of the songs. The annotations themselves serve as a reference guide to the songs, and the original artists should not be able to control the market for such a uniquely productive use of their work. Just as the court held in the Harry Potter Lexicon case that the reference guide had a fair purpose, the annotations that serve as a pseudo-reference guide also have a fair purpose.

Though the productive purpose is fair, it is hard to ignore the powerful transformative language from *Campbell* when analyzing the first factor. While many prior fair-use cases

---

189 See Michael Robbins, *Can Song Lyrics Be Considered Poetry*, CHI. TRIB. (July 6, 2013) http://www.chicagotribune.com/lifestyles/books/ct-prj-0707-song-lyrics-poetry-essay-20130706-story.html#page=1 (arguing that song lyrics and poetry are essentially the same, but that it is important to preserve the distinction between the two in that song lyrics are written to be heard, whereas poetry is written to be read).
190 See About Genius, supra note 9; see also Wallen et al, supra note 160 (describing the role annotations play in the scientific community in clarifying information and sharing knowledge); Jones & Plass, supra note 161 (describing the positive effect of annotations in learning languages).
191 See Schafer et al, supra note 187.
194 See id. at 519-21.
195 See About Genius, supra note 9.
196 See RDR Books, 575 F. Supp. at 550 (holding that reference works should not be controlled by the copyright holder of the original work).
197 Id.
199 Although this Note separates purpose and character of the use, and classifies transformative uses under character, courts generally do not stick to rigid classifications. See supra notes 88-Error! Bookmark not defined. and accompanying text. Courts have even called productive uses transformative. See supra note 86.
focused on the transformative, *artistic* nature of secondary works, the basic idea of the transformative test is to ask whether or not a secondary work really “add[s] something new” to an original work.\(^{200}\) The *Campbell* Court also explicitly noted that commentary has traditionally been deemed transformative.\(^{201}\) User-generated online annotations are commentary in that they comment directly on the original work. The annotations also “add something new”\(^{202}\) by using the original work as a foundation to inform and educate\(^{203}\) the reader in ways that the song and the lyrics standing alone could not.\(^{204}\) Songs are often intentionally vague and abstract for artistic purposes, while commentary tells the reader what the song really means, which in turn allows the song to remain artistically expressive.\(^{205}\) Because the annotations provide commentary,\(^{206}\) and because commentary is considered transformative,\(^{207}\) annotations can be labeled “productive transformations”\(^{208}\) and satisfy the transformative test under the first statutory factor.

Others may argue that individual annotations are not in and of themselves transformative because commenting on one line out of an entire song does not transform the song itself, and therefore a user annotating one or two lines is not protected by fair use. In *L.A. Times*, the Central District Court in California adopted that view.\(^{209}\) Further, lyrics posted without any annotations are not protected by fair use, so the initial posting of lyrics would be indefensible infringement.\(^{210}\) It would logically follow that every line that is annotated then moves the overall work closer to fair use, with some initial “timeframe” left unprotected. While the distinction is

\(^{200}\) *Campbell*, 510 U.S. at 579.
\(^{201}\) *Id.; see also* Copyright Act of 1976, 17 U.S.C. § 107 (2012) ("[F]or purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").
\(^{202}\) *Campbell*, 510 U.S. at 579.
\(^{203}\) Three of the six “productive” uses Pamela Samuelson identifies can readily be applied here: (1) cultural commentary, (2) grounding ones commentary, and (3) reference works. *See* Samuelson, *supra* note 76. These “productive” uses would of course be applicable to the preceding discussion about the purpose of annotations, but the same rationale would cross over into a court’s transformative analysis. This is just another example of the sub-factors blending into one another.
\(^{204}\) While songs serve the purpose of entertaining the listener, annotations serve the purpose of informing the reader. *Robbins*, *supra* note 189.
\(^{206}\) *About Genius*, *supra* note 9.
\(^{207}\) *Campbell*, 510 U.S. at 579.
\(^{210}\) *Id.* (holding that the initial posting of a verbatim news article is not protected by fair use); *see also* Planet Money, *supra* note 2 (noting that normal lyrics websites that just post lyrics are not protected by fair use).
interesting, it can be reconciled with the purpose of annotated works. The productive purpose of annotation platforms trumps any “timeframe” featuring non-transformative lyrics.\footnote{See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984) (“[A] productive use . . . result[s] in some added benefit to the public beyond that produced by the first author's work.”).} Secondary works need not be creative transformations to satisfy the first factor, and productive uses are generally deemed fair.\footnote{See Samuelson, supra note 76, at 2570 (arguing that productive uses are fair); see also Kelly v. Arriba Soft Corp. 336 F.3d 811, 818 (9th Cir. 2003) (holding that thumbnails from a Google image search were created to “improve access to images on the internet” and thus were transformative, but under a more productive rationale).}

Additionally, the underlying goals of copyright law should seep into the first factor analysis.\footnote{See Stewart v. Abend, 495 U.S. 207, 236 (1990) (“[Fair use] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”).} While lyrics void of annotations are not fair,\footnote{Planet Money, supra note 2.} holding the individual who first posted the lyrics liable would deter the initial posting and the entire process would end before beginning. Such a drastic freezing of innovation for an ultimately minor protection for the artists does not satisfy the requisite balancing of interests that copyright law commands.\footnote{Rosenblatt, supra note 200, at 444 (“[T]he constitutional underpinnings of intellectual property law are explicitly incentive-based for copyright.”); Kilpatrick-Lee, supra note 30 , at 118 (“The purpose of copyright law is to further knowledge and learning, not to further line the pockets of copyright owners.”).} Ultimately, the process of posting and annotating is a fair, productive use, and picking apart the process to find pockets unprotected by fair use loses sight of the forest in the trees. The purpose and character analysis under the first factor should thus swing towards annotations being considered fair use. The same is true for commerciality.

The commerciality sub-factor should also swing towards fair use because user-generated online annotations are not commercial.\footnote{See Copyright Act of 1976, 17 U.S.C. § 107 (2012).} Courts will delve into the motives of infringers in an attempt to ascertain just how commercially motivated their use was, but will also look to see if infringers made money.\footnote{See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).} In the case of user-generated online annotations, such an inquiry will be quick and decisive, and it will result in a finding of no commerciality. Users of the site do not make money.\footnote{See About Genius, supra note 9.} They are not paid by Rap Genius or any other entity to post lyrics or to
annotate.\textsuperscript{219} Whatever their motives may be, they certainly are not to make money.\textsuperscript{220} More likely, the users annotate lyrics in an attempt to participate in an online community of commentary and education, two uses explicitly favored in the statute’s preamble.\textsuperscript{221} Because users have little to no financial incentive to annotate, and because they themselves do not make money from posting, their use would easily pass the commerciality sub-factor.\textsuperscript{222} That, combined with the fact that the annotations are “productive transformations,” should swing the first factor overall in favor of fair use.

3.2 Nature of the Copyrighted Work

The second factor asks courts to look at the copyrighted work itself\textsuperscript{223} and judge how creative the work is.\textsuperscript{224} The more creative the work, the more copyright protection it deserves, and the harder it is for the defendant to show fair use.\textsuperscript{225} Song lyrics are considered highly creative works, which makes a fair-use case for infringing on those lyrics a more difficult one.\textsuperscript{226} However, the second factor, like the others, is not conclusive, and courts have not given the second factor much weight.\textsuperscript{227}

Most of the major fair-use cases featured highly creative works—as those cases are the type that are ripe for litigation—and many of those concluded with a finding of fair use.\textsuperscript{228} In the end, the high level of creativity featured in song lyrics will not preclude a finding of fair use, and the other factors are of more concern.\textsuperscript{229}

\textsuperscript{219} See id.
\textsuperscript{220} See id. Genius encourages users to annotate in an attempt to achieve the website’s goal to “annotate the web” and tries hard to advocate for a community of annotators. Id. Some artists do comment on their own lyrics which may show an underlying motivation to market themselves. However, a vast majority of the annotations are generated by users who are not artists themselves. See id.
\textsuperscript{221} See 17 U.S.C. § 107.
\textsuperscript{222} Id.
\textsuperscript{223} See id. (“the nature of the copyrighted work”).
\textsuperscript{224} See Nimmer & Nimmer, supra note 32, § 13.05.
\textsuperscript{225} See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (“[t]his factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”).
\textsuperscript{226} See Madison, supra note 112, at 531.
\textsuperscript{227} See Nimmer, supra note 32, at § 13.05 (“[T]his second factor more typically recedes into insignificance in the greater fair use calculus.”).
\textsuperscript{228} See Campbell, 510 U.S. at 586 (discussing the highly creative nature of a song and its lyrics while disposing of the second factor quickly).
\textsuperscript{229} See id.
3.3 Amount and Substantially Used

The third factor asks courts to look at the amount taken from the copyrighted work, as well as how much of the infringing work is made up of the copyrighted work. The quality and quantity of the taking must be considered. In the case of online annotations, the amount of annotations relative to the size of the work could play a factor when considering the quantity taken. For example, a song made up of sixty-four lines, with only a few of those lines annotated, would swing against fair use. In such a situation, the entire original work, the song, would be taken, and almost all of the infringing work, the “annotated” song, would be made up of the original work. But if all sixty-four lines were annotated, with annotations for any one line ranging from a few words to several paragraphs, much less of the infringing work would be made up of the original. In that case, it would be easier to show fair use of the lyrics because although the entire song was taken, there would be much more added to the lyrics from the infringer. However, like in the first factor analysis, the underlying goals of copyright law to promote innovation should be considered. Community annotation platforms like Rap Genius engage in a process of commentary that is not fully realized immediately, but the end product is fair, and hindering the process to get to that end product disrupts the innovation that copyright law seeks to incentivize. Therefore, the amount borrowed and used from the original should not trump the fair, productive purpose of the annotations.

Along with the quantity of the work used, the quality used must also be analyzed. In this analysis, courts will look to the “heart” of the work. In the case of song lyrics, specifically, the

---

231 See Campbell, 510 U.S. at 587-88.
232 See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (holding that the more borrowed material used in the infringing work, the less likely the use is fair).
233 See id.
234 This is where the first factor begins to bleed into the third factor analysis. See Campbell, 510 U.S. at 587. Like in the Harry Potter Lexicon case, even if the whole original work is borrowed, the court will judge how much of the infringing work is original, with a greater amount of new work leading to greater likelihood of fair use. See Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008) (holding that the reference materials added to the original material from the books transformed the work into something new under the first factor).
236 See About Genius, supra note 9 (detailing the process by which individual users annotate songs, line by line, until the whole song is completed annotated).
237 See PATRY, supra note 23 (discussing copyright law and its development to incentivize innovation and creation).
238 See Campbell, 510 U.S. at 587-88.
239 Id.
lyrics separated from the music makes a difference in the fair-use calculation. In *Graham*, the court held that exact copies of photographs that appeared in a biographical book were fair in part because the photographs lost their artistic “heart” when viewed as smaller images. Lyric unaccompanied by music are artistic in their own way, but they also lose much of the “heart” of the song when presented in a silent vacuum. Lyrics without their proper musical context look like the photographs without their proper dimensional context in *Graham* in that the art cannot be consumed in its intended manner.

Others would argue that because the lyrics themselves are protected by copyright, they should be examined apart from any music. Even examined apart, the annotated lyrics should satisfy the third factor. When looking at the “heart” of the work, the first factor begins to blend into the third, and the transformative nature of the use becomes important. In the case of annotated lyrics, the annotated versions serve a completely different purpose than the lyrics themselves and are therefore transformative. Because the annotated lyrics are educational, provide commentary, and are meant to be read, they do not take the “heart” of the original lyrics which, even without music, seek to entertain and are written to be heard. Further, the *Campbell* court acknowledged that more can be borrowed when it furthers a transformative purpose. Here, online annotations need to borrow all of the original lyrics in order to create a final product that is truly transformative. Without the lyrics, the annotations would serve no

---

240 *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006).
241 *See* Robbins, *supra* note 189 (arguing that song lyrics and poetry are essentially the same).
242 *See* Bill Graham Archives, 448 F.3d at 613 (“[E]ven though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size. We conclude that such use by [defendant] is tailored to further its transformative purpose because [defendant’s] reduced size reproductions of [plaintiff’s] images in their entirety displayed the minimal image size and quality necessary to ensure the reader’s recognition of the images as historical artifacts of Grateful Dead concert events. Accordingly, the third fair use factor does not weigh against fair use.”).
243 *See Campbell*, 510 U.S. at 587 (discussing how the first factor bleeds into the third factor analysis).
244 *See* Wallen et al, *supra* note 160 (describing the role annotations play in the scientific community in clarifying information and sharing knowledge); Jones & Plass, *supra* note 161 (describing the positive effect of annotations in learning languages).
245 *See* Robbins, *supra* note 189 (arguing that song lyrics are actually written to be heard, whereas poetry is written to be read).
246 *See Campbell*, 510 U.S. 588-89 (holding that a parody, for example, requires enough taking to establish that the secondary work is actually commenting on the original work, and not some other work, which may require the secondary work to borrow a great deal from the original).
247 *See id.* at 579 (holding that the more transformative a work, the more likely it is fair use).
purpose, and without a productive purpose, the annotations would not be transformative.\textsuperscript{248} Therefore, the third factor should fall in favor of fair use because even though the annotated lyrics borrow the entire original work, the “heart” of the original song is not taken and the lyrics themselves are only taken in full in order to achieve a productive purpose.

### 3.4 Effect on the Market

The fourth and final statutory factor asks courts to determine whether or not the infringing work will reduce the market, including the potential market, of the original work.\textsuperscript{249} When the secondary work is deemed transformative under the first factor, the fourth factor is generally given less weight.\textsuperscript{250} In general, potential licensing fees will weigh against fair use; however, the scope of potential licensing fees cannot be unreasonable nor come from an “abnormal or nontraditional” market.\textsuperscript{251} In the case of song lyrics, the licensing markets are the most important. Some song lyrics do have inherent commercial value separated from their music, as they can be used in advertising campaigns or other marketing initiatives. However, those instances are rare. The original artists’ best argument to profits based off of the type of copyright infringement Rap Genius users participate in is that the artists deserve to be paid a licensing royalty for the use of their lyrics on the website.\textsuperscript{252} Unfortunately for them, Rap Genius created a new market that the original artists are not entitled to control.\textsuperscript{253} Further, the transformativeness of the annotated lyrics under the first factor will reduce the fourth factor’s importance in the analysis.\textsuperscript{254}

It is important to note that while music piracy is a real and important issue,\textsuperscript{255} infringement of lyrics is not the same thing. The market for a song is different from the market for lyrics.

\footnotesize {\textsuperscript{248} See About Genius, supra note 9 (describing the purpose of annotating songs to inform the reader and identify connections within the lyrics); cf. Samuelson, supra note 76, at 2570 (arguing that productive uses are fair); Warner Bros. Entm’t v. RDR Books, 575 F.Supp. 2d 513, 541 (S.D.N.Y. 2008) (implying that a productive purpose is transformative).} 

\footnotesize {\textsuperscript{249} See Copyright Act of 1976, 17 U.S.C. § 107 (2012) (“[T]he effect of the use upon the potential market for or value of the copyrighted work.”); see also Nimmer & Nimmer, supra note 32, § 13.05.} 

\footnotesize {\textsuperscript{250} See Campbell, 510 U.S. at 584; cf. Netanel, supra note 125 (describing empirical data that shows courts give less weight to the fourth factor after finding the work to be transformative under the first factor).} 

\footnotesize {\textsuperscript{251} Gordon, supra note 133, at 1827.} 

\footnotesize {\textsuperscript{252} See Planet Money, supra note 2 (describing Rap Genius’ recent agreement to pay licensing fees for lyrics).} 

\footnotesize {\textsuperscript{253} See Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006).} 

\footnotesize {\textsuperscript{254} See Campbell, 510 U.S. at 584.} 

because they serve different purposes. Songs are meant to be heard, and lyrics are meant to be read. The difference is important because the market for lyrics unaccompanied by music is substantially smaller than the market for the songs themselves. This difference comes into play when balancing the interests of Rap Genius and its users versus the interests of the original artists. Protecting such a small amount of available licensing money for the original artists at the expense of the innovation Rap Genius represents overprotects the artists. This is especially apparent when compared to the money still available to artists in the music industry. Copyright law seeks to incentivize creation, and even without a licensable lyrics market, artists will remain incentivized, but Rap Genius may have never created its innovative platform had it been required to pay licensing fees from the outset.

Further, the licensing market created by Rap Genius is not a market the original artists deserve to claim royalties for because Rap Genius created a new market. In Graham, an existing licensing market did not swing the fourth factor in favor of the plaintiff because the secondary user created a new market due to the transformative nature of the use under the first factor. Just as the secondary user created a new market that the original artist did not have the right to control in Graham, Rap Genius annotators created a new market by transforming song lyrics into a platform for education and commentary. Online annotations are an “abnormal” and “untraditional” market because they are a new introduction into the entertainment industry.

See Robbins, supra note 189.

Id.

See Planet Money, supra note 2 (describing the licensing market for song lyrics, which may be the only truly reliable market for lyrics unaccompanied by music).

See PATRY, supra note 23, at 24 (discussing the balancing of interests that copyright law commands).

Id.

See James McQuivey, Music Industry Stops Losing Money, Finally, FORBES (Feb. 27, 2013) http://www.forbes.com/sites/forrester/2013/02/27/music-industry-stops-losing-money-finally/ (reporting that even after the digital music revolution—which severely hampered profits—the music industry still brought in $16.5 billion in 2012).

Cf. McQuivey, supra note 261 (describing the massive amount of money made by the music industry, so much money that artists will remain incentivized to create music).

See Planet Money, supra note 2.

See Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006) (noting that the secondary use created a new market that the original artist did not have the right to control).

Id.

Id.

See Gordon, supra note 133, at 1827.
When writing their songs, the original artists did not have an expectation that a market for annotating those songs would emerge and thus they are not entitled to licensing fees for such a market.\(^{269}\) Others will argue that there already is a licensing market for song lyrics because lyrics websites have existed for quite some time.\(^{270}\) Because of that, artists do have an expectation that their lyrics may be posted online, and they will expect to receive royalties for those lyrics.\(^{271}\) However, the market is still different. Normal lyrics websites simply post verbatim lyrics without any additional substance, which requires little to no innovative work.\(^{272}\) Annotated lyrics, on the other hand, are “productive transformations” that serve a different purpose than normal lyrics websites and also require a much higher degree of innovative creativity.\(^{273}\) Therefore the two types of websites are very different and represent different markets, with only normal lyrics websites representing a “traditional” market.\(^{274}\) While a market may have already existed for verbatim lyrics posting, Rap Genius created an entirely new market focused on providing information and knowledge, using annotations.\(^{275}\)

Not only did Rap Genius create a new market, but its annotations are “productively transformative” under the first factor, which will lead to courts valuing the fourth factor less.\(^{276}\) This is justified by the fact that transformative works under the first factor are different enough

---

\(^{269}\) Cf. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1589 (2009) (arguing that “[u]nless ‘traditional’ or ‘reasonable’ are related back to the time of creation—the point when the incentive to create is meant to operate—they bear little connection to the idea of creator incentives”). But see Justin Hughes, *Copyright and Its Rewards, Foreseen and Unforeseen*, 122 Harv. L. Rev. F. 81, 91 (2009) (“While the Balganesh proposal would excuse technologies and purposes that are unforeseen even when they have an adverse impact on existing and foreseen markets, in the standard analysis a new technology’s adverse impact on the existing and foreseen markets would weigh strongly against fair use. The Balganesh proposal runs on the premise that ‘[i]ndividuals will not (and cannot) factor the unforeseeable consequences of their actions into their ex ante reasons for acting.’ But they can—because they can foresee that unforeseeable events will disrupt existing markets.” (quoting Balganesh, supra note 269, at 1589)).

\(^{270}\) See Gordon, supra note 133, at 1827.

\(^{271}\) See Planet Money, supra note 2 (describing how lyrics websites are nothing new).

\(^{272}\) See Gordon, supra note 133, at 1827. Therefore lyrics websites are “traditional” markets. Id.

\(^{273}\) Planet Money, supra note 2.

\(^{274}\) See PATRY, supra note 23, at 24 (discussing copyright law and its development to incentivize innovation and creation).

\(^{275}\) See PATRY, supra note 23, at 24.

\(^{276}\) See Gordon, supra note 133, at 1827.

\(^{277}\) See About Genius, supra note 9 (describing the goal of internet annotations to spread knowledge through society using a community-based, online platform).

from the original works that the markets for each should similarly be different.\textsuperscript{279} That rationalization is perfectly illustrated by Rap Genius—its “productively transformative” work did create a new market. The combination of a new, untraditional market, and the subsequent devaluing of the fourth factor in the eyes of the court, leads to the conclusion that the fourth factor favors the users.

The fair-use test is a very malleable one and its fact-specific nature makes predicting an outcome in court difficult.\textsuperscript{280} In the case of user-generated online annotations, the test should fall in favor of the users. Under the first factor, the novel purpose of annotated songs makes the use a “productive transformation” and swings the factor in favor of the users. Under the second factor, the highly-creative nature of the lyrics favors the artists, but courts have been hesitant to give the factor much weight.\textsuperscript{281} Under the third factor, while the amount of annotations per song could affect the quantity calculus, the quality determination falls in favor of the users and should swing the factor in their favor. Finally, the fourth factor should fall in favor of the users because Rap Genius created a new licensing market, which the original artists should not have a right to control. Tied up within each factor is the underlying idea of incentivizing innovation.\textsuperscript{282} Rap Genius created an innovative product that enables users to comment on creative works and disseminate knowledge across the internet.\textsuperscript{283} Copyright law seeks to incentivize innovation,\textsuperscript{284} and fair use seeks to protect uses like commentary and education.\textsuperscript{285} When balanced against the minor royalties the original artists may or may not be entitled to, it is evident that website users who annotate lyrics online should be protected by fair use.

4. The Host Website’s Exposure to Secondary-Infringement Liability

But what if users who annotate lyrics online are not protected by fair use? Such a realization would greatly impact the websites that host annotated lyrics. While fair use should protect users who directly infringe, host websites should also be protected for their indirect infringement. A

\textsuperscript{279} Id.
\textsuperscript{280} See Samuelson, supra note 76, at 2540 (“Fair use is, however, often decried for the unpredictability said to attend the fact-intensive, case-by-case nature of fair use analysis and/or to result from the lack of judicial consensus on the fundamental principles that underlie fair use.”).
\textsuperscript{281} See Nimmer & Nimmer, supra note 32, § 13.05 (“[T]his second factor more typically recedes into insignificance in the greater fair use calculus.”).
\textsuperscript{282} See Patry, supra note 23, at 24.
\textsuperscript{283} Genius, supra note 9; See also Planet Money, supra note 2.
\textsuperscript{284} See Patry, supra note 23, at 24.
website like Rap Genius does not directly infringe on copyrights because the site itself does not post or annotate lyrics—it simply provides the space to do so. However, copyright law has evolved to allow copyright holders to bring claims against such non-infringing parties under the doctrines of vicarious liability and contributory infringement. Though user-generated annotations should be protected by fair use, if they are not, the host website would be both vicariously liable and liable as a contributory infringer. Further, the congressional safe harbors enacted to protect host websites from contributory infringement lawsuits do not protect annotation platforms like Rap Genius. This is a problem because the same balancing of interests that leads to the conclusion that users should be protected for direct infringement leads to the same conclusion that host websites should be protected for indirect infringement. Because the common law imputes liability onto the host website and current statutory law does not provide protections, Congress needs to act to ensure that the pro-innovation goals of copyright law are being properly served.

4.1 Vicarious Liability

One of the common-law doctrines that imputes liability on Rap Genius is vicarious liability, which in the copyright context requires both legal and practical control of the infringing parties by the defendant and a direct financial benefit for the defendant. Rap Genius is vicariously liable to the artists whom its users directly infringe because it maintains the necessary level of control over its users and stands to make money off of that direct infringement. Vicarious liability requires both a legal and practical control by a party over a direct infringer. Rap

---

286 See About Genius, supra note 9 (discussing the roles Rap Genius and its users take in generating content for the website).
287 See Berg, supra note 34, at 309 (describing the common law doctrines of vicarious liability and contributory infringement).
289 See PATRY, supra note 23, at 24.
290 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”).
291 See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007).
292 See About Genius, supra note 9 (describing the roles played by users and the website in generating content).
293 However, reports are that Rap Genius has yet to monetize. See Constine, supra note 4 (detailing Rap Genius’s plan to make money in the future by selling its software to businesses as a collective annotation tool, advertising on its website, and selling premium subscriptions).
294 See Amazon.com, Inc., 508 F.3d at 1173.
295 Id.
Genius can certainly *practically* control its users by editing their work or blocking them entirely, and Rap Genius can *legally* control them as well.

In *Amazon*, the Ninth Circuit held that Google could not legally stop third-party websites from infringing, so Google was not liable under vicarious liability. However, Rap Genius exercises more control over its users than Google does over third parties. Rap Genius contracts with its users using a Terms of Service, which allows the website to block chosen users from annotating. This moves Rap Genius much closer to Napster in its ability to police its own webpages. Though Rap Genius cannot stop its users from infringing everywhere, it certainly can on its own website, and thus it controls its users enough to receive vicarious liability for its users’ direct infringement.

### 4.2 Contributory Infringement

The other common-law doctrine that imputes liability onto Rap Genius is contributory infringement, which occurs when a party that does not directly infringe on a copyright knows of and materially contributes to another’s infringement. Rap Genius contributes to infringement because it knows about the infringement on its website, and is involved enough in presenting the infringing content, that it materially contributes to that infringement. Therefore, Rap Genius would also be liable as a contributory infringer.

The first part of contributory infringement requires actual knowledge of direct infringement by the secondary party. Rap Genius clearly knows what is on its website because it sifts through submissions and chooses what content to display. The Ninth Circuit ruled in *Amazon* that Google knew its search engines provided access to infringing works, and that if Google did
not take “simple measures” to remove the infringing works, it could be held as a contributory infringer.\textsuperscript{306} Here, Rap Genius is in the same situation: The copyrighted images that appeared on Google’s search pages are just like the copyrighted song lyrics that Rap Genius allows its users to annotate.\textsuperscript{307} Because Rap Genius knows its users infringe on those lyrics, it fails the knowledge portion of the test.\textsuperscript{308}

The second part of contributory infringement requires a material contribution to the infringement by the secondary party.\textsuperscript{309} Beyond the fact that Rap Genius materially contributes to infringement with its platform, the website itself is hands on with its lyrics annotations.\textsuperscript{310} Rap Genius receives content from various users and decides what content to feature on its webpages.\textsuperscript{311} Essentially, Rap Genius works with its users—the direct infringers—to create the annotated song as an end product.\textsuperscript{312} Such a contribution to the infringing work goes beyond the acceptable contribution as seen in \textit{Perfect 10 v. Visa}, where the defendants simply made it easier to purchase infringed works.\textsuperscript{313} Here, Rap Genius is actually working hands-on, and side-by-side, with its users, the direct infringers.\textsuperscript{314} Because Rap Genius materially contributes to the direct infringement, and because it knows that the infringement is occurring, Rap Genius would be labeled a contributory infringer.\textsuperscript{315} Along with its vicarious liability, and without further action from Congress, Rap Genius would be liable for the copyright infringement that takes place on its website.

\textbf{4.3 Section 512 Safe Harbors}

The current level of protection offered by Congress would not shield Rap Genius from vicarious liability or from contributory infringement liability if its users were directly infringing without fair-use protection.\textsuperscript{316} For one, the safe harbors specifically exclude protection for

\begin{itemize}
\item \textsuperscript{306} See \textit{Perfect 10, Inc. v. Amazon.com, Inc.}, 508 F.3d 1146, 1175 (9th Cir. 2007).
\item \textsuperscript{307} See \textit{id.} at 1173.
\item \textsuperscript{308} See \textit{id.} at 1175.
\item \textsuperscript{309} See \textit{Gershwin Publ’g Corp}, 443 F.2d at 1162.
\item \textsuperscript{310} See \textit{About Genius, supra} note 9 (explaining the process by which Rap Genius chooses what annotations to feature on its site).
\item \textsuperscript{311} \textit{Id.}
\item \textsuperscript{312} See \textit{id.}
\item \textsuperscript{313} See \textit{Perfect 10, Inc. v. Visa Int’l Serv. Ass’n}, 494 F.3d 788, 800 (9th Cir. 2007).
\item \textsuperscript{314} See \textit{About Genius, supra} note 9 (discussing Rap Genius’s role in generating content for its website).
\item \textsuperscript{315} See \textit{Gershwin Publ’g Corp. v. Columbia Artists Mgmt, Inc.}, 443 F.2d 1159, 1162 (2d. Cir. 1971).
\end{itemize}
vicearious liability.\textsuperscript{317} Also, Rap Genius falls outside the contributory infringement protections as currently written.\textsuperscript{318} The two possible safe harbors Rap Genius could fall into are the caching information and hosting information safe harbors.\textsuperscript{319} The cache safe harbor protects websites that automatically store information from a third party and make it available to other parties, essentially acting as a middle-man.\textsuperscript{320} The host safe harbor allows websites to host subscriber information on their sites, but requires the website to remove infringement when it becomes aware of its existence on its webpages.\textsuperscript{321} However, Rap Genius does not fall into either category. Rap Genius actively selects and rejects annotations and therefore does not cache information.\textsuperscript{322} It is also well aware of the infringement occurring on its webpages—in fact it almost participates in infringing—and it does not remove the infringed content.\textsuperscript{323} Therefore, it is not protected by the host safe harbor either.\textsuperscript{324}

Because Rap Genius and similar annotation sites do not fall into one of the categories Congress has already enumerated, Congress should not wait for the courts to sort out the law,\textsuperscript{325} but should revise \S\textsuperscript{512} to include a new safe harbor for community-driven, discussion-based, knowledge-sharing platforms like Rap Genius. The same balancing of interests that leads to the conclusion that users should be shielded by fair use also applies to shielding host websites from secondary liability. Rap Genius’s product is innovative,\textsuperscript{326} and it may never have been created had its liability been known from the start. While musicians and song-writers will always be incentivized to create music,\textsuperscript{327} too much protection for that music may chill technological

\textsuperscript{317} See Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 37-38 (2d Cir. 2012) (holding that “the control provision [of Section 512] dictates a departure from the common law vicarious liability standard”).
\textsuperscript{318} See 17 U.S.C. \S\ 512.
\textsuperscript{319} See id. (detailing the four safe-harbors that Congress created to protect online service providers from liability).
\textsuperscript{320} Id. \S\ 512(b).
\textsuperscript{321} Id. \S\ 512(c).
\textsuperscript{322} See About Genius, supra note 9.
\textsuperscript{323} See id.
\textsuperscript{324} See Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002) (finding control where the OSP instituted a monitoring program by which user websites received “detailed instructions regard[ing] issues of layout, appearance, and content” and found the OSP unprotected by the host safe harbor).
\textsuperscript{325} Particularly because the courts may be hesitant to do so, at least at the highest level. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”).
\textsuperscript{326} See Plant Money, supra note 2 (describing the innovativeness of the Rap Genius platform).
\textsuperscript{327} Cf. McQuivey, supra note 261 (describing the large amount of money made by the music industry).
advancements focused on sharing it. As the law currently stands, websites like Rap Genius are actually penalized for attempting to facilitate the types of unhindered, knowledgeable discussions that fair use attempts to protect from overzealous copyright protection. Though a new safe harbor would be difficult to define, it is worth the effort to protect the pro-technology and pro-innovation initiatives Congress embraced in adopting the original safe harbors in the first place.

5. Conclusion

Though Rap Genius has agreed to pay royalties to the copyright owners of the songs featured on its website, it should not legally be forced to. The annotations that Rap Genius specializes in are protected by fair use because they pass the fair-use, statutory “test,” and they are supported by the overall goal of the fair-use doctrine to advance knowledge and culture using copyrighted works as a foundation. However, if one day a court were to decide that user-generated, online annotations were not fair use, Rap Genius would be subjected to secondary infringement liability. If such a day were to come, Congress should act to protect Rap Genius and similar community-driven, discussion-based website. Pro-innovation and pro-technology justifications, always present in the copyright and fair use calculus, are especially relevant in the case of Rap Genius. While copyright holders of songs certainly deserve protection under the law, the cultural and technological benefits to society that could be eliminated with too much copyright protection are powerful enough to let Rap Genius continue its effort to “annotate the web.”

Of course, that effort has its limits. While song lyrics deserve the protection argued here, other works of authorship would require a different analysis. Not all works would receive the same consideration under the fair-use test, and the fairness of that use directly impacts the question of secondary liability. But like the presumption of fairness Rap Genius should receive due to pro-innovation and pro-technology justifications, other online annotated works should

328 See Samuelson, supra note 76, at 2617 (“Copyright also promotes the public good when subsequent authors are able to draw upon existing works in making and preparing to make new works, when members of the public are able to use copyrighted materials in a way that allows them to make a range of reasonable uses that pose no meaningful likelihood of harm to the markets for protected works, and when developers of new technologies provide new opportunities for the public to make such reasonable uses.”).
330 Planet Money, supra note 2.
331 See Constine, supra note 4.
also be examined with a careful consideration of the roles copyright protection and the fair-use defense play in encouraging innovation in the Internet Age.