

# Not for Entertainment Only: Fair Use and Fiction as Social Commentary

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I. INTRODUCTION.....	266
II. FAIR USE .....	267
A. <i>Background &amp; Purpose</i> .....	267
B. <i>The Four Factors</i> .....	270
C. <i>Fair Use and Free Speech</i> .....	272
D. <i>Ideas are Not Just Facts</i> .....	274
III. FICTION AS SOCIAL COMMENTARY.....	275
IV. FICTION AND FAIR USE: A NEW SECOND FACTOR .....	288
A. <i>A Proposed “Second Factor”</i> .....	288
B. <i>Analysis by Analogy</i> .....	289
1. Copyright and the Fact to Fiction Continuum ...	289
2. Copyright and the Idea/Expression Dichotomy ..	291
3. Defamation’s Sliding Scales .....	293
C. <i>The New “Second Factor”</i> .....	299
1. The Subject Matter of the Work .....	299
2. The Author’s Intent .....	303
3. The Public and Critical Response.....	305
4. The New Factor, and the Old.....	306
V. CASE STUDY: GONE WITH THE WIND & THE WIND DONE GONE .....	309
A. <i>Subject Matter: The Civil War and Reconstruction</i> ...	311
B. <i>The Author’s Intent: “Northern Georgia as it really         was”</i> .....	313
C. <i>The Public Reception: Best Seller and the Standard         View of the South</i> .....	317

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D. <i>Fair Use Factors Reconsidered</i> .....	319
VI. CONCLUSION .....	320

## I. INTRODUCTION

The borderland between the First Amendment and copyright law is known as fair use. Both the First Amendment and copyright law protect speech, though in different ways, and the underlying purpose of both is to ensure the widest range of public debate over the political, social, scientific, cultural, philosophical and historical issues that should be understood in a functioning democracy.

The First Amendment essentially allows people to say and write what they want, and is grounded in the idea that a vigorous debate is vital to ensuring that the citizens of a democratic state are fully informed. Copyright protects the writings and expressions of authors as means of encouraging widespread creation and dissemination of knowledge. However, the protection of authors under copyright law can in some circumstances prevent public discussion of certain issues as envisioned by the First Amendment. In other words, copyright protection can potentially restrict the right to speak freely. The Fair Use doctrine of copyright law creates a framework for analyzing this interplay by offering protection to authors on the one hand, while simultaneously allowing the unconstrained discussion of ideas encouraged by the First Amendment on the other.

The issue finds its way into court when a copyright holder contends that someone is using his work without permission. The copyright holder sues for infringement, and where appropriate, the alleged copyist asserts that she has the right, under the First Amendment, to use elements or portions of the copyrighted work. When courts deal with these cases, they must analyze a number of things, including the nature of the original work. In general, the more factual the underlying work, the less protection it receives against infringement. Facts are not copyrightable, so works that rely heavily on facts receive a lesser degree of protection. It is only the author's expression of those facts, and not the facts themselves, that are protected. Fiction, on the other hand, is afforded a higher degree of protection under the assumption that a work of fiction is primarily the author's expression. In essence, courts analyze the copied work on a continuum from fact to fiction. Facts receive no protection, and fact-based works receive only limited protection of the author's expression. Works of pure fiction, in contrast, are afforded the highest degree of protection.

This is a valid system, but it deals with only one aspect of the interplay between copyright and the First Amendment. While facts are not

copyrightable, the First Amendment seeks to protect the dissemination and discussion of ideas, not facts. Ideas are more than facts, and writers introduce ideas into the public forum in many different ways, including through fiction. Writers from Aristophanes through Dante and Cervantes, Dickens and Twain, to Roth, Mailer and Vonnegut, have engaged in commentary on political, social, historical and cultural issues through fiction. Because of this, certain works of fiction should be treated more like works of fact and should be more amenable to fair use copying than other works of fiction.

The current view of fair use, however, protects fiction more than non-fiction. This means that a work of fiction that engages in social or political debate will end up with a greater degree of protection than a work of non-fiction that addresses the same topic. This seems to ignore the purported goal of the First Amendment. If authors present, discuss, or debate important public issues through fiction, then there must be a way to ensure that those works are not unduly protected from subsequent use, criticism and commentary, even where that subsequent use takes the form of fiction. To do this, courts should consider whether there is an underlying political purpose to a work of fiction—with “political” being a broadly defined term. The greater the political purpose, the more the work should be subject to widespread comment and criticism as allowed under the fair use doctrine. Works of fiction that do not engage in commentary, in contrast, should retain the highest degree of protection from copying that is currently afforded by the copyright law.

## II. FAIR USE

### A. *Background & Purpose*

The Framers of the Constitution understood that the free flow of information is vital to a democratic society, and they protected it in two ways: through Copyright protection and through the First Amendment. The Constitution’s copyright clause is based on the Framers’ recognition that there is a societal benefit derived from the dissemination of ideas, and that the more widespread the ideas in circulation in a society, the greater the benefit to “the progress of science and the useful arts.”<sup>2</sup> The Framers recognized these societal benefits from their familiarity with English law (many were lawyers, and the colonies were subject to British law), which had protected copyrights for nearly a hundred years precisely for the purpose of disseminating ideas.<sup>3</sup> Copyright law may

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<sup>2</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260-61 (11th Cir. 2001). This is the “Gone with the Wind” case, which will be discussed in detail below. The case contains

protect authors<sup>4</sup> so that they can profit from their work, but the actual purpose is to provide a broader social benefit. As the Constitution states, “Congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . .”<sup>5</sup>

According to the Supreme Court, the “economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors . . . .”<sup>6</sup> Copyright law promotes the progress of the arts and sciences, which, according to the Supreme Court, means “‘to stimulate,’ ‘to encourage,’ [and] ‘to induce’”<sup>7</sup> the types of intellectual activities that promote the progress of the arts and sciences. The “framers intended copyright itself to be the engine of free expression.”<sup>8</sup>

The statutory provisions of the current copyright law are derived from common law and from the experience of history in dealing with the development and dissemination of ideas through writing. Copyright law rewards authors by giving them the exclusive control over most aspects of their work, including the right to make and distribute copies of their work, to perform or display the work, and to create derivatives or adaptations from the original.<sup>9</sup> These rights allow the author, or the subsequent owner of the copyright, to disseminate the work and the

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an excellent discussion of the purpose and history of copyright law, the interplay between the First Amendment and copyright law, and the fair use doctrine.

<sup>4</sup> Author is a term of art used in copyright law to denote the creator of any copyrightable expression. See 17 U.S.C. § 102 (2009), which includes as “works of authorship” literary works, music and sound recordings, drama, dance, works of visual art, movies and architectural works.

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>6</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

<sup>7</sup> *Goldstein v. California*, 412 U.S. 546, 555 (1973).

<sup>8</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>9</sup> 17 U.S.C. §106. Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

ideas contained therein. Presumably authors will profit in some way by distributing the work, and if they profit they will create more.

Authors have long used ideas from preexisting material to create new works or to modify and refine their own ideas. “Every work uses scraps of thought from thousands of predecessors . . . .”<sup>10</sup> Isaac Newton concisely encapsulated this concept when he said, “[i]f I have seen further than other men, it is because I have stood on the shoulders of giants.”<sup>11</sup> Newton was presumably talking about the scientists from Archimedes to Bacon and the mathematicians from Euclid to Descartes who preceded him, and whose works helped him develop and refine his scientific advances. But it is not just scientists, historians, and philosophers who mine the works of previous authors; fiction writers do so as well. Shakespeare, for example, liberally used the works of the Roman biographer Plutarch as the basis for a number of his plays, including *Julius Caesar* and *Anthony and Cleopatra*,<sup>12</sup> and he also frequently used more contemporary sources for works ranging from *Hamlet*<sup>13</sup> to *Romeo and Juliet*.<sup>14</sup>

Historically, courts have recognized that authors like Newton and Shakespeare rely on the work of others and the law has thus evolved to reflect the fact that the spread of knowledge is not only served by rewarding authors, but also by allowing them to use ideas contained in earlier works to create new works. This common law concept was codified in the United States Copyright Act of 1976 (hereinafter the Copyright Act),<sup>15</sup> which states that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright.”<sup>16</sup>

Fair use is not a grant to use copyrighted work freely, but rather a defense that allows the limited use of copyrighted works for certain specified “fair use” purposes. Fair use “establishes a defense to an otherwise valid claim of copyright infringement. It provides that particular instances of copying that otherwise would be actionable are lawful, and

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<sup>10</sup> Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990).

<sup>11</sup> Sir Isaac Newton (1642-1727), letter to Robert Hooke, February 5, 1675/1676. The year is in question because England changed from the Julian to the Gregorian Calendar during Newton’s lifetime.

<sup>12</sup> Anthony and Cleopatra, pp. 15; Julius Caesar, pp. 229; OXFORD COMPANION TO SHAKESPEARE, (Michael Dobson ed., OXFORD UNIVERSITY PRESS, 2001).

<sup>13</sup> Hamlet, OXFORD COMPANION, 179. Hamlet derived from the Norse folk tale of Amleth, first written (in French) by Francois de Belleforest.

<sup>14</sup> Romeo and Juliet, OXFORD COMPANION, 397. The tale was first presented by Masuccio Salernitano in his book, Il novellino (1474) and was immediately popular thorough Italy and then Europe, and has remained popular ever since.

<sup>15</sup> Pub. L. No. 94-553, 2541 Stat. 1976.

<sup>16</sup> 17 U.S.C. § 107 (2009).

sets forth the factors to be considered in determining whether the defense applies.”<sup>17</sup>

### B. *The Four Factors*

The Copyright Act sets forth a list of four non-exclusive factors to consider when analyzing whether a subsequent use of a preexisting work is infringement or is an acceptable fair use. These four factors, like everything else in the statute, were derived from hundreds of years of case law. Section 107 of the Copyright Act states that:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>18</sup>

In construing the listed factors the Supreme Court has noted that “section 107 requires a case-by-case determination whether a particular use is fair . . . . This approach was ‘intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow or enlarge it in any way.’”<sup>19</sup>

Since the codification of the fair use doctrine, the Supreme Court has provided useful historical background and legal analysis of these factors.<sup>20</sup> The first factor looks at the purpose and character of new work:

The central purpose of this investigation is to see . . . whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright,

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<sup>17</sup> *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1521 (9th Cir. 1992). See also *Harper & Row*, 471 U.S. at 561 (discussing the legislative history of the Copyright Act; H.R. REP. NO. 102-836, pt. 3, at 3 (1992)).

<sup>18</sup> 17 U.S.C. § 107 (2009).

<sup>19</sup> *Harper & Row*, 471 U.S. at 549.

<sup>20</sup> See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.<sup>21</sup>

Typically this is the most significant factor in cases of parody or subsequent works that skewer or satirize the original copyrighted work. Courts weigh heavily the “transformative” nature of the new work in determining whether it adds something useful to the public discourse. This is a very important consideration, but a broader understanding of the second factor more accurately reflects the true purpose of the fair use doctrine.

The second fair use factor considers “the nature” of the original work, or the work that was copied. “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.”<sup>22</sup> In particular, the preexisting work is evaluated on a continuum from fact to fiction. “The second factor . . . recognizes that creative works are closer to the core of intended copyright protection than informational and functional works.”<sup>23</sup> This means, according to the Supreme Court, that in general, “fair use is more likely to be found in factual works than in fictional works.”<sup>24</sup>

[Copyright law] generally recognizes a greater need to disseminate factual works than works of fiction or fantasy. . . . [E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case.<sup>25</sup>

This is a valid consideration in most situations, but it fails to recognize that useful knowledge of the kind purportedly protected by the First Amendment is more than historical facts, reports of scientific experiments, or mathematical equations. Creativity may be at the core of copyright protection, but ideas, not facts, are at the core of First Amendment concerns. Useful knowledge includes ideas, concepts, and theories that are neither fact nor fiction. There is no doubt that useful knowledge includes how we think about our society, and this knowl-

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<sup>21</sup> *Campbell*, 510 U.S. at 577-79 (internal citations omitted).

<sup>22</sup> *Id.* at 577-79.

<sup>23</sup> *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003).

<sup>24</sup> *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

<sup>25</sup> *Harper & Row*, 471 U.S. at 563 (quoting Gorman, *Fact or Fancy? The Implications for Copyright*, 29 *J. Copyright Soc.* 560, 561 (1982)).

edge enters the public debate and our cultural conscience in many different ways, including television, film, the internet and books. When this useful knowledge enters into the public conscience or the political debate through a work of fiction, that work of fiction should be treated more like a work of fact, and should be subject to the same range of public debate and scholarly study as any other piece of useful information.

The third factor looks at the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The issue here is whether “the quantity and value of the materials used”<sup>26</sup> from the preexisting work are reasonable in relation to the purpose of the copying. The Supreme Court has noted that even “substantial quotations might qualify as fair use in a review of a published work or a news account of a speech,” but not in a scoop of a soon to be published memoir.<sup>27</sup>

The fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” requires the court “to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original. The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.”<sup>28</sup>

Courts evaluate all four fair use factors based on the facts of the case. In some cases one or more factors might be missing, and in other cases certain factors may be more important than others. But in every case, all four “factors must be explored and the results weighed together in light of the purposes of copyright and the fair use defense.”<sup>29</sup>

### C. *Fair Use and Free Speech*

The fundamental underlying purpose of copyright protection is the free expression of ideas: “The judgment of the constitution is that free expression is enriched by protecting the creation of authors from exploitation by others, and the Copyright Act is the congressional imple-

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<sup>26</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841). *Folsom* was an early copyright case by Justice Story and is quoted extensively in the historical analysis of copyright in Harper & Row.

<sup>27</sup> *Harper & Row*, 471 U.S. at 564.

<sup>28</sup> *Id.* at 568.

<sup>29</sup> *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476-77 (2d Cir. 2004).

mentation of that judgment.”<sup>30</sup> Copyright protection, as mentioned previously, can in some cases restrict freedom of speech. However, according to the Supreme Court, copyright “law ‘builds in protection of the non-copyright holder’s free speech rights through the fair use doctrine . . . .’”<sup>31</sup>

The current interpretation of the second fair use factor, however, can potentially limit free expression. Currently this factor is based primarily on a continuum from fact to fiction. On this spectrum, facts are left open to debate while fiction receives the highest degree of protection. But political ideas are not simply facts. Political ideas, or ideas which touch on political, social, historical, religious, philosophical, and cultural issues, are concepts. Some aspects of these concepts are certainly fact based, but others are entirely speculative. And these types of concepts are presented into the public debate and publicly discussed in a variety of ways, including through fiction. As a result, the current continuum can lead to restrictions on the discussion of important political topics.

The First Amendment protects a broad range of speech, but political speech is afforded the greatest degree of protection. “Speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>32</sup> Freedom of speech is important for a number of reasons, including “the preservation of a meaningful public or democratic dialogue, as well as the uses of speech as a safety valve against violent acts, and as an end in itself.”<sup>33</sup> According to the Supreme Court, “[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.”<sup>34</sup> As a result, the United States has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>35</sup>

But what constitutes a public issue or a political idea? Is it a discussion of the policies and positions of political candidates? Is it a debate regarding pending local, state and federal legislation? Is it the comments of elected officials and political candidates? Political commentators? Protestors? It is all of these things and much, much more. Politics

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<sup>30</sup> *Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979).

<sup>31</sup> *United Video, Inc. v. F.C.C.*, 890 F.2d 1173, 1191-92 (D.C. Cir. 1989).

<sup>32</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>33</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001).

<sup>34</sup> *Williams v. Rhode*, 393 U.S. 23, 32 (1968). *See also* *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989).

<sup>35</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

and public issues incorporate a wide variety of cultural, legal, historical and social subjects. Laws, which are created by representatives selected through the political process, address a wide variety of social, moral, medical, and legal issues. All of these have an impact on our society, and all form part of the public debate and political speech.

To some degree, the discussion of just about any issue affecting our nation, our government, our society, and our culture can be political. Abortion, for example, is not just a medical issue; it has been colored by religious and philosophical understandings and has become a deeply political topic as a result. As such, just about any discussion of abortion could be considered political, except perhaps the private discussion between a doctor and a patient in an examining room. Communications between a doctor and patient operate on a different level than discussions between lawmakers about an abortion bill, or between theologians, philosophers and scientists debating when life begins. The same holds true for just about any issue.

It is impossible to draw up an all-inclusive list of public issues or political topics because society is far too complex, and as society changes, the political issues that effect society also change. A non-exhaustive list of some of the issues discussed during the 2008 presidential campaign includes abortion, abstinence only education, bank regulation and the mortgage crisis, drug laws, environmental issues and global warming, foreign affairs and the war against terror, gun rights and gun control, immigration, judicial review, and moose hunting. "Political" is a difficult term to define, but we have some sense of what public issues are by opening the newspaper, turning on the news on the television or the radio, or looking at news on the internet.

#### D. *Ideas are Not Just Facts*

Just as there is a wide range of political issues, there are a number of outlets for public debate. One form is the political stump speech. Another is the political attack ad. Others include political debate within legislative bodies, discussions on political shows on television and the radio, books and magazines about current affairs, and essays in newspapers and magazines. Popular culture also engages in political "debate." Protest songs were extremely popular in the 1960's, with singers like Bob Dylan, Neil Young, Pete Seeger, Phil Ochs, and Joan Baez spreading their views through music. Television shows like "The Simpsons," "Saturday Night Live," "The Daily Show" and the "Colbert Report" raise and lampoon a number of political subjects. The television show "24" was frequently mentioned in political speeches and news articles about torture. Movies are often highly political and fre-

quently spark political debate. The movie “Juno,” which was about a pregnant teenager, was cited in numerous political discussions about abortion. Comedians routinely use political topics as source material for their jokes, and television and movie writers frequently have references to topical political issues in their scripts. All of these media introduce “political” issues into the public forum and are, therefore, part of the national political debate about these issues.

Fiction writers also frequently use contemporary political topics in their works. In some cases, these topics provide background material to flesh out a character or a plot line, or as source material for a scene, but in many cases political issues are the main subject of the work. Yet as currently defined, copyright law fair use does not account for this use of fiction as a forum for social commentary.

### III. FICTION AS SOCIAL COMMENTARY

U.S. copyright law might draw a distinction between fact and fiction, but writers never have. The earliest writers didn’t even have the concept of fact and fiction. Plato, for example, developed many of his philosophical ideas through fictitious dialogue.<sup>36</sup> If Plato were writing today, would his Dialogues be considered fiction, and therefore merit the highest degree of protection under existing fair use copyright law?<sup>37</sup> Do the fictitious elements (the imagined discussions between invented characters) outweigh the non-fiction elements (the analysis of social and political issues)? Plato’s use of fictitious dialogue to discuss his political ideas leads one to suspect that he would welcome the continued discussion of his ideas. He might even accept that a subsequent writer might use the characters he created in an alternate dialogue that reaches different conclusions. It would be ironic if this debate were prevented because Plato chose to use fiction to present his ideas.

The Greek historian Herodotus, who is widely recognized as one of the earliest historians, frequently engaged in the use of fictitious mythology and outright hyperbole.<sup>38</sup> He described, among other myths, Africans who each had a single enormous foot that was used to provide shade. Does this carelessness with the truth make his work fact or fiction? Despite his problems, with fact as currently defined, modern historians still refer to Herodotus as the “Father of History.” Herodotus was not alone in mixing fact and fiction. Many ancient “historians” such

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<sup>36</sup> See, e.g. PLATO’S DIALOGUES.

<sup>37</sup> The current duration of copyright is the life of the author plus seventy years, 17 U.S.C. § 302, so the works of Plato have long since fallen into the public domain.

<sup>38</sup> THE HISTORIES OF HERODOTUS, circa 440 BCE.

as Thucydides, Livy and Plutarch routinely added imagined scenes, speeches and dialogue to embellish their work.

The reality is that “historians” up to the eighteenth century often played fast and loose with the facts. The distinction between what can be supported as “fact” and what could loosely be regarded as “fiction” is a relatively modern concept. It was not until the nineteenth century and the increased influence of the empirical sciences that historians began to draw these distinctions.<sup>39</sup> Until then, “history” was often widely (and wildly) embellished to help the writer tell a compelling story, or to prove a broader point. One of the best known examples of this embellishment was the tale of the cherry tree invented by Parson Weems in his “Life of Washington” to illustrate that George Washington could not tell a lie.<sup>40</sup>

Fiction, on the other hand, does not focus on historical facts, but tries instead to get at “the truth of human nature.”<sup>41</sup> All fiction seeks to uncover some truths about the human experience. Even the most whimsical works deal with the human condition. Writers often explore the range of human desire, emotion, longing, need, and fear. Even the most fanciful of fiction touches on these subjects because the characters are human. This even applies to works in which the central characters are not human, such as *The Wind in the Willows*,<sup>42</sup> *Animal Farm*,<sup>43</sup> *Watership Down*,<sup>44</sup> because the stories are meant to be allegories of human situations.

To explore the human condition, authors frequently use real events as the basis of a story or as the setting in which the story takes place. Alternatively, many writers use fiction to address contemporary issues and social problems. These writers are doing more than simply telling a story set in a particular time or place; they are using fiction to show that human beings are impacted by the world around them. And in doing this, these writers comment on contemporary topics, much like Plato or Parson Weems. Authors have done this since the dawn of writing, and

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<sup>39</sup> Jill Lepore, *Just the Facts, Ma'am*, THE NEW YORKER, March 24, 2008, at 79-83. (Reviewing JOHN BURROW, A HISTORY OF HISTORIES: EPICS, CHRONICLES, ROMANCES AND INQUIRIES FROM HERODOTUS AND THUCYDIDES TO THE TWENTIETH CENTURY (2008), and GORDON WOOD: THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY” (2008).

<sup>40</sup> LAWRENCE COUNSELMAN WROTH, PARSON WEEMS: A BIOGRAPHICAL AND CRITICAL STUDY, 6, 57 (Eichelberger Book Co. 1911); MASON LOCKE (“PARSON”) WEEMS, A HISTORY OF THE LIFE AND DEATH, VIRTUES AND EXPLOITS OF GENERAL GEORGE WASHINGTON (J.B. Lippencott Co. 1918).

<sup>41</sup> Jill Lepore, *Just the Facts, Ma'am*, THE NEW YORKER, March 24, 2008, at 81.

<sup>42</sup> KENNETH GRAHAME, THE WIND IN THE WILLOWS (1908).

<sup>43</sup> GEORGE ORWELL, ANIMAL FARM (1945).

<sup>44</sup> RICHARD ADAMS, WATERSHIP DOWN (1972).

as a result the history of Western Civilization can be gleaned from reading the great works of fiction

Some of the earliest works of literature that have survived are the works of a handful of Greek playwrights.<sup>45</sup> One of the first was Aeschylus.<sup>46</sup> His plays deal with the foibles of human nature and the effects of the gods on human affairs, but a few such as *The Persians* are fictitious history. *The Persians* is based in part on Aeschylus's own experiences fighting against the Persians at Salamis. The underlying theme of the story is the effect of hubris, or unremitting pride, on human affairs. Aeschylus hewed so closely to historical fact that modern scholars often refer to this play for information about the Greek wars against the Persians.

Euripides was the first great playwright to use fiction to comment on contemporary social issues.<sup>47</sup> One example was his play *The Trojan Women*,<sup>48</sup> which was deeply critical of Greek attitudes glorifying war. Euripides described the slaughter of Trojans by the Greeks during the siege of Troy, and the effect that this barbarity had on the survivors, particularly the women. This play used historical events to comment on a contemporary problem - the Athenian slaughter of the natives of Melos - which was occurring during the same year that the play was written. However, Euripides chose to use fiction to address this issue, presumably so that he could draw historical lessons while avoiding directly attacking—and angering—political leaders.

Perhaps the most famous Athenian playwright to combine fictional drama and social criticism was Aristophanes.<sup>49</sup> He primarily wrote comedies, but the use of humor allowed him to attack contemporary issues in a way that more serious playwrights dared not. One of his earliest plays, *Clouds*, was about philosophers (including Socrates) who teach rhetorical tricks to help students avoid their creditors. For these philosophers, words were ephemeral, and the most ephemeral, transitory things of all, the Clouds, were the noblest teachers. It is fiction, but given the importance of philosophers in Athenian society, it is also political commentary. Today, these writings would be called “satire,” but that term had yet to be coined. Another play, *Knights*, attacked the political and governmental failings of Cleon (the Athenian leader)

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<sup>45</sup> There is some evidence of earlier writers, but beyond fragments, none of their works have survived to the present era.

<sup>46</sup> 525-456 BCE.

<sup>47</sup> ~480-405 BCE.

<sup>48</sup> EURIPIDES, *THE TROJAN WOMEN* (415).

<sup>49</sup> 445-380 BCE.

through loosely drawn caricatures.<sup>50</sup> Aristophanes often targeted the rich and powerful, and on more than one occasion was charged with sedition.

A number of modern categories of fictitious social criticism came from these early Greek playwrights, including comedy, parody, and satire. The purpose of comedy is to amuse an audience through ridicule of a character, or through a character's ridiculous behavior.<sup>51</sup> A favorite topic of ridicule has always been pompousness, and no one has ever been more pompous than political leaders. As a result, they were (and are) a frequent subject of ridicule, from the ancient Greeks to today. Parody is also a form of amusement, but a parody lampoons through reproduction of some aspect of the original work or target of the parody. Parody was one of Aristophanes' favorite tools.<sup>52</sup> Satire is social commentary but is frequently considered a form or subset of comedy. Many satires are not funny, but the public seems to associate satire with ridicule or an amusing attack on certain aspects of society.<sup>53</sup>

Like Aristophanes, many of the earliest writers wrote about contemporary topics. It can hardly be imagined that they would do otherwise. Writers have always created pure fantasy, but often fantasy is based in some degree on reality. Some fabulists, for example, wrote nonsense stories about animals, and some were quite successful. But the most successful, such as Aesop,<sup>54</sup> used stories about animals to reveal "truths" about human nature and human behavior.

Writers exist in part because of readers, and to be successful a writer must produce works that are of interest to readers. Readers are interested in the world around them, including its problems. In many cases readers (or audiences for drama) want to laugh at those problems, in some cases they want to escape from those problems, and in other cases they want to gain a better understanding of them. Throughout history works of literature have addressed all of these issues.

True satire, or biting social commentary, did not fully develop until the Roman era, with writers such as Horace,<sup>55</sup> Persius,<sup>56</sup> and Juvenal.<sup>57</sup>

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<sup>50</sup> MATTHEW HODGART, *SATIRE* 35 (McGraw-Hill 1969); LEON GUILHAMET, *SATIRE AND THE TRANSFORMATION OF GENRE* 41 (University of Pennsylvania Press 1987).

<sup>51</sup> G. BRERETON, *Comedy*, in CASSELL'S ENCYCLOPEDIA OF WORLD LITERATURE, Vol. 1, 123-126 (S.H. Steinberg ed., Funk & Wagnalls Co. 1973).

<sup>52</sup> B. HARDY, *Parody*, in CASSELL'S ENCYCLOPEDIA OF WORLD LITERATURE, Vol. 1, 416-418 (S.H. Steinberg ed., Funk & Wagnalls Co. 1973).

<sup>53</sup> W.W. ROBSON, *Satire*, in CASSELL'S ENCYCLOPEDIA OF WORLD LITERATURE, Vol. 1, 501-503 (S.H. Steinberg ed., Funk & Wagnalls Co. 1973).

<sup>54</sup> 620 - 560 BCE.

<sup>55</sup> 65 - 8 BCE.

These Roman satirists primarily wrote in verse, but through their poems they produced character sketches, speeches, parables, and short stories. All of these writers criticized, to varying degrees, many aspects of Roman society. Their main goal was to entertain their readers and to inform and engage them in discussions of important matters affecting society. These writers lampooned the powerful and sought to expose evil and corruption in society. Their forum was fiction, for many reasons. One reason was that a writer of fiction can range far beyond the bounds established by fact, thus freeing the imagination. But perhaps the most important reason for using fiction was the capricious and often violent nature of Roman society and politics. It could have been dangerous (if not deadly) to anger the wrong person, so it was extremely risky to attack someone explicitly. As a result, writers often attacked their subjects indirectly through works of fiction and through characters drawn closely enough to conjure up their subjects, but far enough from reality to plausibly deny their attacks.

After the fall of the Roman Empire, most writing (or at least most of the writing that has survived) turned to religious matters. It was not until the early Renaissance that non-secular writing returned. One of the earliest works of secular writing was the *Canterbury Tales*<sup>58</sup> by Geoffrey Chaucer.<sup>59</sup> The *Canterbury Tales* consists of twenty four stories (twenty-two in verse and two in prose) told by a group of travelers on a pilgrimage to the Cathedral at Canterbury, England. It is a mix of bawdy comedy, romance, religious sermons, moral parables, and the occasional tale with a social subject. Some tales are serious, others are borderline pornographic, but all are meant to entertain. Many deal with serious topics, particularly abuses by religious figures, which was a popular topic of the day. The *Summoner's Tale*, for example, is about an avaricious Friar who is constantly bothering a bed-ridden merchant for money to support the local monastery. Eventually the merchant gets aggravated and tells the Friar that he has a special gift hidden in the bed behind his back. The Friar reaches behind the merchant for the gift, and the merchant farts in the Friar's hand. Money-grubbing holy men were an irritant throughout Mediaeval Europe and served as the topic of both fiction and non-fiction criticism. The issue did not cease, eventually becoming one of the complaints lodged against Martin Luther.

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<sup>56</sup> 34 – 62 CE.

<sup>57</sup> ~60 – ~140 CE.

<sup>58</sup> GEOFFREY CHAUCER, *CANTERBURY TALES* (1387-1400).

<sup>59</sup> 1343 – 1400.

Writing of all forms increased with the invention of the printing press at the end of the fifteenth century. The increase in the availability of written material led to greater literacy, which in turn created a demand for more writing. In response, writers produced an explosion of written product of all forms, which turn led to a broader dissemination of knowledge. (This is exactly what the Constitution meant by “promote the useful arts and sciences.”<sup>60</sup>) The spread of knowledge led to dramatic social changes, and many writers wrote about those changes. In the early sixteenth century, one of the most prominent authors was Desiderius Erasmus.<sup>61</sup> He wrote prodigiously on many subjects, but his most famous work was *The Praise of Folly*,<sup>62</sup> in which Folly lectures mankind on a variety of matters and “praises” the stupidity of various doctrines of the Catholic church. This method enabled Erasmus to indirectly criticize church teaching. While the work is not fiction in the sense of placing imagined people in contrived situations, it used a popular form of writing to comment on - and in many cases skewer - the main issues of contemporary public debate.<sup>63</sup>

Erasmus’s good friend Thomas More<sup>64</sup> also wrote about various social changes and upheavals. More’s most famous book, *Utopia*,<sup>65</sup> is a dialogue between the author and a traveler to an unusual and unique land where men live in harmony and dignity. Unlike *Praise of Folly*, which took the form of a lecture, *Utopia* uses standard narrative elements to depict a fictitious traveler journeying to a new land. There is no doubt that the underlying purpose of the work is to enlighten and engage the reader in a broader political debate about the nature of English society.

Before the advent of the printing press, satire was most often presented through drama, and in a play there is a strong need to entertain an audience. This explains, in part, why satire is often considered a form of amusement. The development of printing led to the rise of individual reading, which in turn led to the development of serious literary writing and readers who wanted to engage in thoughtful reflection. Perhaps the quintessential writer for this kind of reader was Miguel de Montaigne,<sup>66</sup> who wrote thoughtful essays about a wide array of top-

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<sup>60</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>61</sup> 1446 – 1536.

<sup>62</sup> DESIDERIUS ERASMUS, *THE PRAISE OF FOLLY* (1509, revised 1511).

<sup>63</sup> Luther took the same criticisms of the Catholic Church in a very different direction in Germany in 1517, and broke totally from the church.

<sup>64</sup> 1478 – 1535.

<sup>65</sup> THOMAS MORE, *UTOPIA* (1516).

<sup>66</sup> 1533 – 1592.

ics.<sup>67</sup> Montaigne did not write fiction, but other writers of the era began to write fictional social criticism that was less lampoon and humorous satire, and more intellectual analysis. More's *Utopia* is an example of this kind of work.

Erasmus, More, and Montaigne were humanists, men who believed that human beings were God's highest achievement and that the study of humanity was a noble and Godly endeavor. This view dominated the era, and humanists contributed greatly to the literature of the time. In France, Francois Rabelais<sup>68</sup> created a masterpiece of humanistic literature with the paired novels *Gargantua* and *Pantagruel*.<sup>69</sup> On one level the books tell wild tales about Gargantua, his son Pantagruel, and a number of their friends. But throughout the books, the characters engage in wide ranging discussions of theology, moral philosophy, politics, history, medicine and botany. Rabelais' characters attack, openly and more subtly, most aspects of French society, from long-winded poets and priests, to venal judges and politicians. They also discuss many of the scientific and philosophical ideas that were being debated throughout learned Europe. While frequently bawdy, the books are classic exposition of the inherent dignity and value of human beings. The books have become classics, not because they are long-winded discourses on philosophy, but because they are generally amusing. Rabelais used fiction to convey important social, cultural and political information, but he was able to spread his views much further through the fictitious adventures of his larger-than-life leading men than through essay, political broadside, or angry lecture.

*Don Quixote*,<sup>70</sup> by Miguel de Cervantes,<sup>71</sup> relays the adventures of a slightly daft and down on his luck nobleman, Alonso Quijano, who, after reading one too many tales of chivalry and adventure, takes the name Don Quixote, and sets out to right all of the wrongs of the world. After a number of dismal attempts, Quixote convinces (or hoodwinks) a peasant named Sancho Panza to be his squire. The pair sets out, this time with slightly more adventure, but barely more success. *Don Quixote* is perhaps the first novel of the modern form, with invented characters, fictional dialogue, imagined scenes and a contrived plot. But while the characters and story are fictional, the setting is real. On one level,

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<sup>67</sup> MONTAIGNE'S ESSAYS, 1580, revised with additional essays, 1588, and posthumous with additional writing, 1595.

<sup>68</sup> 1494 - 1553.

<sup>69</sup> FRANCOIS RABELAIS, GARGANTUA (1532); FRANCOIS RABELAIS, PANTAGRUEL (1534). This is actually two books, the first the life of Gargantua and the second the life of his son, Pantagruel.

<sup>70</sup> MIGUEL DE CERVANTES, DON QUIXOTE (1st part 1604, 2nd part 1615).

<sup>71</sup> 1547 - 1616.

the book is a parody of popular stories of chivalric adventure, but it can also be read as a commentary on Spanish politics and society, told through the twin tales of the visionary (and generally futile) idealist, Don Quixote, and the practical realist, Sancho Panza.

*Gulliver's Travels*,<sup>72</sup> by Jonathan Swift,<sup>73</sup> is a satire in the truest sense. It is absurd and treats the objects of its scorn—mankind's belief in its inherent superiority—with ridicule and contempt. It attacks contemporary attitudes on politics, academia, society, and human nature by following the travels of Lemuel Gulliver through a number of strange and magical lands. In each land, a particular version of humanity is presented and ridiculed. In the final adventure, Gulliver meets a race of brilliant and enlightened horses that are plagued by oafish beasts in human form. Clearly Swift was saying that mankind is the oafish beast. The book is, therefore, perhaps best appreciated as a satire and broad social commentary on the attitudes and mores of eighteenth century England.

*The Life and Opinions of Tristram Shandy, Gentleman*,<sup>74</sup> by Laurence Sterne<sup>75</sup> is a convoluted tale of the chaotic life (with particular emphasis on the events leading up to the conception) of the title character, Tristram. The book is full of strange and seemingly pointless digressions and it is often dismissed today as nearly unreadable. It was actually written, however, as a commentary on John Locke's theory of the irrational nature of the association of ideas. Beyond that, the book also contains lengthy discourses on historical and philosophical issues, satires and lampoons of leading writers and scholars of Sterne's day, and loose references to a number of Sterne's predecessors, including Rabelais and Cervantes. Sterne effectively used fiction to engage in a public dialogue about these issues and people.

Victor Hugo<sup>76</sup> was one of France's most famous writers, but he was also a politician and reformer, and his interest in social affairs shows in his writing. His two most famous novels are *The Hunchback of Notre Dame*<sup>77</sup> and *Les Misérables*,<sup>78</sup> both of which provide a useful insight into the use of literature as a vehicle for social criticism. *The Hunchback of Notre Dame* is the story of the hunchback Quasimodo, his futile

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<sup>72</sup> JONATHAN SWIFT, *GULLIVER'S TRAVELS* (1726).

<sup>73</sup> 1667 – 1745.

<sup>74</sup> LAURENCE STERNE, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN* (1759-67).

<sup>75</sup> 1713 – 1768.

<sup>76</sup> 1802 – 1885.

<sup>77</sup> VICTOR HUGO, *THE HUNCHBACK OF NOTRE DAME* (1831). The proper title (in French) is simply *Notre-Dame de Paris*.

<sup>78</sup> VICTOR HUGO, *LES MISÉRABLES* (1862).

love for the gypsy girl Esmeralda, and its tragic consequences. Hugo was outraged at the social conditions that created Quasimodo and Esmeralda, and he uses the story of the deformed Quasimodo as a metaphor for all unfortunates. Unfortunately, the pathos of Quasimodo overwhelms the social pathos, as most people remember the story of the hunchback and forget the many horrors plaguing French society. In *Les Misérables*, in contrast, Jean Valjean is an everyman, and his plight is the plight of all the downcast, dispossessed, and “miserable people.” Clearly *Les Misérables* is a story about desperate times and the desperate measures that those times force upon people. Hugo tries to shock and outrage his audience at the unfair laws, inflexible government officials and the degradation of poverty that pervades French society. Whether purposeful on Hugo’s part or not, *Les Misérables* is more of a social commentary than the *Hunchback of Notre Dame*. Quasimodo (in the *Hunchback*) operated within his social environment, while in *Les Misérables*, the social environment operates around Jean Valjean.

Perhaps the most famous novelist of the social condition was Charles Dickens.<sup>79</sup> Dickens wrote over a dozen novels, but the most famous are those that dealt intimately with the bleakness of the early years of industrialization in Victorian England. *Oliver Twist*<sup>80</sup> is the tale of a bastard child and his struggles (and adventures) on the streets of London. The central theme seems to be that poverty, not human nature, is the foundation of crime. *David Copperfield*<sup>81</sup> is a more biographical and less bleak tale of the struggles of a young man to survive. The poverty of the era is depicted in clear-eyed detail, yet most of the characters retain their dignity and integrity and persevere despite their mean circumstances. *Bleak House*<sup>82</sup> is an indictment of the English court system and its effect on some of the people involved with it. In the novel those people are the heirs of a great estate, but in the end the attorney’s fees have depleted all of the assets, leaving the heirs destitute. *Hard Times*<sup>83</sup> is, in part, a tale of the depredations of industrial workers in Victorian England, but the novel also involves a convoluted tale of love and betrayal with the full gamut of Dickensian characters. *Little Dorrit*<sup>84</sup> again focuses on a child, but the story revolves around the life of her family in debtor’s prison. At times, it verges on a cloying

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<sup>79</sup> 1812 – 1870.

<sup>80</sup> CHARLES DICKENS, *OLIVER TWIST* (1837-39). Note: Dickens wrote most of his books in serial form published month by month in magazines. As a result the publication dates for his novels span a number of years.

<sup>81</sup> CHARLES DICKENS, *DAVID COPPERFIELD* (1849-1850).

<sup>82</sup> CHARLES DICKENS, *BLEAK HOUSE* (1852).

<sup>83</sup> CHARLES DICKENS, *HARD TIMES* (1845).

<sup>84</sup> CHARLES DICKENS, *LITTLE DORRIT* (1855-57).

diatribe about poverty, but it is mostly a critique of the hypocrisy of imprisoning the poor. Almost all of Dickens's novels are set in Victorian England, and all describe the many problems associated with that society. Dickens's impact was enormous, as his writing changed attitudes about poverty in England. His impact continues to this day, and it is likely that more people know about Victorian England through his writing than through the work of historians.

The nineteenth century was a time of enormous social change, brought on chiefly by the Industrial Revolution, and these changes were reflected in the literature of the era. One of the most famous works of social commentary in the United States was *Uncle Tom's Cabin*<sup>85</sup> by Harriet Beecher Stowe.<sup>86</sup> Stowe was a staunch abolitionist and wrote *Uncle Tom's Cabin* as an indictment of slavery. There is strong drama as Eliza flees slavery at the beginning of the novel, and as Tom struggles against the brutal slave-master Simon Legree at the end. Stowe treats all of her characters honestly, showing both the good and the bad in the people on both sides of the issue. It is notable that many of the Southerners in the book are treated with admiration, and that her main villain, Simon Legree, is a transplanted Northerner. The book was immediately popular in the North and is often considered a rallying point for the abolitionist movement. Frederick Douglass said that it transformed many unconcerned Americans into abolitionists.<sup>87</sup> One famous fable suggests that when President Abraham Lincoln met Stowe in the White House in 1862 he remarked, "So this is the little lady who made this big war."<sup>88</sup>

After the publication of *Uncle Tom's Cabin*, there were numerous other novels written about slavery by authors in both the North and South.<sup>89</sup> One of the most famous of the "Anti-Tom" novels was *The*

<sup>85</sup> HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (1852).

<sup>86</sup> 1811 – 1896.

<sup>87</sup> DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN*, 161 (Simon and Schuster, 2005).

<sup>88</sup> DAVID HERBERT DONALD, *LINCOLN*, 542 (Simon and Schuster, 1995). Note: the story is told by Stowe's family, and is uncorroborated by independent witnesses.

<sup>89</sup> MARY HENDERSON EASTMAN, *AUNT PHILLIS'S CABIN; OR, SOUTHERN LIFE AS IT IS* (1852); W. L. G. SMITH, *LIFE AT THE SOUTH; OR, UNCLE TOM'S CABIN AS IT IS* (1852); ROBERT CRISWELL, ESQ., "UNCLE TOM'S CABIN" CONTRASTED WITH BUCKINGHAM HALL, THE PLANTER'S HOME, (1852); REV. BAYNARD R. HALL, D.D., *FRANK FREEMAN'S BARBER SHOP: A TALE* (1852); "J. THORNTON RANDOLPH" (CHARLES JACOBS PETERSON), *THE CABIN AND PARLOR; OR, SLAVES AND MASTERS*, (1852); CAROLINE RUSH, *THE NORTH AND THE SOUTH; OR, SLAVERY AND ITS CONTRASTS* (1852); MARIA J. MCINTOSH, *THE LOFTY AND THE LOWLY; OR, GOOD IN ALL AND NONE ALL-GOOD* (1853); MISS MARTHA HAINES BUTT, *ANTIFANATICISM: A TALE OF THE SOUTH* (1853); J. W. PAGE, *UNCLE ROBIN IN HIS CABIN IN VIRGINIA, AND TOM WITHOUT ONE IN BOSTON* (1853); SARAH J. HALE, *LIBERIA; OR, MR. PEYTON'S EXPERIMENTS* (1853); "VIDI," *MR. FRANK, THE UNDERGROUND MAIL-*

*Planter's Northern Bride*, by Caroline Lee Hentz.<sup>90</sup> Hentz's book presents the then-common pro-slavery view that slaves could not survive without the assistance of their owners and that Northern abolitionist agitation would inevitably foment a bloody slave rebellion. Though none of the many "Anti-Tom" novels were as successful as *Uncle Tom's Cabin*, they were an integral part of the social and political discourse about the issue of slavery.

The issue of race continued to be an important topic for American writers well after the Civil War, and one of the most famous books to address this contentious topic was *The Adventures of Huckleberry Finn*<sup>91</sup> by Mark Twain.<sup>92</sup> Twain was known primarily as a humorist, but he was also a keen social critic. Most of his social criticism was delivered straight up, in speeches, essays, and non-fiction travel writing. His masterpiece, however, is *Huckleberry Finn*, which is both a wild tale of youthful adventure and a scathing criticism of American society. On the surface it is the tale of Huck Finn and his misguided attempts to free the slave Jim, but it is also an analysis and indictment of racial attitudes in the United States, both before the Civil War (when the story is set), and more importantly after the War, when it was published.

The Progressive Era, which ran approximately from the end of Reconstruction to the beginning of the First World War, was a time of great social upheaval in the United States. Industrialization had finally reached America, and it transformed society. Industrial practices were often controversial, and perhaps the most famous novel to discuss them was *The Jungle*<sup>93</sup> by Upton Sinclair.<sup>94</sup> *The Jungle* depicts the horrors of the stockyards and meat packing plants of Chicago. If ever there was an example of fiction engaging in political discourse, this is it. The book was an immediate and widespread commercial success, and it left many

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AGENT (1853); "LOGAN" (THOMAS BANGS THORPE), THE MASTER'S HOUSE; A TALE OF SOUTHERN LIFE (1854); MRS. CAROLINE LEE HENTZ, THE PLANTER'S NORTHERN BRIDE (1854); "A LADY OF NEW ORLEANS," TIT FOR TAT (1856); WILLIAM M. BURWELL, WHITE ACRE VS. BLACK ACRE (1856); MRS. G. M. FLANDERS, THE EBONY IDOL (1860); MRS. V. G. COWDIN, ELLEN; OR, THE FANATIC'S DAUGHTER (1860); MRS. HENRY R. SCHOOLCRAFT, THE BLACK GAUNTLET: A TALE OF PLANTATION LIFE IN SOUTH CAROLINA (1860). See also, Anti-Toms Homepage, <http://www.iath.virginia.edu/utc/proslav/antitoms.html>, which is part of the University of Virginia's Institute for Advanced Technology in the Humanities web sites devote to Uncle Tom's Cabin in American Culture. Last visited, December 19, 2008.

<sup>90</sup> CAROLINE LEE HENTZ, THE PLANTER'S NORTHERN BRIDE (A. Hart, 1854). Hentz and Stowe were friends when they both lived in Cincinnati, Ohio.

<sup>91</sup> MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1884).

<sup>92</sup> 1835 – 1919. Born Samuel Clemens.

<sup>93</sup> UPTON SINCLAIR, THE JUNGLE (1906).

<sup>94</sup> 1878 – 1968

members of the public disgusted by the practices described in the book. In fact, President Theodore Roosevelt was so shocked by what he read that he ordered the Department of Agriculture to investigate the food packing industry. This ultimately led to the passage of the Pure Food and Drug Act of 1906, which outlawed many of the more unseemly practices of industrial food production.<sup>95</sup>

With industrialization came increased wealth and its attendant problems. Many writers tackled these issues through their works, perhaps none better than Sinclair Lewis.<sup>96</sup> His first successful novel, *Main Street*,<sup>97</sup> is the story of a young woman who marries a small town doctor, moves to his home town, and is left appalled by the provincialism, the smug snobbery, and the bourgeoisie values of her new neighbors. The book was an instant success, and led to a great deal of popular commentary about supposed “Midwestern” values. It also spawned at least two novels that took exception to Lewis’s views: *Let Main Street Alone!*<sup>98</sup> by Meredith Nicholson, and *Ptomaine Street, the Tale of Warble Petticoat*<sup>99</sup> by Carolyn Wells. Lewis’s next novel, *Babbitt*<sup>100</sup> treads much of the same ground as *Main Street*, this time focusing on George Babbitt, a smug, self satisfied realtor in the Midwestern city of Zenith. Babbitt recognizes the soullessness of his society, and makes a few middling attempts to break away, but ultimately decides that fitting in is more important to him than being his own man. He does, however, encourage his son to seek his own way in the world and not be bound by the same complacency that held him back. *Arrowsmith*<sup>101</sup> is the story of a doctor who thinks that science and reason will solve all of society’s ills. This mirrors, to some extent, the fascination with all things scientific at the beginning of the twentieth century. Finally, *Elmer Gantry*<sup>102</sup> is the story of a charlatan and huckster who becomes a duplicitous but successful evangelical preacher. It is a direct attack on the rise of evangelical Christianity in the United States in the 1920’s.

The Great Depression of the 1930’s produced many books critical of various social and political conditions of those times. One of the most famous works of this era was *The Grapes of Wrath*<sup>103</sup> by John

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<sup>95</sup> NATHAN MILLER, THEODORE ROOSEVELT: A LIFE 459 – 462 (1992).

<sup>96</sup> 1885 – 1951.

<sup>97</sup> SINCLAIR LEWIS, MAIN STREET (1920).

<sup>98</sup> MEREDITH NICHOLSON, *Let Main Street Alone, in THE MAN IN THE STREET* (1921).

<sup>99</sup> CAROLYN WELLS, PTOMAINE STREET, THE TALE OF WARBLE PETTICOAT (1921).

<sup>100</sup> SINCLAIR LEWIS, BABBITT (1922).

<sup>101</sup> SINCLAIR LEWIS, ARROWSMITH (1925).

<sup>102</sup> SINCLAIR LEWIS, ELMER GANTRY (1927).

<sup>103</sup> JOHN STEINBECK, THE GRAPES OF WRATH (1939).

Steinbeck.<sup>104</sup> It relates the struggles of farmers from Oklahoma who move to California for migrant farm work in the aftermath of the dust bowl. The central theme of the novel is the depredation of desperate people. Steinbeck addressed similar issues in a number of other books, including *In Dubious Battle*<sup>105</sup> and *Cannery Row*.<sup>106</sup> These books mix social commentary with fictitious characters and plot. For Steinbeck, *Grapes of Wrath* and *In Dubious Battle* are works with a purposeful political agenda. Steinbeck could more effectively present his views, and garner sympathy for the downtrodden, by writing a compelling story than by writing an equally compelling news article. At his most ham-handed, his characters are stereotypes and his dialogue a political rant. Such is the case of *In Dubious Battle*. His next novel, however, *The Grapes of Wrath*, works perhaps more effectively because it deftly weaves social pathos with a compelling story.

Not all of Steinbeck's stories, or all of Dickens', Twain's, Lewis', Swift's, or even Aristophanes', are social commentary. Most famous writers write entertainment as well as commentary. Most set their stories in a social, political, cultural, and historical milieu, and so engaged in some commentary on those matters, but the stories revolved around plot line and character development, not the underlying social issues. Steinbeck's *Tortilla Flats*<sup>107</sup> and *Cannery Row* are examples of such works. Both deal with the people in tough times, but they deal primarily with the human story, which for these two books is the inherent joy of humanity. In good satire and good works of social commentary, the social environment is an integral part of the story line: history or politics drives the plot, and culture informs character development. The best writers seamlessly intermingle story and social environment until they become almost inseparable.

These works represent only a tiny fraction of all the literature produced since the dawn of writing. It can hardly be undeniable that the vast majority of writing then and now is not social criticism or commentary; it is not satire, parody, allegory, or parable: most writing is for entertainment. It is important to understand, moreover, that just because a work touches on topics of history, politics, morality, law, science, or religion, that does not make it a work of social commentary. It should also be noted that these works represent only a small fraction of works of social commentary that are presented through fiction. Since the beginning of writing, fiction has addressed the entire spectrum of

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<sup>104</sup> 1902 – 1968.

<sup>105</sup> JOHN STEINBECK, *IN DUBIOUS BATTLE* (1936).

<sup>106</sup> JOHN STEINBECK, *CANNERY ROW* (1945).

<sup>107</sup> JOHN STEINBECK, *TORTILLA FLATS* (1935).

social and political topics, ranging from the structure of government to personal autonomy and everything in between.

Our understanding of Western culture owes as much to fiction as it does to history—or more to the point, factual historical writing. We understand the Renaissance through writers like More and Montaigne, the Enlightenment through Rabelais and Swift, and Industrialization through Hugo, Dickens and Lewis. Not only did these writers explain their world and the times in which they lived, but in many cases they also shaped that world. Western civilization is the product of many minds and many thoughts, and many of those thoughts were presented through the use of literary fiction.

How, then, should the law take account of this kind of writing? Should social commentary in the form of fiction be treated like fiction? Under the current view of fair use, it is. But doesn't this risk removing some of the most vital writing from the public dialogue about important issues? As the Supreme Court said, "copyright is intended to increase and not to impede the harvest of knowledge,"<sup>108</sup> and limiting the ability to comment on fiction decreases that harvest of knowledge. It also foists upon an author the opposite of what the author may have wanted. Most of these writers wrote to engage in the debate over important social issues. It makes sense to continue that debate by throwing the author and his work into the public forum to be subjected to vigorous debate. To do so effectively would be to take cognizance of the purpose of both the First Amendment and copyright law, and to recognize that the "nature of the underlying work" should not be confined to a continuum of fact to fiction. It should also include in its continuum fiction that employs varying degrees of social commentary. Works that are fictitious social commentary, like *Utopia*, *Bleak House*, and *The Grapes of Wrath*, should be treated more like works of fact, since that is the position that they actually occupy in the public consciousness.

#### IV. FICTION AND FAIR USE: A NEW SECOND FACTOR

##### A. *A Proposed "Second Factor"*

The preceding discussion of fiction as social commentary not only suggests that these types of works should be more readily available for subsequent use than more fanciful works of fiction, but also it suggests a format for determining which works should be more readily open to fair use. As we have seen, there are varying degrees of social commen-

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<sup>108</sup> Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985).

tary in works of fiction. In fact, many authors purposefully used fiction as a means to create works of social commentary. We have also seen that the public responds differently to different works. As a result, three intertwined factors should be considered when determining if a work of fiction should be available for subsequent fair use. The first sub-factor should be the nature of the work, whether it is a work of social commentary, a work of pure entertainment, or something in between. This will depend, in part, on the second sub-factor, the author's intent in creating the work. Where an author writes a book for a social or political purpose, thereby entering a work into public dialogue, the author should expect that his or her work will be further debated. And if the book is fiction, the author should not be surprised if a subsequent author continues the debate in fiction. The third and final factor is the public response to the book. Works that become part of the public debate over important social issues should be broadly available for subsequent criticism of all forms, including in subsequent fiction.

## B. *Analysis by Analogy*

It might appear that these are fluid and ambiguous criteria, and that analyzing them might be beyond the scope and expertise of the courts. Many might question how a can court analyze the underlying subject matter of the work, the author's intent, and the public response. The courts have a long history of analyzing these kinds of situations, particularly in copyright law and the law of defamation. In a standard fair use analysis, courts analyze whether a work is one of fact or fiction or somewhere in between, and in other copyright cases the court must differentiate between an idea and the expression of the idea. In some defamation cases the court must evaluate the truthfulness of a statement, whether a statement is fact or opinion, and whether and to what extent the subject of a statement is a public figure. Each is a nebulous concept and the courts apply a sliding scale to evaluate them. These sliding scales can help flesh out the three elements of my proposed second fair use factor.

### 1. Copyright and the Fact to Fiction Continuum

As noted above, "fair use is more likely to be found in factual works than in fictional works."<sup>109</sup> This is because the "law generally

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<sup>109</sup> *Id.*

recognizes a greater need to disseminate factual works than works of fiction or fantasy."<sup>110</sup>

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." This is because facts do not owe their origin to an act of authorship. . . . The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.<sup>111</sup>

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. . . . "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book."<sup>112</sup>

The Supreme Court has described the continuum from fact to fiction:

[E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case."<sup>113</sup>

At one end of the spectrum we have a "sparsely embellished" phone directory. In *Feist Publications v. Rural Tel. Service*,<sup>114</sup> the Supreme Court determined that there can be no copyright in raw factual data such as phone listings, but there can be copyright in certain aspects

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<sup>110</sup> *Id.* at 563 (quoting Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC. 560, 561 (1982)). See also *Goldstein v. California*, 412 U.S. 546, 561-62 (1973), *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981), Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L.REV. 719, 763, n. 155 (1989).

<sup>111</sup> *Feist Publ'ns v. Rural Tel. Service, Co.*, 499 U.S. 340, 347-48 (1991) (quoting M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* § 2.11[A], p. 2-157 (1990)).

<sup>112</sup> *Id.* at 349-50 (quoting *Baker v. Selden*, 101 U. S. 99, 103 (1880)). See also Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM.L.REV. 1865, 1868 (1990) and Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM.L.REV. 516, 525 (1981).

<sup>113</sup> *Harper & Row*, 471 U.S. at 563 (quoting Gorman).

<sup>114</sup> *Feist*, 499 U.S. 340.

that indicated some level of creativity, such as the “selection, coordination, or arrangement” of the listings.<sup>115</sup>

Near the other end of the spectrum is the memoir of a prominent person. The case of *Harper & Row, Publ'rs v. Nation Enters.*,<sup>116</sup> involved an attempt by *The Nation* magazine to scoop the memoir of former President Gerald Ford. *The Nation* had obtained a copy of Ford's memoirs and planned to publish selected excerpts dealing primarily with Ford's decision to pardon former President Richard Nixon. Ford sued to prevent *The Nation* from scooping his book, and in its defense *The Nation* said that publication would be fair use since the issue of Nixon's pardon was factual and publicly important.

The court noted that Ford's memoirs did relate to important public matters, and in many cases Ford was simply relating well known historical facts from his own perspective. Factual information receives only limited protection, and in this case that protection would be limited to the extent of Ford's expression of those facts. But the Court also noted that *The Nation* planned to publish much more than just selected excerpts of Ford's discussion of important political matters. “The Nation did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression. Such use, focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts.”<sup>117</sup>

## 2. Copyright and the Idea/Expression Dichotomy

Copyright does not protect ideas but only the expression of those ideas.<sup>118</sup> According to the Supreme Court, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work.”<sup>119</sup> This distinction between a non-protectable idea and the protectable expression of the idea is known as the idea/expression dichotomy. The idea/expression dichotomy strikes “a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.”<sup>120</sup>

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<sup>115</sup> *Id.* at 357.

<sup>116</sup> *Harper & Row*, 471 U.S. 539.

<sup>117</sup> *Id.* at 563-64.

<sup>118</sup> “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. §102(b) (2009).

<sup>119</sup> *Feist*, 499 U.S. at 349-50.

<sup>120</sup> *Harper & Row*, 471 U.S. at 556.

In cases involving the idea/expression dichotomy, courts have to analyze both works at issue to suss out the idea from the expression of the idea. The simple non-literary example of wrist-watch copyrights will help explain this distinction. One company produced a novelty watch with the face of a cat on the watch face. There was a small mouse on the end of the second hand, and the cat's eyes followed the mouse around the dial. A competitor produced a similar watch with a cat and a mouse, and the first company sued for copyright infringement. The court noted that a watch face featuring a cat watching a mouse is an idea, but the expression is the use of a particular type of cat, say a Tabby, watching a particular design of a mouse.<sup>121</sup>

The classic literary explanation of the idea/expression dichotomy was developed by Judge Learned Hand.

Upon any work, . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work, but the analogy is not a good one, because, though the skeleton is a part of the body, it pervades and supports the whole. In such cases we are rather concerned with the line between expression and what is expressed.<sup>122</sup>

Hand's comments came from a case involving a movie that was allegedly copied from a play. The play was a comedy about a Jewish boy who marries an Irish girl. The movie was about a Jewish family living next door to an Irish family, and the Irish boy falls in love with the Jewish girl. Both works relied heavily on comedic ethnic stereotypes (the stingy Jew, the drunken Irishman) played for laughs. Hand noted that stories of love between members of antagonistic families are as old as *Romeo and Juliet*, and comedic stereotypes are the stock in trade of entertainers. As a result, the movie did not infringe on the play. Subsequent cases have expanded on Hand's reasoning. "It is well established that, as a matter of law, certain forms of literary expression are not protected against copying."<sup>123</sup> For example, familiar stock

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<sup>121</sup> *Direct Mktg. of Va. Inc., v. E. Mishan & Sons, Inc.*, 753 F. Supp. 100 (S.D.N.Y. 1990).

<sup>122</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>123</sup> *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (rejecting consideration of general ideas as well as scenes-a-faire in determining substantial similarity under the extrinsic test).

scenes and themes that are staples of literature are not protected.<sup>124</sup> Additionally, “[s]cenes-a-faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement.”<sup>125</sup> In other cases involving two similar works, courts have looked at “the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting of” the two works.<sup>126</sup> This means that when faced with a case of alleged infringement, the court must evaluate both works and determine what elements are standard literary elements, what characters are stereotypes or stock characters, what plot elements are standard plot elements, and what scene elements flow naturally from the situation, among other nebulous criteria.

### 3. Defamation’s Sliding Scales

Defamation, like copyright, deals with the interplay between free speech and limitations on that speech. If one person says something that harms another person’s reputation, the speaker can be sued for defamation. As a result, the threat of defamation can have a limiting effect on the free expression of ideas, just as the threat of being sued for copyright infringement can limit free speech. Defamation incorporates the well known torts of slander and libel. A defamatory statement is a false statement that “tends to injure the plaintiff’s reputation and expose the plaintiff to public hatred, contempt, ridicule, or degradation.”<sup>127</sup> A person is harmed by defamation when that statement serves to lower him or her “in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>128</sup>

There are a number of situations in which First Amendment concerns regarding free speech and the free flow of information have resulted in judicially-created limits on the ability to sue for defamation. The first involves the truth of the purportedly defamatory statement. A true statement cannot be defamatory, regardless of how embarrassing it

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<sup>124</sup> *Id.* at 1294.

<sup>125</sup> *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002).

<sup>126</sup> *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996).

<sup>127</sup> *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 573 (Minn. 1987) (quoting *Church of Scientology v. Minnesota State Med. Ass’n Found.*, 264 N.W.2d 152, 155 (Minn. 1978); citing *Gadach v. Benton County Co-op. Ass’n*, 236 Minn. 507 (1952)).

<sup>128</sup> Restatement (Second) of Torts § 559. Defamation is a matter of state law, and most follow the Restatement (Second) of Torts, §558 to §652. Defamation cases dealing with First Amendment issues affect matters of Federal law, and often appear in Federal Court. The major cases dealing with the interplay between defamation and the First Amendment are all federal cases.

is to the subject of the negative comment.<sup>129</sup> The statement need not be absolutely true, or true in every regard, as long as the statement is substantially true.<sup>130</sup> “To establish the defense of substantial truth, the defendant need only show the truth of the “gist” or “sting” of the defamatory material.”<sup>131</sup>

Similarly, a statement of mere opinion is not actionable unless it implies that it is based on some undisclosed defamatory fact.<sup>132</sup> If the basis of the opinion is disclosed in the publication or is well known to the public, and the opinion can be logically inferred from the facts, the opinion is not actionable.<sup>133</sup> A person, however, cannot simply avoid an action for defamation by adding the phrase “in my opinion” to the statement.<sup>134</sup> The issue is whether the statement contains “a provably false factual connotation.”<sup>135</sup> To determine if the statement is one of fact or opinion, the court can look at: (1) the specific language used in the statement, (2) whether the statement is verifiable in some way, (3) the general context of the statement, and (4) the broader context in which the statement appeared.<sup>136</sup>

First Amendment concerns also require that in certain situations speech must be free and open. One example involves a statement made in the context of a government proceeding, such as in court, in legislative bodies or within the executive branch.<sup>137</sup> In those situations the speaker has a legal privilege to make the statement and the wronged plaintiff has little or no recourse.<sup>138</sup>

A qualified privilege also exists where there is a duty to disclose certain information. Such a duty may be “public, personal or private, either legal, judicial, political, moral or social.”<sup>139</sup> For example, there is a duty to report a suspected crime without fear of later being sued for

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<sup>129</sup> *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 795-96 (Ky. 2004); *Bell v. Courier-Journal and Louisville Times Co.*, 402 S.W. 2d 84, 87 (Ky. 1966).

<sup>130</sup> *Stringer*, 151 S.W.2d at 796; *Bell*, 402 S.W.2d at 87.

<sup>131</sup> *Global Relief Found. v. New York Times*, 390 F.3d 973, 980 (7th Cir. 2004). *See also* *Green v. CBS, Inc.*, 286 F.3d 281 (5th Cir. 2002); *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82 (Nev. 2002).

<sup>132</sup> *See, e.g.*, PROSSER AND KEETON ON TORTS, Fifth Ed., § 113A, 813-15; *Yancy v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989); *Buchholtz v. Dugan*, 977 S.W.2d 24, 28 (Ky. App. 1998).

<sup>133</sup> *See, e.g.*, PROSSER AND KEETON ON TORTS, § 113A; *Yancy*, 786 S.W.2d at 857; *Buchholtz*, 977 S.W.2d at 28.

<sup>134</sup> *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-23 (1990).

<sup>135</sup> *Id.* at 20.

<sup>136</sup> *Ollman v. Evans*, 750 F.2d 970, 980-84 (D.C. Cir. 1984). *See also* *Gertz v. Welch, Inc.*, 418 U.S. 323, 340 (1974); *Milkovich*, 497 U.S. at 1.

<sup>137</sup> PROSSER AND KEETON ON TORTS, § 114 Absolute Privilege.

<sup>138</sup> *See, e.g.*, *Louisville Times Co. v. Lyttle*, 77 S.W.2d 432 (Ky. 1934); *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684 (Ky. 1990).

<sup>139</sup> *Stewart v. Pantry, Inc.*, 715 F.Supp. 1361, 1366 (W.D. Ky. 1988).

defamation.<sup>140</sup> Another common example involves the internal discussions within a company or organization.<sup>141</sup> Employers have a right to honestly discuss the qualifications of employees or issues dealing with the work environment.<sup>142</sup>

The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits . . . [A] qualified privilege attaches to statements and communications made in connection with the various activities of such organizations as lodges, societies, labor unions, etc. Thus it is well settled that members of such bodies may report on the qualifications of applicants, prefer charges against fellow members, offer testimony in support of the charges, and make proper publication of any disciplinary action that may be taken, without liability for any resultant defamation, so long as they act without malice.<sup>143</sup>

A second type of privilege involves statements regarding prominent people. Certain people, because of their involvement in issues of public concern, become part of the public discourse, and comments about them are treated as comments about important public matters. There are two types of prominent people: public officials and public figures. A public official is generally a governmental policy maker, such as a political office holder or bureaucrat in a position with significant policy making ability. A public official performs “governmental duties directly related to the public interest,” holds “a position to influence significantly the resolution of public issues,” and appears to the “public to have, substantial responsibility for or control over the conduct of government affairs?”<sup>144</sup>

There are three types of public figures: (1) all purpose public figures, (2) limited purpose public figures, and (3) involuntary public figures.<sup>145</sup> An all purpose public figure is someone who is “a well-known ‘celebrity,’ his name is a ‘household word,’ and because of his or

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<sup>140</sup> See, e.g., *Greene v. Reeves*, 80 F.3d 1101 (6th Cir. 1996) (postal inspector privileged to report photos of nude children to the police); *Bogosian v. Board of Educ. of Cmty. Unit Sch. Dist. 200*, 134 F.Supp. 2d 952 (N.D. Ill. 2001) (teacher privileged to report suspicion that other teacher might be abusing children); *Holcomb v. Walter’s Dimmick Petroleum, Inc.*, 858 N.E.2d 103 (Ind. 2006) (report of possible crime to police is privileged).

<sup>141</sup> See, e.g., *Caslin v. General Electric Co.*, 608 S.W.2d 69 (Ky. App. 1980); *Wyant v. SCM Corp.*, 692 S.W.2d 814, 816 (Ky. App. 1985).

<sup>142</sup> See, e.g., *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004).

<sup>143</sup> *Wolff v. Benovitz*, 192 S.W.2d 730, 733 (Ky. 1946) (quoting 33 Am. Jur., Privilege § 126).

<sup>144</sup> *Britton v. Koep*, 470 N.W.2d 518, 522 (Minn. 1991).

<sup>145</sup> *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 203 (W. Va. 2003). (The Wilson case has one of the best explanations and analysis of this issue of any case I have found.) See also *Gertz v. Welch, Inc.*, 418 U.S. 323, 345 (1974). Gertz is the leading Supreme Court case dealing with this topic.

her ‘pervasive fame or notoriety’ the public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of attention or because he actively pursues that consideration.”<sup>146</sup> Courts have found a number of prominent celebrities to be “all-purpose public figures,” including Clint Eastwood,<sup>147</sup> Johnny Carson,<sup>148</sup> William F. Buckley, Jr.,<sup>149</sup> and Carol Burnett.<sup>150</sup>

A limited purpose public figure is a person who voluntarily injects himself into a particular public controversy, thereby becoming a public figure for a limited range of issues relating to that controversy.<sup>151</sup> A plaintiff is a limited purpose public figure when:

- (1) the plaintiff voluntarily engaged in significant efforts to influence a public debate—or voluntarily assumed a position that would propel him to the forefront of a public debate—on a matter of public concern;
- (2) the public debate or controversy and the plaintiff’s involvement in it existed prior to the publication of the allegedly libelous statement; and
- (3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question.<sup>152</sup>

The final category is an involuntary public figure, or someone who becomes a public figure through no action of his or her own. The most famous case involved Richard Jewell, the security guard who found a bomb at the Summer Olympics in Atlanta in 1996. Subsequent media reports raised questions about his possible (and ultimately disproven) involvement in planting the bomb. The Georgia Courts Court of Appeals found that he was an involuntary public figure.<sup>153</sup>

A person is an involuntary public figure when:

- (1) the plaintiff has become a central figure in a significant public controversy, (2) that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter, and (3) the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere.<sup>154</sup>

All purpose public figures are, as the name suggests, public figures in all cases. Limited purpose and involuntary public figures, on the

<sup>146</sup> *Wilson*, 588 S.E.2d at 204.

<sup>147</sup> *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997).

<sup>148</sup> *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

<sup>149</sup> *Buckley v. Littell*, 539 F.2d 882, 883 (2d Cir. 1976).

<sup>150</sup> *Burnett v. National Enquirer, Inc.*, 193 Cal. Rptr. 206 (Ct. App. 1983).

<sup>151</sup> *Wilson*, 588 S.E.2d at 206 (quoting *Gertz v. Welch, Inc.*, 418 U.S. 323, 351 (1974)).

<sup>152</sup> *Id.*

<sup>153</sup> *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001).

<sup>154</sup> *Wilson*, 588 S.E.2d at 208-9.

other hand, are only public figures in relation to a specific public controversy or an issue that “has received public attention because its ramifications will be felt by persons who are not direct participants.”<sup>155</sup> A public controversy is not the same as a matter of public interest. Stories may be newsworthy because of public interest in them, but that newsworthiness does not make them “public controversies.” Rather, two elements must be satisfied to be treated as a public controversy: “(1) there must be some real dispute that is being publicly debated, and (2) it must be reasonably foreseeable that the dispute could have substantial ramifications for persons beyond the immediate participants.”<sup>156</sup> To help in determining whether an issue is a public controversy, the court can “look to those controversies that are already the subject of debate in the public arena at the time of the alleged defamation.”<sup>157</sup>

Even in those situations in which a statement may have been privileged, or where the subject is a public figure, the speaker can still be liable for defamation if the defamatory statement was made with malice. A “privilege must be exercised in a reasonable manner and is lost if abused.”<sup>158</sup> The “privilege is abused if the speaker is motivated by malice rather than by the public interest that calls the privilege into being.”<sup>159</sup>

In *Sullivan v. New York Times*, the Supreme Court established the malice requirement for statements regarding public officials. It explained that the rule is necessary to ensure free speech under the First Amendment:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though

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<sup>155</sup> *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980); *accord Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433-34 (5th Cir. 1987); *Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 363 (8th Cir. 1996); *Chafoulias v. Peterson*, 668 N.W.2d 642, 651 (Minn. 2003).

<sup>156</sup> *Chafoulias*, 668 N.W.2d at 652.

<sup>157</sup> *Id.* at 652. *See also Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 591 (1st Cir. 1980).

<sup>158</sup> *Suggs v. Stanley*, 324 F.3d 672, 679 (8th Cir. 2003).

<sup>159</sup> *Id.*

it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>160</sup>

A statement, even if made under some privilege, is actionable if it is made with actual malice or with intent to harm.<sup>161</sup> Actual malice is found when the statement was made with “knowledge that [it] was false or with reckless disregard of whether [it] was false or not . . . . [R]eckless disregard is . . . a high degree of awareness of probably falsity, and . . . [w]here the publisher must have entertained serious doubts as to the truth of his publication.”<sup>162</sup> This is a subjective determination and relies on “what the defendant believed and intended to convey, and not what a reasonable person would have understood the message to be.”<sup>163</sup>

Traditionally, malice meant “ill will, hatred, the desire to do another harm, or wrongful motive.”<sup>164</sup> And actual “malice can be shown by evidence of previous ill-will, hostility, threats, rivalry, other actions, former libels or slander, and the like, or by the violence of the defendant’s language, the mode and extent of the publication, and the like.”<sup>165</sup> Courts have further indicated that in cases involving the news media, the publisher has a duty to conduct some investigation if it has any reason to doubt the truthfulness of a story. However, publishers can rely to some extent on their sources, particularly where the source seem reasonable.<sup>166</sup> “To prove that a statement was published with a reckless disregard of the truth, a defamation plaintiff must identify sufficient evidence permitting the conclusion that the defendant in fact entertained serious doubts as to the truth of the statement.”<sup>167</sup>

<sup>160</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>161</sup> *See, e.g., Ball v. E.W. Scripps Co.*, 801 S.W.2d 684 (Ky. 1990); *Louisville Times Co. v. Lyttle*, 77 S.W.2d 432 (Ky. 1935). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

<sup>162</sup> *Ball*, 801 S.W.2d at 689.

<sup>163</sup> *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 92 (Nev. 2002) (quoting *Posadas v. City of Reno*, 851 P.2d 438, 443 (Nev. 1993)).

<sup>164</sup> *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 849 (8th Cir. 2002).

<sup>165</sup> *Butler v. Town of Argo*, 871 So. 2d 1, 27 (Ala. 2003) (internal quotes and cites omitted).

<sup>166</sup> *See, e.g., Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003).

<sup>167</sup> *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733, 746 (7th Cir. 2003).

### C. *The New "Second Factor"*

As the above examples from copyright and defamation law illustrate, courts appear to be able to analyze nuanced issues involving the literary elements of a written work. Courts are also expected to determine the intended purpose of a statement as well as the public response to those statements. The reasoning developed in these analogous areas can help to expand the three intertwined elements of my proposed second factor continuum: (1) the subject matter of the work, (2) the author's intent, and (3) the public response to the book.

#### 1. The Subject Matter of the Work

The subject matter of the novel or other work of fiction is the most important element of this proposed continuum. Some books are clearly about relevant social issues, while others simply use those issues as background to the story or as a plot device to drive the story. Other books, of course, are pure fancy, to use the Supreme Court's term for a work of the purest form of fiction.<sup>168</sup>

In most cases, the degree of social commentary will be fairly obvious. For example, *All Quiet on the Western Front*<sup>169</sup> by Erich Maria Remarque,<sup>170</sup> and *A Farewell to Arms*<sup>171</sup> by Ernest Hemingway,<sup>172</sup> are both set in the First World War, but they are "about" the war in different ways. Remarque's novel is a scathing critique of the stupidity, cruelty, and futility of that war and, by implication, of all wars. Hemingway's novel, by contrast, depicts the horrors of the First World War, but the war is merely the background of the story used to frame the personal development of the two main characters. As a result, *All Quiet on the Western Front* would fall much higher on a spectrum of socially relevant works than *A Farewell to Arms*. Hemingway's novel is a masterpiece of Western literature, but his subject is humanity, not history. His novel, like all good literature, touches on the human condition, but not all good literature touches on the socially, historically, or politically relevant topics that should be the focus of this inquiry.

The Second World War served as the setting for thousands of books, including *The Naked and the Dead*<sup>173</sup> by Norman Mailer,<sup>174</sup>

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<sup>168</sup> Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

<sup>169</sup> ERICH MARIA REMARQUE, *ALL QUIET ON THE WESTERN FRONT* (Published in Germany in 1929, and in English in 1930).

<sup>170</sup> 1898 – 1970.

<sup>171</sup> ERNEST HEMINGWAY, *A FAREWELL TO ARMS* (1929).

<sup>172</sup> 1899 – 1961.

<sup>173</sup> NORMAN MAILER, *THE NAKED AND THE DEAD* (1948).

<sup>174</sup> 1923 – 2007.

*From Here to Eternity*<sup>175</sup> by James Jones,<sup>176</sup> *The Guns of Navarone*<sup>177</sup> by Alistair MacLean,<sup>178</sup> *Catch-22*<sup>179</sup> by Joseph Heller,<sup>180</sup> and *Slaughterhouse Five*<sup>181</sup> by Kurt Vonnegut.<sup>182</sup> These five books provide good examples of the varying degrees of social commentary present in a work of fiction. All five books deal with real events, but they vary greatly in their level of social commentary. Starting with the least relevant: *The Guns of Navarone*, is pure action adventure. The setting and events are real, but the main story is about the daring and bravery of the main characters. There is no moralizing about war; instead, the author focuses on blood, guts and the good guys winning. *From Here to Eternity* is similarly not particularly self reflective. It is a detailed account of the lives of soldiers in Hawaii before the Japanese attack on Pearl Harbor. We learn of the humanity of these soldiers, and from that understand the effect that the war will have on them. But the book is not a commentary on war or the horrors of war. *The Naked and the Dead* is a soldier's eye view of the brutality and banality of war. We read in vivid detail about the suffering and degradation of combat, but Mailer lets us feel the inhumanity rather than lecture us on it. The book's subject is the horror of war, but the book lacks a significant degree of authorial commentary. *Catch-22* is a true satire, poking ribald fun at the insanity of war. It is an example of how intertwined comedy and tragedy are: we laugh at the absurdity of the situations that befall the main character, Captain Yosarian, rather than cry at the horror of what is happening to him and the people around him. The horror is inescapable and made unforgettable by the absurdity. Of these five books, by far the most direct commentary on war is provided in *Slaughterhouse Five*. The story revolves around the main character, Billy Pilgrim, and his abduction by aliens who take him to a parallel universe where time is non-linear. This forces Billy to constantly relive his experiences as a prisoner of war in Dresden, Germany. Ultimately, the horror and insanity of his experience drives Billy insane. This novel makes the reader wonder if the alien abduction was really just a psychic break or an elaborate coping mechanism, which drives home the enduring consequences of the horror and insanity of war.

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<sup>175</sup> JAMES JONES, *FROM HERE TO ETERNITY* (1951).

<sup>176</sup> 1921 – 1977.

<sup>177</sup> ALISTAIR MACLEAN, *THE GUNS OF NAVARONE* (1957).

<sup>178</sup> 1922 – 1987.

<sup>179</sup> JOSEPH HELLER, *CATCH-22* (1961).

<sup>180</sup> 1923 – 1999.

<sup>181</sup> KURT VONNEGUT, *SLAUGHTERHOUSE FIVE* (1969).

<sup>182</sup> 1922 – 2007.

From these World War II novels, and from the previous discussion of fiction as social commentary, it would appear that there are at least five types of works of fiction that contain varying levels of social commentary:

1. Works about relevant social issues or political topics. In this category, the social or political issue is the main subject of the work. The main topic drives the plot, influences the characters' behavior, and shapes their development. In many cases, the characters discuss the central issue, and there is often a high degree of authorial exposition regarding that issue. In these types of work, authors frequently digress on the history, relevance and social impact of the main topic. Some examples from the previous history of fiction as social commentary include *Utopia* (political structures and human behavior), *Les Miserables* (poverty and class structure), *Uncle Tom's Cabin* (slavery), *All Quiet on the Western Front* (war), and *The Grapes of Wrath* (poverty and social struggles).

2. Works where the social or political issue is an important underlying theme of the book. The topic is a major plot device or a major background issue in the story. The story, to a large degree, revolves around the underlying theme. The characters may or may not discuss the theme, and there may or may not be a significant amount of authorial exposition, but there is no doubt that the underlying theme is influencing the lives and behavior of the main characters. Some examples include: *Gargantua & Panaegrue* (social changes during the Enlightenment), *Gulliver's Travels* (mankind's inhumanity), *Tristram Shandy* (the absurdity of modern social thought and theories), *Huckleberry Finn* (race and slavery), and most novels by Charles Dickens (poverty and social struggles in Victorian England) and Sinclair Lewis (bourgeoisie values in Gilded Age America).

3. Stories set in a relevant social environment, and which describe the relevant environment, but which do not comment on the underlying issues that shape that social environment. Thus, the social environment is the setting in which the characters exist, but it does not specifically drive their behavior or the plot of the story. Some examples include *Don Quixote* (Renaissance Spain), *Hunchback of Notre Dame* (Renaissance France), *A Farewell to Arms* (the First World War), and *The Naked and the Dead* (the Second World War).

4. Stories set in reality without directly address any social issues related to that reality. This category covers the vast majority of all works of fiction, and some examples include *The Guns of Navarone* and *From Here to Eternity*.

5. Works largely devoid of social content. There is little or no discussion of relevant social subjects or issues, with the exception of human behavior. Most genre fiction (e.g. romance, mystery, horror, science fiction) falls into this category.

These categories are not cast in stone, and it is likely that people will disagree with my placement of various classics in certain categories. There is also no clear boundary between the categories, and some works may be on the cusp between them. In all likelihood, the precise definition of and boundaries to these categories will be established by courts evaluating cases. use.

In general, only works from the first two categories should readily be available for subsequent use because these works are about the kinds of important social and political issues that need to be discussed in a democratic and open society. On the other hand, works in the last two categories should be generally unavailable for subsequent use. A work in the third category would only be available depending on other factors, such as the author's intent and the public response to the work.

In most cases, it will be relatively easy to determine where a work falls on this spectrum. The Harry Potter series of books, for example, are works of pure fancy.<sup>183</sup> These books certainly deal with issues of human nature—addressing subjects like the struggle between good and evil, self-awareness, and coming of age—but they are set in a parallel universe. They make no explicit attempt to address important social or political topics, and as such they should be free from subsequent use.

Such is the case with many works of fantasy, as well as most works of genre fiction. Genre fiction (horror, mystery, romance) is typically about the plot of the story or about the main character's experience within the setting developed in the story. These works deal with human nature but generally lack social commentary. Romance novels, for example, deal with love, lust, romance, and human relationships. These works, however, are largely divorced from the issues and problems of the real world.

For most books, movies, or plays it will be obvious if there is some level of political commentary in the work. Most people understand, with little explanation, what should qualify as social commentary and what should qualify as a political issue. However, if there is a question

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<sup>183</sup> There are seven books in the Harry Potter Series, all by J. K. ROWLING: HARRY POTTER AND THE PHILOSOPHER'S STONE (1997); HARRY POTTER AND THE CHAMBER OF SECRETS (1998); HARRY POTTER AND THE PRISONER OF AZKABAN (1999); HARRY POTTER AND THE GOBLET OF FIRE (2000); HARRY POTTER AND THE ORDER OF THE PHOENIX (2003); HARRY POTTER AND THE HALF-BLOOD PRINCE (2005); HARRY POTTER AND THE DEATHLY HALLOWS (2007).

about the social relevance of a particular subject, the court can apply the same logic as in defamation, and look at whether a subject has historically been an issue of public concern and political debate.<sup>184</sup> Generally, one need only open the newspaper or turn on the television to discover the socially relevant issues of today. Current topics of social and political debate range from abortion to water-boarding. If these issues are present in a piece of literature, the court will then have to determine the degree to which they are addressed in the book and can look at the five levels set out above. For further guidance, the court can also look to the classics of Western literature. But in close cases, or when dealing with works in the third category, the court can look at what the author was trying to accomplish with the work.

## 2. The Author's Intent

To help understand the degree of political purpose or social commentary in a work, we can look at the author's intent in writing the book, in setting the story in a particular time or place, or in establishing the central theme of the work. Intent can be determined in a number of ways. Often, authorial intent will be well known. Few have any doubts about the intent of writers like Victor Hugo, Charles Dickens or John Steinbeck. We know their intent because we are familiar with their careers and their writings. All three imbued their novels with concern for the downtrodden and outcast.<sup>185</sup>

In many cases, however, the author's intent might not be as clear. In those situations, there are a number of ways to determine the author's purpose. If the author is alive, he or she can be asked. If the author is dead, then interviews, speeches, or letters can be evaluated to see if the author explained his or her intent in writing the book. An evaluation of the writer's other works can also shed light on the author's views. The author might have addressed similar issues in non-fiction writing such as essays, book reviews, cultural criticism or reportage. The author might have focused on similar subjects or social issues in other works of fiction. If the work in question is not clearly a work of social commentary, it might be worthwhile to determine if other novels by the author were more clearly social commentary. If the author never wrote social commentary, then there probably needs to be some explanation for why this work might be different. Conversely, if other works by the author exhibit some degree of social commentary, there is a high

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<sup>184</sup> Chafoulais, *supra* note 157.

<sup>185</sup> In a similar vein, a reader's political orientation can be discerned from what they read.

likelihood that the work in question might be a social commentary a well.

Many authors are well known for their social, political or philosophical views, and they clearly impart those views into their works. The French writer Jean Jacques Rousseau,<sup>186</sup> for example, is most famous as a philosopher, but he wrote two best selling novels infused with his philosophical ideas. *Julie*<sup>187</sup> is a love story, but also a philosophical inquiry into issues of personal autonomy. *Emile*<sup>188</sup> is the story of the education of a young boy, but it is actually a discourse on Rousseau's views on child development. A more contemporary example involves the libertarian thinker and writer Ayn Rand.<sup>189</sup> She inculcated her novels with her beliefs, including hostility towards totalitarianism in *We The Living*,<sup>190</sup> a belief in unconstrained individualism in *The Fountainhead*,<sup>191</sup> and a belief in free market capitalism in *Atlas Shrugged*.<sup>192</sup> We know this because Rand's views on communism and totalitarianism are well known through her lectures and non-fiction writing.

Most authors are generally open about their views, and typically clear when they insert those views into their work. They are, after all, trying to make a point, and you don't generally make your point by being obscure. (Although a good point can best be made subtly.) It is infrequent that an author does not intend certain things in his or her writing, but there are times when readers take something from a work that the author may not have intentionally put there. Perhaps the most famous example involves *Don Quixote*. Some critics believe that Cervantes was critiquing Spanish society, but many others think his book was nothing more than a lampoon of the kind of chivalric romances that were popular in his day.<sup>193</sup>

It is much more common for an author to intend a work to be a deep social commentary but to fall miserably short. Western literature contains numerous political manifestos masked with a superficial story. Dickens flirted with this terrain in *Hard Times*, and Steinbeck certainly hit the mark with *In Dubious Battle*. Most similar works by lesser authors simply disappear into obscurity. A personal favorite is the novel

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<sup>186</sup> 1712 – 1778.

<sup>187</sup> JEAN JACQUES ROUSSEAU, *JULIE, OU LA NOUVELLE HELOISE (JULIE, OR THE NEW HELOISE)* (1761).

<sup>188</sup> JEAN JACQUES ROUSSEAU, *ÉMILE, OU L'ÉDUCATION* (1762).

<sup>189</sup> 1905 – 1982.

<sup>190</sup> AYN RAND, *WE THE LIVING* (1936).

<sup>191</sup> AYN RAND, *THE FOUNTAINHEAD* (1943).

<sup>192</sup> AYN RAND, *ATLAS SHRUGGED* (1957).

<sup>193</sup> *See, e.g.,* MATTHEW HODGART, *SATIRE* 217-220 (1969).

*Mother*,<sup>194</sup> by the Russian author Maxim Gorky.<sup>195</sup> Gorky's short stories are brilliant bits of social pathos but *Mother* is four hundred pages of political nonsense. It was widely popular before the Bolshevik Revolution, but is now essentially unread and unreadable.

Generally, an author writes on a socially relevant topic because she wants to add her voice to the public debate. When this is the case it seems only fair to honor the author's wishes, and to open the work to further debate.

### 3. The Public and Critical Response

As noted previously, the main purpose of the First Amendment, copyright law, and the fair use doctrine, is to encourage public debate over political issues. It is relevant, therefore, to ask whether a work has become part of the public debate. Some books have entered the social consciousness; for example, *1984*,<sup>196</sup> by George Orwell.<sup>197</sup> The mere mention of the title raises images of a dystopian dictatorship. A number of Orwell's other novels, though infused with social content and written for a social purpose, do not have this effect on the public. *Keep the Aspidistra Flying*,<sup>198</sup> and *Coming Up for Air*,<sup>199</sup> both deal with issues of class and poverty in depression era England, but are currently almost unknown. Orwell's intent in all three works appears essentially the same – namely, to comment on, and hopefully change, his society

A work that slips under the waves of popular culture and succumbs to the tide of obscurity has not become part of the public debate, regardless of the nature of the work or the author's intent in writing it. On the other hand, where an author aspires to create a work of social relevance, it is important to ask if he hit the mark. For Orwell, *1984* and *Animal Farm* hit the mark, while most of his other novels did not. And as a result of their notoriety, *1984* and *Animal Farm*, should be much more fertile ground for subsequent reworking than Orwell's other novels.

The more noteworthy a book, the more likely it will become the subject of public scrutiny. The book will be reviewed in newspapers, magazines, websites, and possibly even on television. There may be in-depth book reviews in magazines like the *New Yorker* and *The New York Review of Books*, and in literary and scholarly journals. The au-

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<sup>194</sup> MAXIM GORKY, *MOTHER* (1907).

<sup>195</sup> 1868 – 1936. Born Aleksey Maksimovich Peshkov. Gorky means “bitter” in Russian.

<sup>196</sup> GEORGE ORWELL, *1984* (1949).

<sup>197</sup> 1903 – 1950. Born Eric Arthur Blair.

<sup>198</sup> GEORGE ORWELL, *KEEP THE ASPIDISTRA FLYING* (1936).

<sup>199</sup> GEORGE ORWELL, *COMING UP FOR AIR* (1939).

thor might also discuss the book on radio and television talk shows. The topic addressed in the novel might be addressed in subsequent analytical or critical writing, with or without mention of the work of fiction from which it sprang. Politicians might even mention the book on the campaign trail (though modern politicians are much more likely to mention movies or television shows). A less noteworthy work, despite the author's fondest hopes, probably won't be the subject of much debate.

Fame, however, is not the same as social importance. The *Harry Potter* books, for example, are the most famous and lucrative books on the shelves today, but they are works of almost pure fancy. They fail to discuss explicitly relevant social issues in a serious manner because they are almost entirely fantasy. As a result, they are not readily amenable to "fair use" under my proposed continuum. But if a work is noteworthy, and if it discusses important social subjects, it will be subject to scrutiny and criticism. Most scrutiny will be in the form of critical commentary, but some criticism might be in the form of fiction. The real question is the extent to which one work of fiction that criticizes or comments on a previous work of fiction should be able to use the first work.

#### 4. The New Factor, and the Old

What are the limits on the subsequent use of a work of fiction that engages in social commentary? The simple answer is that all of the existing fair use factors will still apply. As noted previously, fair use is evaluated based on (1) the purpose and character of the subsequent use, (2) the nature of the original work, (3) the amount of the original used in the subsequent work, and (4) the effect of the use on the market for the original.<sup>200</sup> Each of these factors is essentially a limitation on the type and extent of the subsequent use, and each should be modified slightly to deal with the particulars of fiction as social commentary. In 1994, the Supreme Court addressed an analogous situation in the case of *Campbell v. Acuff-Rose Music, Inc.*,<sup>201</sup> which involved a rap parody of the Roy Orbison classic *Oh Pretty Woman*. The Court focused on each fair use factor in relation to an imaginative work (which was a song) that was parodied, or commented on, by another imaginative work (also a song). The Court's analysis regarding parody would appear to apply to any form of commentary, and so is particularly relevant here.

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<sup>200</sup> 17 U.S.C. § 107 (2009).

<sup>201</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

The first fair use factor is the purpose and character of the subsequent use.<sup>202</sup> The Supreme Court noted in *Campbell* that:

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.<sup>203</sup>

If a parody must use elements of the original to comment on it, so too must a non-parody commentary. In this situation, it would seem that the "element" should be the subject of the social commentary of the original work. The subsequent author should hew fairly closely to the same topic, same subject matter, or same theme as the first work. In other words, if the first work is about the degradation of poverty, the subsequent work should be as well. If the first work is about war, the second work, while transformative, should also be about war. A subsequent author, for example, could use *All Quiet on the Western Front* as the starting point for an alternate view of war, but should not be able use it to present a fictitious discourse on the breakdown of the traditional social structure in Europe during the First World War. Straying so far from the central theme of Remarque's masterpiece would not be commenting on it, but rather simply using it to gain attention or to "avoid the drudgery in working up something fresh."<sup>204</sup>

The second factor is the subject of this paper and has been analyzed in detail. The third factor is "the amount and substantiality of the portion used" by the copyist in relation to the copyrighted work as a whole.<sup>205</sup> Generally the subsequent author may use only enough to make his or her point. As the court noted in *Campbell*:

Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be

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<sup>202</sup> 17 U.S.C. § 107(1) (2009).

<sup>203</sup> *Campbell*, 510 U.S. at 580 (emphasis added).

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

<sup>205</sup> 17 U.S.C. § 107(3) (2009).

sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.<sup>206</sup>

A similar analysis should apply to cases dealing with works of socially-relevant fiction. The subsequent work should use enough of the first to make the point, but not so much as to replace the original. For example, *All Quiet on the Western Front* is about the horrors of the First World War, and more broadly, of all wars. Imagine, for example, that a subsequent author wanted to make a different point about war, perhaps suggesting that war is an enduring element of human societies because it is the biggest adventure that most people will ever have. That author should be able to use selected elements of Remarque's work to make that point. The subsequent author should not be able to parallel, scene for scene, the story of Paul Bäumer by following a different member of his Army unit, but writing it as an adventure. That would be, in my opinion, using far too much of the original. The subsequent author might, however, revisit one of Remarque's characters after the war, and have him recount the war as the most exciting time of his life. From this, the subsequent writer could draw starkly different conclusions about war.

The fourth fair use factor is the "effect of the use upon the potential market for" the original work.<sup>207</sup> As the Supreme Court noted in *Campbell*,

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," the role of the courts is to distinguish between "biting criticism [that merely] suppresses demand [and] copyright infringement, which usurps it."<sup>208</sup>

This analysis will apply with more force to my proposed second factor. Since the entire purpose of the subsequent work is to criticize the ideas presented in the original, the question will be whether the criticism diminishes the ardor for the original, or whether the author

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<sup>206</sup> *Campbell*, 510 U.S. at 588-89 (quoting *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980)).

<sup>207</sup> 17 U.S.C. § 107(4) (2009).

<sup>208</sup> *Campbell*, 510 U.S. at 590-91 (internal punctuation omitted) (quoting B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967); *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

has merely created an alternate story based on the same characters, settings and themes.

#### V. CASE STUDY: GONE WITH THE WIND & THE WIND DONE GONE

As noted above, writers frequently use fiction to debate important public issues. One of the most prominent examples involves *Uncle Tom's Cabin* by Harriet Beecher Stowe, a novel that had a significant impact on the national debate over slavery. There were dozens of subsequent books, both fiction and non-fiction, that used Stowe's novel as basis to present views in support of, and in opposition to, slavery. This debate over slavery, and the behavior of the slave states before, during, and after the Civil War, has been a fertile source for fiction ever since. Recent best sellers set in this era include (but are certainly not limited to) *The Oldest Living Confederate Widow Tells All* by Allan Gurganus,<sup>209</sup> *Cold Mountain* by Charles Frazier,<sup>210</sup> *March* by Geraldine Brooks,<sup>211</sup> and *The March: A Novel* by E.L. Doctorow.<sup>212</sup> There have been several books on this subject, but none is more famous than *Gone With the Wind*<sup>213</sup> (hereinafter *GWTW*) by Margaret Mitchell.<sup>214</sup> In fact, few works of fiction have ever been as successful or as famous as *GWTW*. The book presents a particular take on Southern culture, and it has influenced the way the public thinks about the South ever since it was published.<sup>215</sup> It is the quintessential example of a work of fiction that has become part of the public debate on an important topic, and as such, it is (or at least should be) fertile ground for discussing these issues.

In 2001, a writer named Alice Randall wrote a book called *The Wind Done Gone*<sup>216</sup> (hereinafter *TWDG*), which uses characters and settings from *GWTW* to discuss slavery. *TWDG* is a retelling of life on Tara, the fictional plantation owned by the O'Hara family in *GWTW*, from the perspective of the slaves on the plantation. When the owners of the copyright to *GWTW* (Suntrust Bank, hereinafter referred to as "the Mitchell Estate") got notice of the forthcoming publication, they sued the publisher of *TWDG* (Houghton Mifflin) to prevent distribu-

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<sup>209</sup> ALLAN GURGANUS, *THE OLDEST LIVING CONFEDERATE WIDOW TELLS ALL* (Knopf 1989).

<sup>210</sup> CHARLES FRAZIER, *COLD MOUNTAIN* (Atlantic Monthly Press 1997).

<sup>211</sup> GERALDINE BROOKS, *MARCH* (Viking 2005).

<sup>212</sup> E.L. DOCTOROW, *THE MARCH: A NOVEL* (Random House 2005).

<sup>213</sup> MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

<sup>214</sup> November 8, 1900 – August 16, 1949.

<sup>215</sup> See, e.g., *RECASTING: GONE WITH THE WIND IN AMERICAN CULTURE* (Darden Asbury Pyron ed. 1983).

<sup>216</sup> ALICE RANDALL, *THE WIND DONE GONE*, 2001.

tion of the book. In her defense, Randall claimed that the book was a parody of *GWTW*, and therefore a non-infringing fair use. In determining whether to grant an injunction, the district court looked briefly at all of the standard fair use factors. It spent little time on the second factor, noting only that “*Gone With the Wind* is certainly a work of fiction that is creative, imaginative, and written to gain a financial return for the author’s efforts.”<sup>217</sup> The district court ultimately rejected the parody fair use defense and issued an injunction preventing the distribution of *TWDG*.<sup>218</sup>

Randall and her publisher appealed, and the Eleventh Circuit vacated the trial court’s preliminary injunction in a brief order.<sup>219</sup> Subsequently, a full opinion was issued that analyzed in detail the question of whether Randall’s use of elements of *GWTW* constituted fair use.<sup>220</sup> The full opinion sets out an informative history of the background and purpose of copyright law and the importance of the fair use doctrine in the interplay between copyright protection and the right to free speech guaranteed by the First Amendment.<sup>221</sup> The court then analyzed the case at hand. The court found that the Mitchell Estate had established a *prima facie* case of copyright infringement by proving the similarities and differences between *GWTW* and *TWDG*.<sup>222</sup> The similarities include the setting (though the names of the plantations are changed) and many of the characters (though they have names derived from the perspective of the slaves). The court then stated that Randall’s use of certain elements of *GWTW* might not be copyright infringement if they fell within the fair use exception. The court then worked point by point through the four fair use factors.

This court focused on the purpose and character of the allegedly infringing use. “Parody” the court noted “is a form of comment and criticism that may constitute a fair use of the copyrighted work being parodied . . . . For purposes of our fair-use analysis, we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements.”<sup>223</sup> The court focused on the transformative nature of the new work. “*TWDG* is more than an abstract, pure fictional work. It is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology

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<sup>217</sup> Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1379 (N.D.Ga. 2001).

<sup>218</sup> *Id.*

<sup>219</sup> Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001) (staying temporary injunction).

<sup>220</sup> Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (full opinion).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1266-67.

<sup>223</sup> *Id.* at 1268. (This is a rather broad and probably erroneous definition of parody).

of *GWTW*. . . . It is hard to imagine how Randall could have specifically criticized *GWTW* without depending heavily upon copyrighted elements of that book.”<sup>224</sup> The court concluded by noting that “*TWDG* reflects transformative value because it can provide social benefit by shedding light on an earlier work, and, in the process, creating a new one.”<sup>225</sup>

Because of the transformative nature of Randall’s work, the court gave only a cursory review of the other factors, and ultimately determined that Randall’s book was a non-infringing fair use of *GWTW*. The court reversed the lower court’s grant of an injunction and remanded the case. The parties eventually settled without further judicial proceedings,<sup>226</sup> and subsequent copies of *TWDG* bear a seal stating “The Unauthorized Parody.”

It is beyond dispute that *GWTW* is more than a work of fiction. The novel defines for many people life in the South during and after the Civil War. Because of this prominence, and the fact that subsequent authors have attempted to use the book for further social commentary, *GWTW* is an excellent case study for my proposed second factor.

#### A. *Subject Matter: The Civil War and Reconstruction*

The first element to consider is the degree of social commentary in a work, which ranges from works of pure fancy to works of deep satire and trenchant social commentary. On first blush, *GWTW* falls somewhere in between. It is a sweeping historical romance set in Georgia during the Civil War and Reconstruction, and those events clearly have an impact on the characters. A more thorough analysis will help determine where *GWTW* falls on my continuum, and whether it should be open to the type of subsequent use presented by Randall.

The central story of *GWTW* involves the eventful life of the main character, Scarlett O’Hara. The book begins with Scarlett as a teenage girl, attending parties on her father’s plantation, and follows her life through various relationships, marriages, deaths, and innumerable hardships. The book is set in the American South, specifically the small plantations of northern Georgia and in Atlanta, during the Civil War and Reconstruction. It opens at a party with war imminent. Talk of war dominates every conversation, and Scarlett is angry that the young men would rather talk about war than about her. She doesn’t realize, or care, that war will come and that it will change everything about the

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<sup>224</sup> *Id.* at 1270-71.

<sup>225</sup> *Id.* at 1271 (quoting Campbell, 510 U.S. at 579 (internal quotations and punctuation omitted)).

<sup>226</sup> *Settlement reached over ‘Wind Done Gone’*, The Associated Press, May 10, 2002.

South and about her life. Her first husband (whom she married not out of love but to make her supposed true love, Ashley Wilkes, jealous) dies early in the war, her home is destroyed, and the world she knows is thrown into turmoil. The bulk of the book is set in the aftermath of the war, during Reconstruction. Scarlett struggles and schemes, but ultimately perseveres and prevails. In the end, Scarlett's life, and the world in which she lives, is changed completely by the war.

One of Mitchell's biographers says that *GWTW* tells two stories. The first is the story of "the rise and fall of Southern independence in the American Civil War, the social changes wrought by the conflict, and the collapse of the plantation order in Reconstruction."<sup>227</sup> But Mitchell also tells the story of Scarlett and her family. "Interwoven with this story of the ill-fated Confederacy [is] a second narrative of equally ill-fated individuals and their hopeless relations with one another—Scarlett O'Hara, Ashley Wilkes, Melanie Hamilton, and Rhett Butler."<sup>228</sup> The genius of Mitchell's book is that it does both in a compelling manner.

Scarlett O'Hara is shallow, impetuous, and nasty, but she is also brave, persevering, and loyal. She is cruel and manipulative, but also vulnerable and needy. Because of the depth of Scarlett as a character, her numerous relationships and the intriguing plot twists, *GWTW* would work if it were set anywhere or at any time. Mitchell, however, purposefully set the book during the Civil War and its aftermath. The novel revolves around real events, but it is not just set in that time and place to give it verisimilitude. The central story is about how the Civil War and Reconstruction affected people and how it changed Southern culture.

Set against my five degrees of social commentary, *GWTW* is certainly not pure fancy, and is more than a work merely set in a real time or place. The war and its aftermath clearly have an impact on the characters, and they clearly drive the plot. The Civil War and Reconstruction are strong central elements of the book. But by the same token, *GWTW* is not a work of pure social criticism or cultural commentary. It is not *All Quiet on the Western Front* or *The Grapes of Wrath*. The book depicts the devastating effects of the Civil War not as an indictment of war, but as a way to show the effect of the war on the characters of the story. The book does, however, present a particular view of Reconstruction. Mitchell, like many Southerners, detested Reconstruction, and *GWTW* focuses on how it affected her main characters: Scarlett,

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<sup>227</sup> DARDEN ASBURY PYRON, SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL 238 (1991).

<sup>228</sup> *Id.* at 238-39.

Rhett, Melanie and Ashley. Reconstruction breaks the will of the sentimental Ashley, and it forces the clear-eyes and cold-hearted Rhett to collaborate with the “damned Yankees.” Both are destroyed by Reconstruction, though in different ways. Mitchell uses her characters to draw a larger point about the era. Under my proposed second factor, this makes *GWTW* a work that uses reality as a central theme of the book, which places it as a level two on my continuum.

B. *The Author’s Intent: “Northern Georgia as it really was”*

Why did Mitchell set her story during the Civil War and Reconstruction? Did she intend her novel to be a commentary on that era? Did Mitchell purposely enter into the public debate over the Civil War and Reconstruction when she wrote *Gone With the Wind*?

Mitchell was an intensely private person and never discussed the book while she was writing it.<sup>229</sup> She never told anyone, not even her husband, what the main topic of her novel was, or why she chose the particular topic. And after the book became successful, she never explicitly stated her reasons for setting the story during the Civil War and Reconstruction. We do not have a clear and definite statement of Mitchell’s intent, but inferences are possible.

Mitchell was born in 1900,<sup>230</sup> and grew up in Atlanta, Georgia, hearing stories about the Civil War and its aftermath.<sup>231</sup> She was also an avid reader and read most of the contemporary historical novels of the South. Most of those novels (like *GWTW*) were set during the war or Reconstruction, and many were written to defend the “lost cause” (as the pre-Civil War South became known to many Southern writers<sup>232</sup>) or to present a particular version of Reconstruction to justify racial segregation. These novels began appearing just after Reconstruction, and many were quite famous and successful. The more prominent include *Red Rock: A Chronicle of Reconstruction*<sup>233</sup> by Thomas Nelson Page,<sup>234</sup> *Gabriel Toliver: A Story of Reconstruction*<sup>235</sup> by Joel Chandler Harris,<sup>236</sup> and *Love is the Sum of It All*<sup>237</sup> by George Cary Eggleston.<sup>238</sup>

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<sup>229</sup> *Id.* at 223-29.

<sup>230</sup> *Id.* at 28.

<sup>231</sup> *Id.* at 231. See also Richard Harwell, *A Striking Resemblance to a Masterpiece: Gone with the Wind in 1936*, in *RECASTING: GONE WITH THE WIND IN AMERICAN CULTURE* 45 (Darden Asbury Pyron ed. 1983).

<sup>232</sup> See EDWARD A. POLLARD, *THE LOST CAUSE: A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES* (1866).

<sup>233</sup> THOMAS NELSON PAGE, *RED RECK: A CHRONICLE OF RECONSTRUCTION* (1898).

<sup>234</sup> 1853 – 1922.

<sup>235</sup> JOEL CHANDLER HARRIS, *GABRIEL TOLLIVER: A STORY OF RECONSTRUCTION* (1902).

<sup>236</sup> 1848 – 1908. Harris is best known for the Uncle Remus stories.

Perhaps the most famous writer of the “lost cause” was Thomas Dixon, whose book *The Clansman: an Historical Romance of the Ku Klux Klan*,<sup>239</sup> was made into the infamous movie *Birth of a Nation*.<sup>240</sup> *The Clansman* was the middle book in a trilogy which began with *The Leopard's Spots: A Romance of the White Man's Burden*,<sup>241</sup> and ended with *The Traitor: A Story of the Fall of the Invisible Empire*.<sup>242</sup> The trilogy is a heroic portrait of Southern struggles against Reconstruction, and explains, from a Southern racist point of view, the birth of the Ku Klux Klan. The books justified and promoted the Klan, and were quite popular and successful in their goal, proving that fiction can have an impact on real world events. Books that were published while Mitchell was writing *GWTW* included *So Red the Rose*<sup>243</sup> by Stark Young,<sup>244</sup> *None Shall Look Back*<sup>245</sup> by Caroline Gordon,<sup>246</sup> *The Fathers*<sup>247</sup> by Alan Tate,<sup>248</sup> and *The Vanishing Virginian*<sup>249</sup> by Rebecca Yancy Williams.<sup>250</sup>

Mitchell read most of these accounts of the “lost cause,” but was less than impressed with their version of the South. She ridiculed what she called the “moonlight-on-the-magnolias” version of the South and the stories of “cavaliers” that predominated the writing about the Antebellum South, slavery, and the Civil War. She thought it silly and historically inaccurate. In a letter written long after *GWTW* was published, Mitchell said that she has “been embarrassed on many occasions by finding myself included among writers who pictured the South as a land of white-columned mansions whose wealthy owners had thousands of slaves and drank thousands of juleps.” Her novel was set in northern Georgia, and “North Georgia certainly was no such country.”<sup>251</sup> She did note that she wanted to write not about the Grandees

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<sup>237</sup> GEORGE CARY EGGLESTON, *LOVE IS THE SUM OF IT ALL* (1907).

<sup>238</sup> 1839 – 1911.

<sup>239</sup> THOMAS DIXON, *THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN* (1905).

<sup>240</sup> *BIRTH OF A NATION* (David W. Griffith Corp. 1915). *Birth of a Nation* was the first feature film ever viewed in the White House.

<sup>241</sup> THOMAS DIXON, *THE LEOPARD'S SPOTS: A ROMANCE OF THE WHITE MAN'S BURDEN* (1902).

<sup>242</sup> THOMAS DIXON, *THE TRAITOR: A STORY OF THE FALL OF THE INVISIBLE EMPIRE* (1907).

<sup>243</sup> STARK YOUNG, *SO RED THE ROSE* (1934).

<sup>244</sup> 1881 – 1963.

<sup>245</sup> CAROLINE GORDON, *NONE SHALL LOOK BACK* (1937).

<sup>246</sup> 1895 – 1981.

<sup>247</sup> ALLEN TATE, *THE FATHERS* (1938).

<sup>248</sup> 1899 – 1979. Tate was Caroline Gordon's husband.

<sup>249</sup> REBECCA YANCEY WILLIAMS, *THE VANISHING VIRGINIAN* (1940).

<sup>250</sup> 1895 – 1976.

<sup>251</sup> DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 243-245 (1991) (quoting from a letter Mitchell wrote to Virginius Dabney, July 23, 1942).

of the South, but about smaller landholders and strivers.<sup>252</sup> According to her biographer, “Mitchell herself conceived of her history as radical, revisionary, and rebellious.” In the book, she intended to “repudiate the traditional definition of Southern history.”<sup>253</sup>

One of the few books about the “Old South” that Mitchell seemed to have enjoyed was *Lamb in His Bosom*,<sup>254</sup> by Caroline Miller.<sup>255</sup> Unlike many of the others books, this was the story of poor hardscabble whites in the backwoods of Georgia. The book was set in the years leading up to the Civil War, but the main characters owned no slaves and issues of state’s rights were far from their thoughts. It won the Pulitzer Prize in 1934, and is still considered one of the best depictions of life in that region. Mitchell had high praise for the book. In a letter in 1937, she wrote Miller that “your book is undoubtedly the greatest book that ever came out of the South about Southern people, and it is my favorite book.”<sup>256</sup> This perhaps was much closer to what Mitchell intended to create than another tale of the “lost cause.”

Mitchell wanted to present an accurate picture of life in that part of the South at that time. And as she mentioned in her letter, it was not a place of grand estates; it was a place of hardscabble farmers, backwoodsmen, swamp trackers, and poor white trash.<sup>257</sup> These people, and not plantation owners, were the backbone of the South. These were the people who fought the war, bore the brunt of its destruction, and suffered the most during Reconstruction.

Mitchell was not particularly concerned about slavery, in part because there were few large plantations in northern Georgia. The characters of her book were relatively small land-holders and owned relatively few slaves. According to one reviewer, “race relations are largely in the background” in *GWTW*.<sup>258</sup> “Slaves, in Mitchell’s treatment, are chiefly social decorations for upwardly mobile white farmers.”<sup>259</sup> (Perhaps her nonchalance about slavery makes her treatment of them in the novel all the more odious, but that is an issue of our modern inference and doesn’t alter her intention in writing the book.)

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<sup>252</sup> *Id.* at 243-45.

<sup>253</sup> *Id.* at 240.

<sup>254</sup> 1933.

<sup>255</sup> 1903 – 1992.

<sup>256</sup> Letter from Margaret Mitchell to Mrs. Caroline Miller, (Apr. 7, 1937) in MARGARET MITCHELL’S GONE WITH THE WIND LETTERS 1936-49 at 133 (Richard Harwell, ed. 1976).

<sup>257</sup> *Id.* at 245.

<sup>258</sup> KENNETH O’BRIAN, *Race, Romance, and the Southern Literary Tradition*, in RECASTING at 163.

<sup>259</sup> DARDEN ASBURY PYRON, SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL 248 (1991).

More than anything, Mitchell wanted to create an accurate picture of the times. "I worry if I don't have ten references for each fact."<sup>260</sup> She said that she "took great pains to describe Northern George as it was."<sup>261</sup> It was not her intention to present yet another story of a mythological South.<sup>262</sup> That is not to say that she totally rejected common Southern complaints about the War and Reconstruction. After the publication of *GWTW*, Thomas Dixon, the author of *The Clansman*, wrote to complement Mitchell on her book. Mitchell wrote back: "Your letter of praise about 'Gone With the Wind' was very exciting . . . I was practically raised on your books and love them very much."<sup>263</sup> And while it was not her intention, she was hardly displeased that her book was seen by many as an antidote to *Uncle Tom's Cabin*.

It makes me very happy to know that "Gone With the Wind" is helping refute the impression of the South which people abroad gained from Mrs. Stowe's book. Here in America "Uncle Tom's Cabin" has been long forgotten and there are very few people today who have read it. They only know it as the name of a book which had a good deal to do with the bitterness of the Abolition movement.<sup>264</sup>

Clearly Mitchell was doing more than simply creating a work of fiction. She wrote about the South, the Civil War, and Reconstruction, in part, to change people's perceptions, ideas, and attitudes about those times. She was trying to create what she felt was an accurate picture of that part of the South, not only as an antidote to the silly tales of cavaliers, but also to refute more hostile accounts from abolitionists. As a result, her book is, in part, political, historical and social commentary.

It is more than a little ironic, therefore, that the movie version of the novel focused on the one aspect of the era that Mitchell most despised, the view of the genteel plantation owner and of white men as cavaliers fighting for a noble cause. The movie begins with the famous introduction:

There was a land of Cavaliers and  
cotton fields called the Old South. . . .  
Here in this patrician world

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<sup>260</sup> *Id.* at 314 (quoting a letter from Mitchell to Ernest V. Heyn, April 15, 1939).

<sup>261</sup> Letter from Margaret Mitchell to Virginius Dabney (July 23, 1942) in MARGARET MITCHELL'S *GONE WITH THE WIND LETTERS 1936-49* at 359 (Richard Harwell, ed. 1976).

<sup>262</sup> DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 311 (1991).

<sup>263</sup> Letter from Margaret Mitchell to Thomas Dixon, (Aug. 15, 1936) in *GONE WITH THE WIND LETTERS* 52-3.

<sup>264</sup> Letter from Margaret Mitchell to Alexander L. May (July 22, 1938) in *GONE WITH THE WIND LETTERS* 215-27.

the Age of Chivalry took its last bow.<sup>265</sup>

Mitchell wasn't happy about this, but as the film was being made she realized it was entirely out of her hands.<sup>266</sup> It is likely that the public is far more familiar with the movie and its version of the Antebellum South than with the book and its version. As a result, the public's perceptions about the South were created more by the movie than by the book. However, both are the product of the same source, Mitchell's novel, and both were produced by Mitchell's pen.

### C. *The Public Reception: Best Seller and the Standard View of the South*

*GWTW* was an immediate hit, selling more than a million copies in its first year of sales in the United States. It sold many more millions around the world the next year.<sup>267</sup> Sales have been extraordinary ever since, and according to some sources *GWTW* is second only to the Bible as a perennial best seller.<sup>268</sup> But as mentioned, book sales alone are not an important factor in determining whether a work has become part of the public debate over important social and political matters.

Not only was *GWTW* a commercial success, it has also become a national phenomenon. *GWTW* won the Pulitzer Prize for Literature in 1937.<sup>269</sup> It was reviewed in newspapers and magazines around the country.<sup>270</sup> Almost all reviews discussed the intertwined and compelling love stories that are at the heart of the book, but many reviews also discussed Mitchell's take on Southern literature and Southern history.<sup>271</sup> While some of the negative criticism dealt with Mitchell's writing and story telling—in particular her tendency towards melodrama—most of the negative criticism dealt with her views on Southern culture, the Civil War, and Reconstruction.<sup>272</sup> Questions were immediately raised about her political and cultural biases and her historical accuracy re-

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<sup>265</sup> DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 388-89 (1991).

<sup>266</sup> *Id.* at 391.

<sup>267</sup> *Id.* at 336.

<sup>268</sup> RECASTING: *GONE WITH THE WIND* IN AMERICAN CULTURE 1 (Darden Asbury Pyron ed. 1983); DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 328 (1991).

<sup>269</sup> DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 336 (1991).

<sup>270</sup> *Id.* at 330-37.

<sup>271</sup> Richard Dwyer, *The Case of the Cool Reception*, in RECASTING: *GONE WITH THE WIND* IN AMERICAN CULTURE 21-31 (Darden Asbury Pyron ed. 1983).

<sup>272</sup> See in particular Malcolm Cowley, *Going with the Wind*, in RECASTING: *GONE WITH THE WIND* IN AMERICAN CULTURE 17-20 (Darden Asbury Pyron ed. 1983) (originally published in the *New Republic*, September 16, 1936 at 161-62).

garding Southern history and race relations. Within months of publication, the book was the subject of wide debate regarding Southern history, politics and culture.<sup>273</sup>

The success of the book led to immediate talk about a movie adaptation, and three years later the movie premiered in Atlanta. The movie focuses on the grandeur of the South and the "lost cause," almost precisely the things that Mitchell avoided in the book. Unfortunately, the public reaction to the story has as much, or more, to do with the movie than with the book. One of Mitchell's biographers edited a collection of essays about *GWTW*, and in most essays the movie and the book are inseparably intertwined.<sup>274</sup> One of the issues that Mitchell only touches upon lightly in the book is the issue of slavery and race relations,<sup>275</sup> but this became an important part of the movie. A character or supporting characters can be written into the background in a book, but if seen in a movie, even briefly, their presence is visible. There is no doubt that slaves are shown and slavery is depicted in the movie. Consequently, the movie is seen by many, rightly or wrongly, as a justification for slavery. It is this depiction of slavery and race relations that is the main subject of *TWDG* by Alice Randall. To a certain degree, Randall's book is much more of a comment on the film of *GWTW* than it is of Mitchell's book.

Taken as a whole, there is no doubt that *GWTW* is a commentary on Southern history. This is what the author intended, and it is how the public perceived the work. Certainly, *GWTW* is not a social commentary in the same way as *The Grapes of Wrath*, *Oliver Twist*, or *Utopia*. But it is set during a real time and place—the Civil War and Reconstruction—and both are very important to the story and the development of the characters. The book was written in part to change some of the views of Southern culture, and of the historical era of Reconstruction. As a result, there should be no reason why a subsequent author could not use, in appropriate ways, *GWTW* as a starting point for continued discussion of the South during the Civil War and Reconstruction. This is essentially what Alice Randall did in her book *The Wind Done Gone*. She used *GWTW* to attack a central myth of the South, a

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<sup>273</sup> DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 328-50 (1991).

<sup>274</sup> RECASTING: *GONE WITH THE WIND* IN AMERICAN CULTURE (Darden Asbury Pyron, ed. 1983).

<sup>275</sup> See Gordon Wood: *From "The Clansman" and "Birth of a Nation" to "Gone with the Wind": The Loss of American Innocence*, in RECASTING: *GONE WITH THE WIND* IN AMERICAN CULTURE 123-36 (Darden Asbury Pyron ed. 1983), Thomas Crips: *Winds of Change: "Gone with the Wind" and Racism as a National Issue*, in RECASTING: *Gone with the Wind* in American Culture 137-52 (Darden Asbury Pyron ed. 1983).

myth that Mitchell helped propagate. As such, her book is clearly the type of subsequent use envisioned by my proposed second factor.

#### D. *Fair Use Factors Reconsidered*

The next question is whether Randall's use of elements of *GWTW* complied with the other existing fair use factors. The Eleventh Circuit found compliance, but the court addressed the issue based on the transformative nature of Randall's work. "*TWDG* is more than an abstract, pure fictional work. It is principally and purposefully a critical statement that seems to rebut and destroy the perspective, judgments, and mythology of *GWTW*. Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."<sup>276</sup>

It appears that Randall's work focuses primarily on one particular part of the portrait of the South – the issue of slavery – while Mitchell addresses a much broader topic. Mitchell addresses many aspects of Southern culture and the effect that losing the war had on that culture. Slavery was only a relatively minor issue in *GWTW*. However, slavery was a major issue in the Civil War, and Reconstruction was, in part, an attempt to deal with the after effects of slavery. So Mitchell's minor point was, historically, a major point. And for Randall it was the main issue of her novel. In my previous analysis I said that the "subsequent author must hew fairly closely to the same topic or subject matter as the first work."<sup>277</sup> Here the question is whether Randall's use of the whole of *GWTW* to comment on only one small aspect is fair. In my judgment it is a very close case, largely because the issue of slavery was the dominant issue of the Antebellum South. Randall's real target is the Antebellum South, and she uses *GWTW* to hone in on that target. So while it is a close case, I would weigh this factor in favor of Randall.

In discussing the third factor, the amount and substantiality of the portion used, the Eleventh Circuit noted that Randall took elements of *GWTW* that related directly to slavery, but also took many elements that did not. For example, she recounted how the Tarleton twins were given a slave child as a birthday present. This certainly addresses the depravity of slavery. However, Randall also used a number of scenes and characters that veered away from her central theme, including the famous scene where Scarlett meets Rhett after throwing a vase at Ashley.<sup>278</sup> The court ultimately was unable to determine whether the

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<sup>276</sup> *Suntrust*, 268 F.3d at 1270.

<sup>277</sup> *Campbell*, 510 U.S. at 580.

<sup>278</sup> *Suntrust*, 268 F.3d at 1273.

amount taken was reasonable in relation to the purpose of the copying, and remanded the case for further analysis of that issue. I would have less hesitancy under my proposed paradigm, finding that Randall clearly used more of the original than necessary to make her point. She used many of the same scenes, though told from a different perspective (the slaves) and ran her story parallel to the story of *GWTW*, even when unnecessary to make her central point. Randall needed to use enough of *GWTW* to remind readers of the role of slavery in *GWTW*, but she used too much of the original in order to do so.

In analyzing the fourth factor—the effect on the market for the original—the Eleventh Circuit notes that the issue is not whether *TWDG* might effect the market for *GWTW* because its criticism is effective, but whether it has the potential to be a market substitute.<sup>279</sup> The Court found that there was no actual evidence of market substitution, and held that this factor weighed in favor of Randall.<sup>280</sup> This is the one factor that can be evaluated based on actual evidence and not on speculation. Here, the trial court found no evidence that *TWDG* had any effect on the market for *GWTW*, either because of the effectiveness of its criticism or because it was a market substitute. As a result, the final factor weighs in favor of Randall.

I would say that, on the whole, Randall's book would be precisely the type of fiction that would be promoted and encouraged under my proposed second factor of fair use. While Randall does, on occasion, use more of Mitchell's work than might be necessary to make her point, she is engaged in the time-honored tradition of commenting on important social and political topics through fiction, and this should be encouraged.

## VI. CONCLUSION

Margaret Mitchell used fiction to do more than just entertain her readers. She wrote through fiction to expound on a subject, to change minds, and to be part of the broad national debate over important topics. She was enormously successful, both in terms of sales of her book, and in the popularity of her ideas. Her version of the South is, in many ways, the accepted view. However under the current understanding of fair use, a subsequent author would have only a limited ability to attack this version because Mitchell wrote through fiction.

Authors have long used fiction to spread political, historical, philosophical and social ideas. But the current fair use criteria that holds that

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<sup>279</sup> *Id.* at 1274.

<sup>280</sup> *Id.*

works of fiction are more deserving of protection than works of fact ignores this reality. It ignores the long history of writers who have used fiction to expound on important social and political matters, and it ignores the desire of many authors to become part of the public debate over these issues. Consequently, it seems that fair use should be modified to conform to this reality. Courts should be able to consider the degree of social commentary in the work, as well as the underlying purpose of the author in creating the work. Where an author purposefully enters the public debate over important issues, even in fiction, the courts should allow that important debate to continue.

My point is not to replace the current fair use second factor, but to present an alternative second factor to apply in those cases where a novel or other work of fiction is used to make a social or political point. This proposed second factor adheres, I believe, more closely to the purpose of the First Amendment, the copyright laws in general, and the fair use doctrine in particular. It also respects the wishes of authors by making their work socially relevant, and honors the long and enduring history of fiction as social commentary.

