

Sports, GIFs and Copyright: Is it a Draw between Content Owners and Consumers in the Web 2.0 Era?

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I. INTRODUCTION

After Internet news media company, BuzzFeed, started using GIFs¹ to report on the 2012 Summer Olympics, other online providers, such as The Atlantic Wire and Business Insider followed suit, sparking a phenomenon in the online news world. BuzzFeed's Deputy Sports Editor noted, "What GIFs do is sort of bridge the gap between an image and video, which becomes incredibly useful in sports—you don't have to wade through and listen to an entire highlight/video but at the same time, you get the motion and action that makes sports, sports."² Whereas most sports coverage tends to consist of images or videos as supplementary material to an article, GIFs allow a narrative to weave all of these things together. More specifically, they allow articles to offer "just the right balance of context, editorial commentary and visual expression."³ For example, during the Olympics, South Korean fencer Shin A-lam refused to leave the fencing platform after her opponent won because of faulty timekeeping. More traditional journalistic outlets, such as The Guardian, failed to accurately capture Lam's passion and bravery by distilling the defiant moment into a couple of dispassionate sentences or box scores.⁴ On the other hand, BuzzFeed, and other websites unencumbered by legacies of journalistic style, were able to couple their commentary on the event with a GIF that fully demonstrated Lam's defiance. This contrast demonstrates how GIFs can capture and convey the spirit of an event

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¹ Most simply, "GIF" stands for Graphics Interchange Format, a bitmap image format that effectively portrays content to viewers as a digital flipbook.

² Reb Carlson, *What the Rise of Animated GIFs means for Content*, CONTENTLY (Aug. 29, 2012), <http://contently.com/strategist/2012/08/29/what-the-rise-of-animated-gifs-means-for-content/>.

³ Kevin Nguyen, *Why BuzzFeed Has the Best Olympic Games Coverage*, THE BYGONE BUREAU (Aug. 8, 2012), <http://bygonebureau.com/2012/08/08/why-buzzfeed-has-the-best-olympic-games-coverage/>.

⁴ *See id.*

of cultural importance in a manner that is both more informative than a single image and more digestible than a highlight video.

Given this ability to be both more explicative and fluid, it is not surprising that the GIF has become “the standard currency for online sports journalism.”⁵ However, the GIF’s rise in currency is not only attributable to its ability to bridge the gap between picture and video. For instance, part of the popularity of GIFs is that they are easy to share quickly on social media networks, such as Twitter and Tumblr, and that they are usually tiny slices of an event that efficiently explain a larger picture.⁶ Further, GIFs are inherently different from video in how they interact with readers as, “video requires a reader’s intervention to play, whereas a GIF adds itself forcefully.”⁷ GIFs loop constantly, which has profound implications as it allows a brief moment to exist in perpetuity in the reader’s mind.⁸ It is the mixture of these various characteristics that has allowed GIFs to not only become the emerging standard for commenting on sporting events but also a staple of today’s popular communication and lexicon. Despite having been technologically possible for more than twenty-five years, over the course of the past few years, “the GIF has evolved from a medium of pop-cultural memes into a tool with serious applications, including research and journalism;” so much so that it was recognized as the 2012 “Word of the Year” by Oxford American Dictionary.⁹

Given this rise of GIFs on online news services and social media, a number of interesting questions have emerged. First, what are the copyright implications of using GIFs made from stitching together still-frame images captured from a copyrighted broadcast?¹⁰ More particularly, with respect to sports GIFs, do those GIFs that act like highlights pose a greater threat of copyright infringement than those that have gained expressive value outside of the sports broadcast or sports realm? How does the proliferation of this method of displaying sports content affect traditional copyright business models? These questions substantiate the viewpoint that there is an unprecedented zone of ambiguity in U.S. copyright law, resulting in content owners’ toleration of technically infringing works.¹¹ Interestingly, despite the perceived

⁵ See Sarah Lyall, *Maker of Animated GIFs Waits for Offbeat Moments*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/sports/deadspins-tim-burke-waits-to-turn-offbeat-moments-into-gifs.html?_r=0.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See The Week Staff, ‘GIF’: *The Oxford American Dictionary’s Word of the Year*, THE WEEK (Nov. 13, 2012), <http://theweek.com/articles/470472/gif-oxford-american-dictionary-word-year>. This article notes the importance of the fact that the GIF has transcended only being understood as a noun and is now also consistently used as a verb. Such a development is another moment in the “Internet’s ongoing takeover of the English language”.

¹⁰ See Lyall, *supra* note 5.

¹¹ See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 618 (2008). In today’s world, in which every person and corporation has the technological ability to copy and distribute copyrighted works and there is mass low-value infringement, tolerated use is infringing usage of copyrighted work of which the owner may be aware, yet does nothing about. The reasons for such inaction can range from desires to

novelty of GIFs and their increasingly high social currency, after contextualizing their uses within the larger Web 2.0 phenomenon, it becomes readily apparent that together, copyright and innovative business models can effectively offer sports leagues (and content owners, in general) adequate protection from infringing uses of such GIFs enumerated in this work by the players identified in the same while simultaneously not alienating their fans.

Before beginning this work's analysis, it is imperative to discuss the reasons why this work focuses on sports GIFs in particular and to firmly establish the contours of this work. First, the use of GIFs to display copyrighted content from sports broadcasts has an immediate and significant impact. This impact is pronounced because, given the ease of making and then subsequently disseminating GIFs, the effect of their infringement is not only immediately felt, especially as highlight-like GIFs can be posted and consumed during the course of a game, but also potentially widespread with the speed and popularity GIFs on social media. Further, this form of distribution not only affects the traditionally exclusive hold that sports leagues have enjoyed over all of their content, but it also directly interferes with their long-established highlight and licensing markets. Moreover, by offering short-form content in a vehicle so highly valued on social media, sports GIFs substantially limit the ability of sports leagues to develop their own content platforms. For example, if a league wants to offer a media player that displays relevant highlights from a game, the unauthorized GIFs will directly rival such official content, which may be further exacerbated by the inherent differences between video and GIF formatting discussed above.

Additionally, sports GIFs poignantly illustrate that current media users are no longer passive viewers of information, but rather participators, creators and collaborators.¹² In the current era, people can create and share vast amounts of content on their own terms.¹³ Given the role that technology has played in ushering in such an era, this focus on sports GIFs directly implicates the role of copyright in the Web 2.0 in a new arena (e.g., outside of video-sharing and peer-to-peer file sharing). Relatedly, the focus on sports GIFs is timely given the sustained popularity of sports in the United States and the aforementioned rise in social currency of GIFs, particularly in journalism. It is axiomatic that sports has and continues to play a vital role in the evolution of the American culture. Some contend that sports are America's civic religion that not only reaffirms our interconnectedness and belonging but also materially indexes belonging.¹⁴ Since GIFs are so easily created and have the power to

create goodwill to uncertainty regarding legal concepts such as fair use.

¹² See Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use*, 12 J. MARSHALL REV. INTELL. PROP. L. 70, 79 (2012).

¹³ See *id.*

¹⁴ See Michael Serazio, *Just How Much is Sports Fandom Like Religion?*, THE ATLANTIC (Jan. 29, 2013), <http://www.theatlantic.com/entertainment/archive/2013/01/just-how-much-is-sports-fandom-like-religion/272631/>; Michael Serazio, *The Elementary Forms of Sports Fandom: A Durkheimian Exploration of Team Myths, Kinship and Totemic Rituals*, COMMUNICATION AND SPORT Vol. 1 No. 4 303-325 (Dec. 2013), <http://com.sagepub.com/content/1/4/303.full.pdf+html>.

efficiently convey vast amounts of information and expression, particular attention to how GIFs interact with American sports fandom is indeed warranted and will be informative with regard to how this form will interact with other areas of cultural influence.

Although this work does explore various theories of liability that may or may not attach to various players in terms of unauthorized GIFs, it does not purport to be an exhaustive survey of all available causes of actions, defenses or even uses of GIFs. Rather, this work purports to shed light on the following three considerations. First, this work critically questions the compatibility of the current cultural standard of borrowing with copyright law and those traditional business models organized to exploit copyrighted content.¹⁵ As will be explored more fully below, we no longer live in an era where copyright owners can demand that users seek permission before augmenting the content with which they come in contact.¹⁶ Second, this work illustrates the sheer number and variety of players implicated in the infringement of copyrighted property in today's culture. Third, and inherently related to the second consideration, this work evaluates how forms of unauthorized copying, such as the creation of GIFs, are increasingly blurring the lines between commercial versus non-commercial, amateur versus professional, and avid fan versus misappropriating commercial entity.¹⁷ Therefore, determining who to sue and who to allow to engage in tolerated uses of copyrighted materials becomes increasingly difficult and has profound implications for how content owners go about protecting their copyrights and conducting their business affairs.

This work is organized in the following manner. Part II outlines the relevant aspects of the current sociocultural environment, which directly affects how copyright owners assert their rights and how consumers engage with cultural products, such as sports broadcasts. Moreover, this section provides insight into the resurgence of GIFs as not only a novel and interesting technology but also an integral part of today's cultural lexicon. Part III establishes a taxonomy of players and GIFs. This section identifies individual fans and content providers that create, interact with and share GIFs as the primary players of interest, and enumerates different types of GIFs that are used to communicate about sporting events today. Part IV advances normative arguments for both content owners, such as sports leagues and broadcasters, and sports fans as users of cultural products. Such arguments bring to the forefront the diversity of interests implicated when content owners purport to assert their rights during an era of increased user modification. Part V outlines the likelihood of liability for copyright infringement for both individual fans and content providers for their various uses of GIFs. Part VI explores potential business alternatives that content owners could turn to in order to better adjust to the shift in both the sociocultural

¹⁵ See Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 201 (2014).

¹⁶ See, e.g., Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459 (2008).

¹⁷ See, e.g., William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1433-1434 (2010).

environment and the viability of traditional copyright business models. Part VII concludes that copyright law coupled with innovative business models, which more accurately interact with the changes brought about by the Web 2.0 phenomenon, will allow content owners to protect their rights and monetize new means of user engagement without alienating fans.

II. CONTEXT

In order to obtain a comprehensive understanding of how copyright law and its business models interact with the proliferation of GIFs as a means to disseminate and perform copyrighted conduct, it is necessary to contextualize the GIF phenomenon within today's sociocultural environment. It is tenable that the most significant copyright development of the twenty-first century has not arisen through any law promulgated by Congress or any opinion delivered by the Supreme Court, but rather has come "from the unorganized, informal practices of various, unrelated users of copyrighted works, many of whom probably know next to nothing about copyright law."¹⁸ To understand this, one must consider what is popularly known as "Web 2.0," which refers to the "vast array of technologies and platforms on the Internet that enable users to generate content of their own, albeit often 'remixed' with the works of others."¹⁹ In this new era of Web 2.0, the "explosion of blogs, social networks and video-sharing sites has allowed any Internet user to become a journalist, or filmmaker, or music star."²⁰ From blogs to Wikis to podcasting, the Web 2.0 culture encourages users to no longer passively consume copyrighted content but to engage, create and share content online.²¹

This era of Web 2.0 culture would not have been possible without the democratization of digital tools. As digital tools have become increasingly ubiquitous, anyone with a computer can reuse, recreate and otherwise change any manner of literary and artistic works, including audio, video, text, photographs, software and other creative "expressions."²² It was these technological abilities that enabled end users to create a variety of content, ranging from commentary and criticism to both verbatim and modified copies of a wide range of materials.²³ Further, these tools effectively permit anyone with an Internet connection to disseminate such content to viewers and similar users for further creation, use and manipulation.²⁴ The user's utilization of

¹⁸ See Lee, *supra* note 16 at 1460.

¹⁹ See *id.*; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 28 (2008). The Internet has effectively enabled what Lessig refers to as a "read/write" culture whereby ordinary Internet users are empowered to become active creators of the culture they live in rather than mere passive consumers.

²⁰ Olufunmilayo Arewa, *YouTube, UGC, and Digital Media: Competing Business and Cultural Models in the Internet Age*, 104 Nw. U. L. Rev. 431, 432 (2010).

²¹ See Lee, *supra* note 16, at 1460.

²² Mary W. S. Wong, "Transformative" User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1077 (2009).

²³ See Arewa, *supra* note 20, at 432.

²⁴ See Wong, *supra* note 22, at 1077.

these tools to become active manipulators of content has resulted in works that are commonly categorized under the label, “user-generated content.”²⁵ User-generated content has become the “watchword” of today’s Web 2.0 culture²⁶ and is indicative of the reach of Web 2.0. For instance, the number of user-generated content creators rose from 83 million in 2008 to 115 million in 2013,²⁷ while YouTube, a popular locale to consume user-generated content, received over 112 million American viewers of 6.6 billion videos in January 2010.²⁸

Although the unauthorized use of copyrighted content is not a novel concept, the implications and impact that such unauthorized uses have had on traditional, popular culture industry business models are materially more significant in the digital era.²⁹ Such an increase in significance can largely be attributed to the uniquely disruptive force of the Internet.³⁰ More specifically, given that most individuals do not abide by the Copyright Act in their daily lives, the proliferation of networked digital communications works to both threaten and revolutionize how people interact with copyrighted content.³¹ In turn, the behavior of individual end-users has become more important than ever before.³² Therefore, it is evident that Web 2.0 challenges conventional understandings of copyright law under which copyrights are largely understood as static and fixed from the top down.³³ Under such conventional views, copyright holders existed at the center of the “copyright universe” and they exercised considerable control over their exclusive rights.³⁴ The pervading expectation was that others would seek prior permission for all uses of such copyrighted works outside of a fair use.³⁵ Although this is a rather pervasive view of copyright, such a formalistic view of the law inherently ignores today’s reality. The Copyright Act is wrought with gray areas,³⁶ many of which persist over time largely due to the fact that so few copyright cases are ever filed and the majority of those cases filed are not actually resolved by a judgment.³⁷ Some have argued that such gray areas

²⁵ *See id.*

²⁶ *See Lee, supra* note 16 at 1460.

²⁷ *See Arewa, supra* note 20 at 432.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See Digital Copyright* 111 (2001).

³² *Id.*

³³ *See Lee, supra* note 16, at 1459.

³⁴ *See id.*

³⁵ *Id.*

³⁶ Since the Copyright Act is written at a high level of generality with only a few very detailed exemptions and without an active administrative body to fill in the gaps, “gray areas” have emerged because the public is largely unable to anticipate which uses are infringements, which are fair uses and which are otherwise permissible. *See id.* at 1474-1475.

³⁷ *See id.*; *See also*, Mark Motivans, Bureau of Justice Statistics Special Report, U.S. Dep’t of Justice, *Intellectual Property Theft*, 2002 (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipt02.pdf> (stating that of the 1,889 copyright cases disposed in 2002, 77.6% were dismissed, including 42.3% by settlement. Only 22.4% of the cases (423) led to judgment, of which only 1.5% were settled by trial).

and the increasing popularity of user-generated content, not just with users but also with content owners,³⁸ have allowed informal practices to emerge today, effectively serving as gap fillers in our copyright system.³⁹ Thus, instead of all user-generated content being condemned as copyright infringement, “the unauthorized mass practices of uses may have, in some instances, turned out to be the catalyst for subsequent ratification of those practices.”⁴⁰ In simpler terms, copyright law does not operate as formulaically as it appears on paper. The Copyright Act no longer delineates the boundaries of an author’s exclusive rights in the Web 2.0 era. Rather, an author’s rights are now determined by a much more unorganized “give and take” of sorts amongst users, copyright holders and intermediaries.⁴¹ Now, users have more control in asserting the agenda with copyright holders, which often results in users modifying a copyright owner’s work without prior permission. Given the shift in dynamics between users and copyright holders, over time, copyright holders can decide to accept or systematically embrace, either formally or informally, such user modification.⁴² Therefore, the development of the Web 2.0 movement and the uncertainty of both the law and content owners’ responses to user-generated content have resulted in an environment in which copyright law’s exclusive rights are not clearly delineated and users arguably have more of an ability to influence the direction of copyright law and its practice than ever before.

Despite the legal challenges posed, the emergence of Web 2.0 has arguably resulted in a number of positive social implications. Many contend that digital technology underlying Web 2.0 has ushered in a new wave of user creativity that effectively advances “semiotic democracy”⁴³ and that is a crucial element of the emerging

³⁸ See generally Romanenkova, *supra* note 15.

³⁹ These informal practices are ways of conducting business, which are not authorized by formal copyright licenses but whose legality falls within a gray area of copyright law. See, e.g., Lee, *supra* note 16, at 1461 (noting such “informal practices are necessary because formal copyright law has many gaps and gray areas that cannot possibly be filed or clarified fast enough to keep pace with the vast number of uses of copyrighted works that occur each day. Formal copyright licenses might fill some of these gaps, but high transaction costs often make licenses cost-prohibitive or ineffective. And sometimes copyright holders even prefer informal practices over formal licenses”).

⁴⁰ See *id.* Lee makes no claim that “give and take” is unique to Web 2.0, but rather that it is far more noticeable on the Internet.

⁴¹ *Id.*

⁴² *Id.* at 1463-64. Lee introduces the new concept of “warming” to explain how uncertainty in copyright law may influence behavior. Whereas copyright scholarship has primarily focused on how uncertainty in copyright law may chill legitimate speech, the practices related to user-generated copyright suggest an opposite crosscutting force may also be in play, particularly on the Internet. Lee categorizes this crosscutting force as “warming” in which “users are emboldened to use copyrighted works without authorization based on the development of what appears to be an increasingly accepted informal practice.” He further contends that the Internet is especially conducive to “warming” given the social networking features which have become inherent to Internet usage and the rapid development of community norms, such as in the blogosphere.

⁴³ The term “semiotic democracy” has its origin in the work of Media Studies Professor, John Fiske. See JOHN FISKE, TELEVISION CULTURE (London: Routledge Press, 1989) (describing television viewers’ ability to assign meanings to the images they encountered on the screen different, and independent, of those intended by content producers). The term’s meaning has expanded to include the ability to engage with,

“participatory culture.”^{44, 45} More specifically, with regard to semiotic democracy, several prominent scholars have noted this form of digital technology has resulted in the decentralization of the power to remake cultural artifacts and the ability to construct new meanings therefrom.⁴⁶ Such a belief is premised on the idea that placing this power in the hands of individual users facilitates greater engagement with cultural and social life, resulting in opportunities for self-expression that encourage greater freedom and democracy.⁴⁷ Similarly, this increased engagement and participation in cultural life advances the realization of Professor Lawrence Lessig’s “free culture,” which promotes free speech rather than the zero-cost uses that are the hallmark of the more restrictive permission culture.⁴⁸ Moreover, the development of the Internet in this fashion is a realization of the assertion that the Internet is uniquely generative.⁴⁹ As we are firmly immersed in the Web 2.0 movement, the Internet has provided users with the means to not only experiment with new uses but to also share their innovations with one another. Furthermore, on the participative Internet, it has also become clear that external incentives for the production of information goods are no longer absolutely necessary.⁵⁰ In sum, although the Web 2.0 movement has complicated copyright law as it was traditionally conceived, it has allowed for increased opportunities for individuals to engage in and contribute to a cultural life that was historically controlled by a smaller concentration of content owners and providers.⁵¹

The recent rise in popularity and use of GIFs closely tracks the development of the Web 2.0 movement. While CompuServe, the Internet service provider, first developed the “Graphic Interchange Format” in 1987 as a means of bringing “a little color and movement to the Web,”⁵² the GIF has recently enjoyed an unlikely

rework, and redistribute cultural products and images. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (Stanford, Calif.: Stanford University Press, 2004); Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. R. 489 (2006) (increasing ubiquity of the phrase as well as its increasingly utopian nature).

⁴⁴ See generally, HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (2006) (exploring the technological, social, and cultural dynamics surrounding “convergence culture”). Additionally, the term “participatory media” has been used, in part, because the phrase “user-generated conduct” has been found to be inadequate to express this development. See e.g., PAT AUFDERHEIDE & PETER JASZI, UNAUTHORIZED: THE COPYRIGHT CONUNDRUM IN PARTICIPATORY VIDEO, A CONVENING REPORT, (2007), available at http://www.cmsimpact.org/sites/default/files/rappoteurs_report.pdf.

⁴⁵ See Wong, *supra* note 22 at 1077.

⁴⁶ See *id.*; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 37, 84 (2004).

⁴⁷ See Fisher, *supra* note 43.

⁴⁸ See Lawrence Lessig, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

⁴⁹ See Jonathan Zittrain, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 71-74 (2008).

⁵⁰ See Yochai Benkler, THE WEALTH OF NETWORKS 116-22 (2006).

⁵¹ See Thomas W. Joo, *Remix Without Romance*, 44 CONN. L. REV. 415, 417 (2011) (“A significant roadblock to semiotic democracy is the fact that a relatively small number of multinational media enterprises dominate the channels of cultural distribution, such as television, publishing and recorded music. Many of these same enterprises also hold copyrights in many influential cultural properties.”). See also LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 263 (2001).

⁵² See Alex Williams, *Fresh From the Internet’s Attic*, N.Y. TIMES, Feb. 13, 2013, <http://www.nytimes>.

renaissance.⁵³ Such a renaissance, which has manifested itself in the GIF's assumption of such a prominent role in today's cultural currency, can largely be attributed to the following two developments: (1) the increasing ease with which GIFs can be created and (2) the growth of social media.

First, GIFs have become easier to create. This is largely due to the proliferation of web-based applications such as GIFSoup and Gifninja, which allow people to create GIFs instantly.⁵⁴ Therefore, much like rest of the Web 2.0 movement, this newfound viability of GIFs is partially the result of the individual user's ability to create, rather than solely enjoy, GIFs. Second, the growth of social media sites played an instrumental role in this resurgence. In particular, despite years of popularity on social media sites such as MySpace, Fark, and Reddit, it was "Tumblr's highly visual structure and reblogging functionality that has enabled the GIF to go viral and find a wider audience."⁵⁵ This seeming co-dependence between GIFs and social media suggests that they are created not only with the intention of being consumed but also with the intention of being reblogged and shared by others.

These developments have allowed GIFs to gain substantial currency in today's popular communication. More specifically, where so much of daily communication occurs via text, GIFs have begun to function "as glorified emoticons [used] to punctuate a point."⁵⁶ In this sense, and in the vein of the Web 2.0 movement, people are using GIFs as a means of re-purposing the content from which the GIF was originally derived; people are adding their own meaning to cultural products produced by others. Notably, it is arguable that "in a way, GIFs [are] taking over TV Shows like 'The Soup' or 'Best Week Ever' as the more accurate pop culture barometer of our time."⁵⁷ GIFs have such a capacity due to their entrenchment in the Web 2.0 movement as another embodiment of cultural products that are easily created, disseminated, and manipulated in meaning so that users enjoy greater participation in the production of cultural life.

Nonetheless, despite such changes in the fundamental understandings of copyright law and the feasibility of a top-down copyright regime, the existence of gray areas within the case law does not ultimately adjust the analysis of copyright infringement liability. Such analysis continues to be anchored by two questions. First, is there copyright infringement? In this vein, does the creation and dissemination of GIFs derived from copyrighted content violate any of the copyright owner's exclusive rights? Second, do such uses of GIFs constitute fair uses such that liability does not attach? In order to answer these questions, it is crucial to obtain a deeper understanding of how GIFs are used and by whom. As detailed later in this work, the fair

com/2013/02/14/fashion/common-on-early-internet-gif-files-make-comeback.html?_r=0.

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ Carlson, *supra* note 2.

⁵⁶ *See Williams, supra* note 52.

⁵⁷ *Id.*

use analysis is where accommodations to this changing sociocultural environment are most likely to be realized.

III. TAXONOMY OF PLAYERS AND GIFS

This section purports to provide ideal types of the players involved in the unauthorized production and dissemination of sports GIFs as well as the various forms of GIFs that such players use. The inclusion of this taxonomy is to help ground and frame this work's analysis and is not meant to be exhaustive.

A. *Players*

1. Individual Fans

For the purposes of this work, individual fans are those persons who participate in the consumption of sports media and sports news, and display a higher than average interest in sports.⁵⁸ Such persons are likely to be involved in the dissemination of sports footage and sports information, most often through social media. These people are most likely fans who want to engage with sports content as much and as often as they can, and are likely unaware that some of their behavior can rise to the level of copyright infringement.

2. Content Providers

For this paper, content providers are those online platforms that publicly display sports highlights and occasionally provide commentary regarding relevant sporting events and various other incidents implicating the integrity of sports, ranging from issues with performance-enhancing drugs to concerns about domestic violence. Moreover, for analytical purposes, content providers are limited to those websites that use copyrighted content without permission (e.g., they are not officially licensed, they are not using an official league video player, etc.) and commercially profit from these activities.⁵⁹ Finally, these content providers provide content in GIF form by stitching together still images derived from copyrighted broadcasts.⁶⁰

B. *Types of GIFs*

1. Highlight GIFs

Highlight GIFs are those GIFs that capture and perform the most important moments of the game, with the high probability that such moments will include the most impressive moments of athleticism and competition. Furthermore, these GIFs are the least likely to be altered or augmented as they are isolated and translated from

⁵⁸ For instance, these fans are those who are likely to be interested in more than just passive consumption of sports, media, and information.

⁵⁹ See, e.g., GIFs FTW, FOR THE WIN, <http://ftw.usatoday.com/tag/gifs>.

⁶⁰ See Lyall, *supra* note 5.

the copyrighted broadcast to GIF from. Predictably, these GIFs are also most likely to compete with the sports leagues' traditional highlight license market. The players defined above use these GIFs in the following fashions. First, individual fans most commonly view these GIFs to consume sports news or to remain up-to-date on the highlights from previous games. Moreover, the individual fans copy and disseminate these GIFs amongst their friend group, via social media and messaging, to facilitate discussion or demonstrate awe or disappointment over a particular play. By contrast, content providers create and host these GIFs in order to provide fans with highlights of games that they either did not have access to or that they want to relive. The use of GIFs on these types of platforms is most likely correlated with the intention of fostering additional views for commercial gain. Therefore, the use of these GIFs on such sites places these sites in direct competition with sports leagues and their licensees that offer their own content online.

2. Expressive GIFs

Expressive GIFs typically focus on someone's expression during the course of the broadcast. For instance, an expressive GIF may capture a player's unique homerun celebration, a coach's dismay after a subpar play or a fan's expression when the fan realizes he or she is on the stadium jumbo-tron. These GIFs are not intended to nor do they replace traditional highlights. Rather, they are used to communicate expressions and emotions in certain situations and circumstances outside of sports and the particular game from which they are derived. Individual fans use such GIFs as a means to communicate with one another. Given how GIFs of this nature typically gain currency outside of the sports realm, individual fans can and do share these forms of GIFs with their counterparts who are much more removed from the realm of sports. For instance, using a GIF depicting a homerun celebration can be used to convey one's sentiments about completing law school, which would be easily understood by both fans and non-fans. Similarly, following the demand of individual fans, content providers will, on occasion, perform expressive GIFs that have gone viral and in the context of other expressive GIFs. For example, content providers make articles (or "listicles") that consist of a list of expressive GIFs outlining various kinds of emotions that one feels or one is thought to feel as they go through a particular course of events within or outside of the sports realm.

3. Commentary GIFs

Commentary GIFs are GIFs that capture action from sports broadcasts that is salient to a much larger ongoing commentary regarding issues of social or political significance. For example, this would include GIFs depicting a disproportionately large player suspected of using performance-enhancing drugs hitting a homerun, GIFs portraying a concussion resulting from a dangerous play, or GIFs capturing the impetus for an on-court fight. Individual fans do not usually utilize such GIFs unless they host their own blogs expressing their views on larger, relevant social or political issues. By contrast, content providers will most often utilize this form of

GIFs in conjunction with editorial comments regarding the broader state of the issues in which its particular writers are interested. In this regard, the writers and editors of these content providers are repurposing the GIFs such that they are not only objects of entertainment value but also objects of social and political value.

IV. NORMATIVE ARGUMENTS

The impulses of today's users to modify the cultural products that they consume have facilitated robust discussion with regard to the best normative arguments for and against such user modification. Before analyzing whether the law attaches liability to the uses of GIFs as enumerated above, it is worthwhile to critically consider and contrast those normative arguments supporting the maintenance of stringent copyright protection for content owners and those supporting increased user innovation as they apply within the contours of this work. For the purposes of this analysis, content owners are the sports leagues that own the copyrights to the broadcasts of their sporting events and profit off of their performances and distribution.

A. *Arguments for Content Owners*

There are three arguments that are commonly made to grant producers of cultural goods, such as the sports leagues, broad authority and control over their goods and the ability to prohibit modifications of their products. Each argument constitutes a "reasonably straightforward application of one of the three major traditions concerned with the justification and scope of intellectual property rights."⁶¹

1. Economic Efficiency (Incentives)

This first argument is utilitarian and posits that the innovations that underlie most cultural goods are public goods.⁶² In this context, these innovations are public goods in the sense that they can be enjoyed by an unlimited number of users without being exhausted and, once they have been made available to one person, it is difficult for the creators to prevent others from gaining free access to these innovations.⁶³ Such circumstances make it cumbersome for creators of such goods to recover the costs of creation, let alone profit therefrom, causing potential creators to begin seeking other jobs. In seeking other jobs, these creators will deprive the public of the benefits of their potential future creations.⁶⁴ To avoid such an outcome, this argument advances that the government must somehow ensure that creators are adequately compensated for their creations.⁶⁵ It can achieve this goal through a number of different means, but it is most likely that a government would grant the creators rights to suppress

⁶¹ William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1446 (2010).

⁶² *See id.*

⁶³ *See id.*; *see also* Fisher, *supra* note 43, at 199.

⁶⁴ *See* Fisher, *supra* note 58, at 1446.

⁶⁵ *See id.*

competition in the production and distribution of embodiments of their innovations.⁶⁶ Overall, this argument advances the premise that the social benefits, resulting from the increased innovation at the primary level, generated by enlarging creators' rights, exceed the social costs, including the diminution of creativity at the secondary level of those adjustments.⁶⁷

In the case of GIFs, a strong argument, informed by the line of thought discussed above, would flow as follows. In order to ensure that they are able to earn monetary rewards sufficient to cover the costs of creation, content owners would need to rely on a prohibition on the unlicensed making and distribution of verbatim copies. More specifically, in order to ensure sufficient monetary return, such a prohibition would necessarily entail verbatim copies of whatever duration. This is especially salient to the circumstances at hand, as the content owners identified in this work already rely on traditional highlights markets to cover their costs. Thus, the creation of verbatim copies of shortened duration, such as the creation of certain GIFs identified in this work, would jeopardize the content owners' ability to remain profitable and thus continue providing people with their broadcasts.⁶⁸

A more extreme argument influenced by this line of thought has been advanced by the music and journalism industries and can be applied to this context in the following manner. Content owners could argue that their core businesses are becoming less viable and that, in order to avoid extinction, they must find new sources of revenue. One such source of revenue would be licensing income from people who wish to disseminate and consume sports content in GIF form. If user innovation is becoming more popular and pervasive, that is more reason for content owners to protect their rights. In the alternative, if such rights are not protected, these innovative users may soon find that they have nothing from which to create their GIFs.⁶⁹ Although both of the arguments advanced above are persuasive, exploration of the extent to which such content owners need copyright rules to make a profit and to remain incentivized to produce additional works may limit their force. Such a counter-argument would necessarily be informed by data demonstrating the costs of producing a creative work versus the profits made by content owners protected under the Copyright Act. In all, absent such data, the economic incentives argument closely tracks this situation and points in favor of a normative environment in which content owners retain a rather significant amount of control over their copyrighted works.

⁶⁶ See *id.* at 1447 ("Initially, [such a] right did not include a right to prevent the making of derivative works, but lawmakers gradually came to believe that talented people would not have optimal incentives to put their talents to work unless they could control . . . abridgements, and adaptations thereof.").

⁶⁷ See *id.*

⁶⁸ Although highly relevant to Professor Fisher's work, consideration of the need for a derivative work right is outside the scope of his work but it could, nonetheless, be argued that the ability to recover costs for producing sporting event broadcasts (e.g., costs of stadium upkeep, usage of broadcast equipment, compensation of players and production staff) are so high as to necessitate such a right.

⁶⁹ See Fisher, *supra* note 61, at 1448-1449. It is imperative to note that opinions concerning the plausibility of such an argument vary widely with regard to the music and journalism industries and will most likely similarly vary with regard to the discussion detailed above.

B. *Labor-Desert Theory*

The second argument is guided by rights considerations and posits that because creators have worked extraordinarily hard to provide society with valuable cultural goods, it is only fair to compensate these creators for the use of their products.⁷⁰ The heart of this argument is intuitive: “it is immoral to make use of intellectual and artistic creations without paying the creators.”⁷¹

With regard to the uses of GIFs explored in this work, the strongest argument is that, at the most basic level, the content owners appear to be depicting live events in their broadcasts, but a more accurate understanding of such broadcasts would be that they are original works that reflect a series of creative decisions, ranging from deciding which camera to use to whether to use slow motion technology. Therefore, when users engage in unauthorized reproductions of the creative work in GIF form, they are immorally usurping the creative products of the content owners without compensation.⁷²

This argument suffers from two limitations. First, the verbatim copying implicated here may be too small to support an allegation of immorality on the grounds that uses amounting to a matter of seconds from hours-long broadcasts do necessitate material compensation. Second, where GIFs have transformed the copyrighted content to the point where only a miniscule portion of the content can be attributed to the original work, a claim of immorality would again be questioned.⁷³ Where the secondary use produces an easier-to-consume product that has a materially different purpose, it is difficult to argue that the original content owner deserves compensation for his or her artistic contributions where the secondary use has transcended those contributions. Overall, due to the significant creativity that goes into producing broadcasts and the fact that GIFs typically constitute verbatim copying of various aspects of the broadcast, this argument has merit and justifies compensation to the owners of the copyrighted content.

1. Personhood Theory

The final argument commonly advanced on behalf of producers of GIFS has its roots in the “personality” or “personhood” theory of intellectual property.⁷⁴ The central tenet of this argument is that creators of intellectual products define themselves

⁷⁰ See *id.* at 1450 (It is worthwhile to note that the amount of labor or work put into the creation of work varies by context. For instance, with regard to commercial films, generating products requires a great amount of time, money and effort. By contrast, with regard to photographs, the products are generated with minimal effort, but the creators nonetheless invested a considerable amount of labor and resources in order to acquire the requisite skill and equipment to produce the final product).

⁷¹ See *id.*, at 1450.

⁷² See *id.*, at 1450 (“To many, perhaps most, people, this argument has considerable force when applied to unauthorized reproductions of creative works”).

⁷³ *Id.*

⁷⁴ See *id.* at 1451.

in and through their creations.⁷⁵ According to this argument, the law ought to recognize and protect the connections between the creator and his or her work by granting the creator the power to prevent the destruction or mutilation of the creations, even after they have been given away or sold.⁷⁶

The strongest argument in this case would be that in creating broadcasts, complete with commentary, use of slow motion and other film technologies, content owners infuse some of themselves into their final products. As a result, when one augments or distills the original broadcast into a number of short GIFs, that person subsequently offers to the public an altered version of the broadcast that departs from the content owner's original vision.

There are a number of limitations with regard to this theory. First, it can be argued that those who consume GIFs are aware that such modifications were not made by the content owner, but instead by persons disseminating the GIFs. This effectively lessens the wound of one's work being "bastardized."⁷⁷ Second, content owners in these scenarios are typically corporate entities and are therefore less likely to need the sort of protection that the personality theory demands.⁷⁸ It is worthwhile to consider that as corporate entities, content owners nonetheless embody particular values that are translated into their final products. Still, this argument is limited by the fact that the content providers here are manufacturing and distributing products in large quantities. The strength of an argument of this nature is inherently reduced when the products being modified have been widely distributed.⁷⁹ This is the case here because the concern is that certain individuals amongst the millions of broadcast viewers are turning snippets into GIFs for small- or large-scale distribution, which is inherently different than the destruction of a one-of-a-kind sculpture.

C. *Arguments for Users*

The following arguments must be considered in terms of individual fans, as identified in this work.

1. Economic Efficiency (Market Failure)

The first argument in favor of user innovation and modification⁸⁰ asserts that content producers should only be motivated to give way to consumers in a limited

⁷⁵ *Id.*

⁷⁶ *See id.*; see also Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. OF COM. L. 67 (2007).

⁷⁷ *See e.g.*, Fisher, *supra* note 61, at 1451 (discussion of Lessig's scheme for allowing some forms of authorized modifications).

⁷⁸ Since the personality theory is rooted in moral rights, it purports to protect individuals rather than corporate personalities.

⁷⁹ *See* Fisher, *supra* note 61, at 1451.

⁸⁰ *See id.*, at 1455 (citing Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1657 (1982)); see also William F. Patry & Richard Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1646 (2004).

number of instances. This is most likely to occur “when the costs of transacting with the copyright owner over permission to use the copyrighted work would exceed the benefits of transacting.”⁸¹ For example, parodies are generally recognized as socially valuable because they not only entertain people, but also provide consumers with useful information on the demerits or merits of the underlying works. However, if the creators of the parodied works have the right to block the creation of such parodies, it would most likely be on the grounds that they do not like being made fun of and the parodist would not be able to offer the original author a license fee high enough to offset the injury to the creator.⁸² Therefore, “even though the aggregate social benefit of the parody exceeds the social cost, the transaction necessary to permit the parody to be created and distributed will not occur.”⁸³ In order to prevent such a market failure, this line of thought argues for excusing as “fair uses” modifications of copyrighted works that constitute genuine parodies.⁸⁴ In more general terms, “adoption of this approach would have the effect of excusing an important subset of the types of modifications of cultural goods with which we are concerned—at least until alternative mechanisms for overcoming the transaction costs could be devised.”⁸⁵

The strongest argument of this nature would be that content owners should give way to fans’ desires to produce GIFs from the owners’ copyrighted content since the costs of fans transacting with the content owners over permission to utilize the copyrighted work greatly outweigh the benefits of transacting.⁸⁶ The high transaction costs of being categorically rejected from fan modifications or being charged unjustifiably high modification costs for any other reason outweigh the benefits of modifying cultural products via legitimate channels and without potential copyright infringement liability. Unfortunately, this argument is much more of a theoretical proposition, as individual users are not likely to attempt to transact with such large content owners for fear of unjustifiably high transaction costs. Furthermore, it is hard to understand why such a welfare-maximizing situation would not emerge through voluntary transactions between producers and consumers.⁸⁷ Nonetheless, given that there seems to be resistance to such voluntary transactions⁸⁸ and that the price that users are willing to bear for the right to modify is insufficient to capture all of the

⁸¹ *Id.* (citing Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 69 (1992)).

⁸² *See* Fisher, *supra* note 61, at 1455.

⁸³ *Id.*

⁸⁴ *See id.*, at 1456 (citing Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 71-73 (For Posner, a genuine parody is one that “uses the parodied work as a target rather than as a weapon” and does not “take so large a fraction (somehow computed) of the copyrighted features of the original work as to make the parody a substitute for that work.”)).

⁸⁵ *Id.* (citing Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C.L. REV. 557, 581-584 (1988)).

⁸⁶ *See id.* at 1455.

⁸⁷ *See* Fisher, *supra* note 61 at 1458. It is arguable that such voluntary transactions have started to emerge as some manufactures have begun to permit consumers to alter their products while raising the prices they charge for such products.

⁸⁸ *See id.* However, not all manufactures have engaged in such a practice and some adamantly reject it for fears of the erosion of their reputations for quality products.

right's associated social benefits, it does not logically follow that the law should be altered to force cultural producers to do what they do not view as profit-maximizing.⁸⁹ In this context, the argument does not effectively advance heightened respect for user innovation by curbing the producer's control over modifications.

2. Distributive Justice

The second approach in favor of advancing user interaction and modification of goods is premised on distributive justice, which is the fair distribution of income, wealth, and power.⁹⁰ This argument begins with the proposition that income, wealth and power are currently all highly concentrated.⁹¹ Similarly, it also focuses on the increasingly high concentration of semiotic power, which is best understood as "control over the fog of symbols in which we move and with which we define ourselves."⁹² In response to this excessive degree of concentration, this approach argues that the law should be amended in order to help reduce the levels of inequality in each of these realms.⁹³ Notably, there are three recommendations for amending the law that are geared toward increased user modification of cultural goods. First, some commentators argue that the fair use doctrine should be augmented in order to increase its capacity to reduce the costs borne by "poorly financed creators" and the prices paid by "poor consumers who benefit from the recasting of expensive works."⁹⁴ More specifically, such a reform would allow courts to consider whether avoiding unaffordable license fees could be a valid justification for unauthorized copying.⁹⁵ Second, "modifications of cultural goods that reflect or enable attacks on concentrations of economic or political power should be privileged."⁹⁶ Examples of such modifications range from the obvious (e.g., parodies of presidents) to the subtle

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See id.* Data supports this proposition. For instance, as of 2007, the top 10% of citizens earned approximately 50% of total income in the United States. *See also* Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, (Aug. 5, 2009), <http://elsa.berkeley.edu/~saez/saez-US-topincomes-2007.pdf>. Moreover, as of 2007, the top 1% of Americans earned almost one-fourth of the total income. *See id.* at 5, fig. 1. The inequality of wealth is even more pronounced, as of 2000, the top 10% of American adults owned roughly 70% of total household wealth. *See* Press Release, United Nations Univ. World Inst. for Dev. Econ. Research, *Pioneering Study Shows Richest Two Percent Own Half World Wealth* (Dec. 5, 2006), http://www.wider.unu.edu/events/past-events/2006-events/en_GB/05-12-2006/. Such inequality persists on a global scale, as of 2000, the richest 10% of all adults owned more than three-fourths of global household wealth. *See id.* Finally, there are no similar concrete indicators of concentration of political power available, but there is little doubt that a small percentage of people, both nationally and globally, exert a vastly disproportionate amount of influence over the rules, policies, and practices by which we are governed. *See* Fisher, *supra* note 58 at 1458-1459.

⁹² *See* Fisher, *supra* note 61, at 1458-1459.

⁹³ *See id.* at 1459. The question of by how much should the law seek to reduce these forms of inequality is outside the scope of this work but has been considered rather extensively for centuries.

⁹⁴ *See id.*, at 1460 (citing Molly Shaffer Van Howeling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1543-45, 1568-69 (2005)).

⁹⁵ *See id.* (citing Van Howeling, *supra* note 94 at 1569).

⁹⁶ *See* Fisher, *supra* note 61, at 1460.

and arguably less interesting (e.g., modifications of the relative importance of the characters in Star Trek episodes frequently reveal criticism of the subordinate roles played by women and racial minorities throughout the series).⁹⁷ Finally, the third and arguably most powerful of the three proposed reforms is that modifications of mass-produced cultural goods should be treated more favorably because they manifest and promote the decentralization of the power of making cultural meaning, or semiotic democracy at large.⁹⁸

In the context of sports GIFs, it could be argued that allowing the modification of a key mass-produced cultural good like a sports broadcast provides significant opportunities for the consumers of such cultural products to engage in the creation of cultural meaning. This argument is especially relevant in this context given the GIF's prominent position in our cultural lexicon. Allowing consumers to modify products that pertain to American pastimes, like sports, which are disproportionately controlled by a few content owners would be a significant move towards a semiotic democracy. Still, an emerging concern is whether the communization of the power of cultural meaning making⁹⁹ via user modification would enable individual users to sustain a robust culture in the event that more traditional cultural meaning makers, such as sports leagues and movie studios, were no longer incentivized to create novel products.¹⁰⁰ Overall, the need for democratization in the face of such economic, political and cultural inequality urges augmentation of status quo mechanisms in order to provide individuals the opportunity to participate in the creation of their sociocultural environment.

3. Human Flourishing

The final argument in favor of user modification of cultural products is premised on the development of a substantive vision of human flourishing and attempts to identify which adjustments to the legal doctrine would grant access to a life in accordance with that vision.¹⁰¹ Many conceptualizations of what constitutes the “good

⁹⁷ See *id.*; Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 602-609 (2007).

⁹⁸ See Fisher, *supra* note 61, at 1461. This last recommendation is particularly salient when the recordings are not kept private, but rather when they are widely disseminated. See also YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 1-34 (2006); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* Chapter 1 (2004); JOHN FISKE, *TELEVISION CULTURE* 236-39 (1987).

⁹⁹ The power of cultural meaning making enables consumers to participate in the process of shaping the world of ideas and symbols in which they live rather than being merely passive consumers of cultural products produced by others. See William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998).

¹⁰⁰ See, e.g., Fisher, *supra* note 61, at 1448-1449. Copyright owners in some fields—such as the music industry and journalism—have begun making the argument that if they cannot defend their rights and monetize new, popular forms of user innovation, the users may find themselves without any raw materials to modify. See also Rob Merges, *IP: Social and Cultural Theory*, THE UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG, <http://uchicagolaw.typepad.com/faculty/2009/03/ip-social-and-cultural-theory.html> (Mar. 10, 2009) (arguing that a cultural environment in which participation is celebrated “may significantly worsen” the environment for creative and original works).

¹⁰¹ See Fisher, *supra* note 61, at 1463. It is worth highlighting that analyses of this general manner are

life” have emerged.¹⁰² These theories converge on five dimensions, choice,¹⁰³ competence,¹⁰⁴ engagement,¹⁰⁵ self-expression¹⁰⁶ and community, all of which suggest that user modification of cultural goods is not only life-fulfilling, but also merits legal protection.¹⁰⁷ Although modifying mass-produced goods is not the only way in which one can live the good life, these five related dimensions suggest that user modification definitely provides users with opportunities for self-fulfillment.

Consumer modification of cultural goods, such as the creation of GIFs from sports broadcasts, promotes opportunities for self-fulfillment and the good life. Most notably, they help engage consumers in an important aspect of their cultural milieu, they allow consumers to express themselves through the creation of GIFs that convey emotions, and they foster community. The importance of allowing consumers to modify cultural products through the creation of GIFs with meanings independent

rather atypical in modern American legal scholarship, largely because they repudiate the principle central to both the dominant form of economic analysis and to the dominant form of contemporary liberalism: that the state ought to remain neutral concerning alternative conceptions of the good. *See, e.g.*, RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191-204 (1985) (advancing the understanding of liberalism as focused on a conceptualization of equality that “supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 15-16 (2002) (“The hallmark of welfare economics is that policies are assessed exclusively in terms of their effects on the well-being of individuals”). Nonetheless, this argument has deep roots, both in philosophy (e.g., Aristotle and John Stuart Mill) and political science (e.g., “republican tradition of eighteenth-century British and American politics and the New Left of the 1960’s and 1970’s”). *See* Fisher, *supra* note 61, at 1463. *See also* William W. Fisher III, *Lecture on Cultural Theory of Copyright*, available at <http://copyx.org/lectures/>.

¹⁰² Fisher, *supra* note 61, at 1468. For further explanation of this conceptualization of the good life and other conceptualizations offered by the Self-Determination Theory, largely advanced by social psychologists, and the Capabilities Approach, pioneered by members of a branch of moral and political philosophy, refer generally to William W. Fisher III, *The Implications for Law of User Innovation*, 94 *MINN. L. REV.* 1417, 1463-1473 (2010).

¹⁰³ In this context, choice is realized when people have the opportunity to freely choose their projects, big and small, and thereby select the cultural products that they wish to modify and the means of modification. *See* Fisher, *supra* note 61, at 1468.

¹⁰⁴ A sense of competence, rather than competence itself, is crucial to one living a good life. *See* Fisher, *supra* note 61, at 1468-69 (citing Edward L. Deci & Richard M. Ryan, *The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 *PSYCHOL. INQUIRY* 227, 231 (2000) and noting: “A recurring theme in accounts of user innovation is that confronting and solving problems, developing the skills necessary to do so, helps foster justified feelings of mastery.”).

¹⁰⁵ With regard to engagement, it is found that a rewarding life entails being active. User modification activity can not only make work during the course of employment more “meaningful,” in the Marxist sense, it can also make for more active play. *See* Fisher, *supra* note 61, at 1469. In both contexts, “the sense of responsibility for the fruits of one’s efforts sharpens the mind, and heightens the senses of involvement and responsibility.” *See id.* (citing JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 90 (2008)).

¹⁰⁶ Most defenders of the freedom to modify cultural goods emphasize self-expression. *See* Fisher, *supra* note 61, at 1469. Projecting oneself into and onto the world is crucial to personhood and the good life. *See* Fisher, *Lecture on Cultural Theory of Copyright*, *supra* note 101. For instance, people contribute their ideas concerning various aspects of their lives, ranging from basketball shoe designs to alternative movie endings, motivated, at least in part, by a hunger for self-expression through aspects of the world that are meaningful to them on an individual basis. *See* Fisher, *supra* note 61, at 1470.

¹⁰⁷ *See* Fisher, *supra* note 61, at 1469.

of the broadcasts from which they originate cannot be overstated. It is also imperative to recall that modifying mass-produced cultural products is not the only way to realize the “good life.” Nonetheless, the realization of the “good life” for as many people as possible requires the creation of additional opportunities for self-fulfillment, which may directly challenge traditional understandings of the rights of content owner.

Despite arguments advanced in favor of content owners, there is already an increase in user modification that has allowed for the realization of goals advanced by the arguments in favor of content users. It is worthwhile to consider whether such an increase in user innovation has been compelled by the state of the law or the realization of content owners that traditional business models are no longer feasible. Specifically, whereas the increase in user modification of cultural goods has arguably contributed to the growth of gray areas in the copyright case law,¹⁰⁸ is it this growth in gray areas or the promulgation of new business models tolerating or encouraging user modification that has allowed this trend to continue? The answer could effectively challenge the current understanding that the law ought to afford users additional opportunities for self-fulfillment by realizing that changes in business models, premised on our understandings of the law and its interaction with our cultural environment, are an alternative source of change.

V. LEGAL ANALYSIS

A. *Sports Broadcasts and Copyright*

In order to sustain a copyright infringement action, a plaintiff must demonstrate ownership of a valid copyright and copying of constituent elements of the work that are original.¹⁰⁹ The first question that must be considered is whether sports broadcasts are in fact copyrightable. A copyright is the set of exclusive rights, conferred onto the creator of an original work, including the rights to reproduce, distribute and create derivative works.¹¹⁰ Despite this grant of exclusive rights, the primary objective of copyright is not to reward creators for the sweat of their labor but rather “to promote the progress of science and the useful arts.”¹¹¹ Prior to its amendment in 1976, the Copyright Act did not directly address whether or not simultaneously recorded transmissions of live sporting events were entitled to copyright protection.¹¹² However, when Congress drafted and enacted the 1976 amendment, it specifically ensured that copyright protection extended to recorded broadcasts of live events.¹¹³

¹⁰⁸ For example, take note of this work’s fair use analysis of individual fan’s usage of highlights GIFs.

¹⁰⁹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

¹¹⁰ 17 U.S.C. § 102, 103.

¹¹¹ U.S. Const. art. I, § 8, cl. 8.

¹¹² See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997).

¹¹³ H.R. Rep. No. 94-1476 at 52 (1976) (“The bill seeks to resolve, through the definition of ‘fixation’ in Section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded”).

Furthermore, while discussing the amendment, the House focused on sporting events, demonstrating that Congress was clearly targeting the protection of sporting events in enacting this amendment.¹¹⁴ Therefore, the definition of a “fixed” work was expressly amended to provide that “a work consisting of sounds, images, or both, that are being transmitted is ‘fixed’ [for the purposes of the Copyright Act]...if a fixation of the work is being made simultaneously with its transmission.”¹¹⁵ Subsequent cases have not only reaffirmed that sports broadcasts are indeed copyrightable,¹¹⁶ but have also firmly established the contours of this copyright protection.¹¹⁷

On the assumption that GIFs are created from copyrighted broadcasts and then subsequently saved on one’s electronic device, GIFs and their unauthorized creation constitute violations of the copyright owners’ exclusive right of reproduction. The right of reproduction is granted by Section 106(1) of the Copyright Act and consists of the exclusive right “to reproduce the copyrighted work in copies or phonorecords.”¹¹⁸ Copies are defined as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed.”¹¹⁹ In order to infringe a copyright owner’s right of reproduction, the defendant must embody the plaintiff’s work in a “material object.”¹²⁰ Moreover, a copy must consist of material objects in which the works are “fixed.”¹²¹

For a work to be “fixed,” its embodiment in a copy must be “sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.”¹²² The creation of GIFs satisfies the above requirements, as the resulting GIFs consist of the infringed work fixed in a series of picture stills (e.g., material objects). GIFs are sufficiently stable because

¹¹⁴ *Id.* (“When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes ‘authorship.’”).

¹¹⁵ 17 U.S.C. § 101.

¹¹⁶ *See, e.g., Nat’l Football League v. McBee & Bruno’s*, 792 F.2d 727, 727 (8th Cir. 1986) (finding that football telecasts are copyrightable under Section 102 of the Copyright Act); *Nat’l Football League v. Primetime 24 Joint Venture*, 211 F.2d 10, 11 (2d Cir. 2000) (noting that, simultaneously with the broadcast, NFL makes videotape recordings of the games, which it then registers with the United States Copyright Act). *See also Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986) (sports telecasts are original works of authorship as it is obvious the telecasts are independent creations and realize the creative decisions within photography that the courts have long recognized as original (e.g., selection of camera angles, kind of film, and camera position, etc.)).

¹¹⁷ *See, e.g., Nat’l Basketball Ass’n*, 105 F. 3d at 846 (Basketball games themselves, as opposed to telecast of the same, do not fall within the subject of copyright because they do not qualify as “original works of authorship” and are thereby not subject to copyright protection).

¹¹⁸ 17 U.S.C. § 106(1). While, initially, copying and reproduction appear to be synonymous, § 106(1) requires “copies” and “phonorecords” to consist of material objects in which the work is fixed. It is only the reproduction of such material objects that is covered by the reproduction right, while copying, in a more generic sense, may not result in such a material object. *See* 2-8 NIMMER ON COPYRIGHT § 8.02.

¹¹⁹ 17 U.S.C. § 101.

¹²⁰ *See* 2-8 NIMMER ON COPYRIGHT § 8.02.

¹²¹ *See* 17 U.S.C. § 101.

¹²² *Id.*

they can be perceived by and communicated to viewers.¹²³ Copyright infringement occurs whenever an unauthorized copy is made, even if it is used solely for the private purposes of the reproducer.¹²⁴ This means that individual fans would be subject to liability for violating the right of reproduction when they make GIFs for personal consumption in the same way that the content providers are liable when they produce the same GIFs for commercial gain. Finally, it is a general rule that copying a work into a different medium than that of the original work does not render it any less of an actionable copy.¹²⁵ The fact that the individual fans and content providers copied the copyrighted work from its audiovisual form to a series of stills does not exempt the copies from constituting a Section 106(1) violation.

In the event that an individual or entity elects to use its GIF copy of a sports broadcast for a purpose other than private use, the question then becomes whether that use subsequently constitutes a violation of the copyright holder's right to performance. Section 106(4) provides copyright owners with the right to "in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works . . . perform the copyrighted work publicly."¹²⁶ With regard to motion pictures or other audiovisual works, under Section 101, a performance occurs by an act of "show[ing] its images in any sequence or to make the sounds accompanying it audible." This definition includes GIFs, as they are designed to show sequences of images from a larger audiovisual work.¹²⁷ Therefore, the defendants perform copyrighted works, the sports broadcasts, through their GIFs.

¹²³ It is worthwhile to note that one who makes copies of a copyrighted work infringes on the copyright owner's right of reproduction under Section 106(1) even if he does not also infringe on the Section 106(3) distribution right by sale or other disposition of those copies. See 2-8 NIMMER ON COPYRIGHT § 8.02.

¹²⁴ See *Walt Disney Prods. v. Filimation Assoc's*, 628 F. Supp. 871, 876 (C. D. Cal. 1986) (story board and story reel prepared by defendant's animators to use in preparing movie held to constitute copies for the purposes of the Copyright Act).

¹²⁵ See 2-8 NIMMER ON COPYRIGHT § 8.01 (citing *Meshwerks, Inc. v. Toyota Motor Sales U.S.A.*, 528 F.3d 1258, 1267 (10th Cir. 2008), *cert. denied*, 555 U.S. 1138 (2009); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982); *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970) (two-dimensional reproduction of three-dimensional work held infringement), *cert. denied*, 398 U.S. 928 (1970); *Walco Prod.'s, Inc. v. Kittay & Blitz, Inc.*, 354 F. Supp. 121 (three-dimensional reproduction of two-dimensional illustration held infringement); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982) (copying from gift wrapping paper to clothing)).

¹²⁶ 17 U.S.C. § 106(4); See also 17 U.S.C. § 101 ("Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."). It is evident, that in addition to the originality and fixation requirements, sports broadcasts fall well within the contours of this definition.

¹²⁷ Although it could be argued that GIFs are simply a technological vehicle for displaying already broadcasted content, in the wake of the Supreme Court's ruling in *Aereo* such an argument would most likely fail. See *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014) (despite the fact that the materials were already broadcasted, the commercially-motivated content providers in this situation would be using technology to carry copyrighted content that they received when it was released to the public to additional viewers in a forum that was not anticipated by the content owners, just as *Aereo* did).

The next question is whether that performance is “public” within the meaning of the Copyright Act. A work is performed “publicly” if it is performed “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered.”¹²⁸ Additionally, to perform a work “publicly” may also mean, “to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.”¹²⁹ Here, the question would be whether the defendants perform the content owners’ works publicly, within the meaning of the above described “Transmit Clause.” In *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014), the U.S. Supreme Court concluded that “when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.”¹³⁰ Therefore, since the defendants would be using GIFs to communicate such contemporaneously perceptible images to a large number of people who are removed from their friends and family and who are unrelated and unknown to each other, they violate the content owners’ performance right under Section 106(4).¹³¹

B. *GIFs and Copyright Infringement*

Although 17 U.S.C. § 501 provides that “anyone who violates any of the exclusive rights of the copyright owner as provided by Sections 106 through 122 . . . is an infringer of the copyright,” it is important to consider whether the copying involved in the creation and performance of GIFs is sufficient to sustain a copyright infringement action since this medium implicates shorter copies and partial performances of entire broadcasts. The creation of GIFs constitutes what Nimmer classifies as “fragmented, literal similarity.”¹³² Where there is such literal similarity between the plaintiff’s and defendant’s works, it is not necessary to determine the level of abstraction at which similarity ceases to exist, as literal similarity, by definition, is always

¹²⁸ 17 U.S.C. § 101 (definition of performing or displaying a work “publicly”). *See also* *Columbia Pictures Indus., Inc. v. Redd Home Inc.*, 749 F.2d 154 (3d Cir. 1984).

¹²⁹ 17 U.S.C. § 101.

¹³⁰ *Aereo*, 134 S. Ct. at 2509.

¹³¹ It is worthwhile to distinguish both this case and *Aereo* from the notable decision *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). Whereas Cablevision was authorized to broadcast the content that it was copying and transmitting to its subscribers, the defendants identified in this work and *Aereo* were not similarly entitled or authorized to possess, let alone perform, the content they were accused of copying and transmitting. Therefore, “an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to “the public,” whereas an entity like *Aereo* that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.” *Aereo*, 134 S. Ct. at 2510.

¹³² *See* 4-13 NIMMER ON COPYRIGHT § 13.03.

a similarity as to the expression of ideas.¹³³ According to Nimmer, in each case the court must consider whether the similarity relates to matter that constitutes a substantial portion of the plaintiff's work.¹³⁴ Therefore, the quantitative relation between the defendant's similar material and the total material contained in the plaintiff's work is important.¹³⁵ However, even if the similar material is quantitatively small, the trier of fact may still properly find substantial similarity if the similar material is qualitatively important.¹³⁶

Although GIFs embody a quantitatively small portion of sports leagues' copyrighted works, it can be argued that GIFs embody the most qualitatively relevant and important aspects of those copyrighted works. For instance, the athleticism that contributes to making a highlight-worthy play and the unpredictable reactions and expressions of the players and the crowd are the very essence of sports. Therefore, these elements constitute the most important parts of these works and create a substantial similarity between the GIFs that feature them and the original copyrighted broadcasts. From this perspective, just as in *Iowa State University Research Foundation v. American Broadcasting Companies*, these short but significant snippets of copyrighted content are indeed actionable.

Alternatively, according to the Supreme Court, the determination of whether copying reaches a level of improper appropriation as to constitute unlawful copying rests on whether there was copying of constituent elements of the plaintiff's work that are original.¹³⁷ The relevant question is whether the creation and public performance of GIFs involve the copying of constituent elements of the sports broadcasts that are original.

It is evident that sports broadcasts are original and courts have recognized their originality as audiovisual works.¹³⁸ Courts have paid particular attention to the orig-

¹³³ See *id.* (citing *Silver Ring Splint Co. v. Digsplint, Inc.*, 543 F.Supp.2d 509, 517 (W.D. Va. 2008)).

¹³⁴ See *id.*

¹³⁵ See *id.* See also *Toulmin v. Rike-Kumler Co.*, 137 U.S.P.Q. 533 (S.D. Ohio 1962), *aff'd*, 316 F.2d 232 (6th Cir. 1963) (copying of a sentence and a half from a book of 142 pages held not actionable); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (30 characters out of 50 pages of source code held de minimis).

¹³⁶ See 4-13 NIMMER ON COPYRIGHT § 13.03. See also *Iowa State Univ. Research Found. v. Am. Broad. Cos.*, 463 F. Supp. 902 (S.D.N.Y. 1978), *aff'd*, 621 F.2d 57 (2d Cir. 1980) (court held defendant's broadcast of one twelve-second segment and an additional two-and-a-half minute segment from plaintiff's film to be infringing); *Monster Comm'n, Inc. v. Turner Broad. Sys., Inc.*, 935 F.Supp. 490, 496 (S.D.N.Y. 1996) (film clips aggregating two minutes found to be infringing but excusable under fair use).

¹³⁷ See *Feist*, 499 U.S. at 361.

¹³⁸ See, e.g., H.R. Rep. No. 94-1476 at 52 (1976) ("When a football game is being covered by four television cameras, with a director guiding the activities of the four cameraman and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameraman and the director are doing constitutes 'authorship.'"); *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 378 (D.C. Cir. 1982) ("Anyone who has ever watched ABC's Monday Night Football, for example, knows that the commentary of the announcers and such efforts as instant replay in slow motion add immensely to the quality of a sports telecast"); see also *Mannion v. Coors Brewing Co.*, 377 F.Supp.2d 444, 452 (S.D.N.Y. 2005) (A photograph can be original in three respects: rendition, timing, and creations of subject); see also *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F.

inality of rendition, which “resides in such specialties of shot, light and shade, exposure, effects achieved by means of filters, developing techniques, etc.”¹³⁹ Today, one can no longer argue that a sports telecast is just a simple recording of a live occurrence; rather, it is a creative method of displaying athletic performances that makes use of innovative film and camera angles.¹⁴⁰ Given the sizable number of creative decisions that go into creating a sports broadcast, ranging from which technology to use to which shot to broadcast,¹⁴¹ it is arguable that sports broadcasts today entail more originality in rendition than has been traditionally understood. GIFs created from these broadcasts inherently embody aspects of both the mechanical and technological originality that went into making the broadcast as a whole. Although it could be argued that the originality embodied in a single highlight GIF or expressive GIF is not as robust as that embodied in the entire broadcast, that fact alone does not negate the reality that such GIFs copy original constituent elements of the content owners’ works.¹⁴²

Before considering whether fair use shields the individual fans and content providers from copyright infringement liability,¹⁴³ it is necessary to determine whether the GIFs use the broadcasts in a manner that can be considered *de minimis*. *De minimis* uses of copyrighted works are not considered to be material and therefore are not considered to be infringing.¹⁴⁴ A determination of whether a use is *de minimis* involves quantitative and qualitative analysis as well as contextual consideration.¹⁴⁵ Even copying of a quantitatively insubstantial part of a work will not be considered *de minimis* where the part appropriated constitutes the “heart of the work,”¹⁴⁶ is

Supp. 2d 301 (S.D.N.Y. 2000).

¹³⁹ See *Mannion*, 377 F.Supp.2d at 452. See also *SHL Imaging, Inc.*, 117 F. Supp.2d at 311 (S.D.N.Y. 2000) (“What makes plaintiff’s photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection,” i.e. not the lens and filter selection themselves, but the *effect* produced by the lens and filters selected, among other things).

¹⁴⁰ See Amy R. Mellow, ...*And the Ruling on the Field is Fair: A Fair Use Analysis of Uploading NFL Videos onto Youtube and Why the NFL Should License Its Material to the Website*, 17 S. CAL. INTERDISC. L.J. 173, 186 (2007).

¹⁴¹ See, e.g., David Zurawik, *CBS Super Bowl Will Have 5 Times the Number of Cameras Ravens Normally Get*, THE BALTIMORE SUN (Jan. 24, 2013), http://articles.baltimoresun.com/2013-01-24/sports/bal-cbs-super-bowl-cameras-ravens-20130124_1_extra-cameras-unmanned-cameras-cbs-sports (number of cameras on field for football telecast depends on the game but ranges from nine to twelve cameras for a regular season game, to 32 for the Conference Championship, to 62 at the Super Bowl).

¹⁴² See *Chicago Record-Herald Co. v. Tribune Ass’n.*, 275 F. 797, 799 (7th Cir. 1921) (noting that defendant may not in general claim immunity from infringement liability on the grounds that the infringement “is such a little one”).

¹⁴³ See *Elsmere Music Inc. v. Nat’l Broad. Co. Inc.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff’d* 623 F.2d 252 (2d Cir. 1980) (court explicitly distinguishes between a *de minimis* defense, that the court finds inapplicable, and a fair use, that the court accepts).

¹⁴⁴ See 3 PATRY ON COPYRIGHT § 9:60. See also *Ringgold v. Black Entm’t Television*, 126 F.3d 70, 74 (2d Cir. 1997) (use of copyrighted material that is so insubstantial that it does not implicate one of the plaintiff’s rights); *Cadence Design Systems, Inc. v. Avant! Corp.*, 189 F.3d 472 (9th Cir. 1999).

¹⁴⁵ See 3 PATRY ON COPYRIGHT § 9:60.

¹⁴⁶ See, e.g., *Harper & Row v. Nation Enter.*, 471 U.S. 539 (1985).

“unique,”¹⁴⁷ or is not used in a fleeting manner, but rather in a contextually significant way.¹⁴⁸

In order to establish that a particular use of a copyrighted work in GIFs is de minimis, individual fans and content providers need to demonstrate that their copying of the protected material is so trivial “as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”¹⁴⁹ In determining whether or not the allegedly infringing use falls below the quantitative threshold of similarity to the copyrighted work, courts often consider the amount of the copyrighted work that was copied, as well as, in cases involving visual works, the observability of the copyrighted work in the allegedly infringing use.¹⁵⁰ The length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work, as evidenced by the lighting and positioning of the copyrighted work, determine observability.¹⁵¹

For instance, in *Ringgold v. Black Entertainment Television*, the court found that the copyrighted artwork in question was “clearly visible” and recognizable as such, with sufficient observable detail for the “average lay observer” to discern depictions of African-Americans in Ringgold’s signature, colorful, two-dimensional style.¹⁵² The inclusion of Ringgold’s work, which was never in perfect focus and was depicted in one four-to-five second segment and several smaller segments totaling 26 to 27 seconds, was found to be actionable as copyright infringement. By contrast, in *Sandoval v. New Line Cinema*, Sandoval’s photographs were included in one of New Line Cinema’s movies but were not displayed with sufficient detail for the average lay observer to identify the subject matter of the photographs or the style used in creating them. The court held that New Line’s inclusion of the photographs, which were displayed in poor lighting and at a great distance, was de minimis.

In the case of GIFs created from copyrighted sports broadcasts, the works typically range from seven to more than 20 seconds, and the copyrighted broadcast from which they are extracted is clearly visible and recognizable. GIFs actually work to highlight the high-quality filming that goes into broadcasting a sports event. Moreover, the GIFs display snippets of the broadcast with sufficient detail for the average lay observer to identify the subject matter, complete with the identification of players and plays, and which camera was used to capture the shot. Therefore, individual fans and content providers would most likely be held liable for the creation and

¹⁴⁷ See e.g., *O.P. Solutions v. Intellectual Prop. Network Ltd.*, 1999 WL 47191 (S.D.N.Y. 1999).

¹⁴⁸ See *Castle Rock Entm’t, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998) (copying of 643 fragments from 84 episodes of *Seinfeld* television series not de minimis).

¹⁴⁹ *Ringgold*, 126 F.3d at 74.

¹⁵⁰ *Id.*; See also *Sandoval v. New Line Cinema*, 147 F.3d 215, 217 (2d Cir. 1998).

¹⁵¹ See *Ringgold*, 126 F.3d at 74; *Sandoval*, 147 F.3d at 217.

¹⁵² See *Ringgold*, 126 F.3d at 76 (Artist who created and owned copyright in “story quilt” brought copyright infringement against producer and broadcaster of television program which used poster depicting the story quilt as set decoration. The appellate court held that the use of the poster in the television program was not de minimis and that the use of the poster for the same decorative purpose for which it was sold weighed against defendants in fair use analysis).

performance of their GIFs made from copyrighted content and could only escape liability under the fair use doctrine.

C. *GIFs and Fair Use*

Fair use is an affirmative defense, employed to counter copyright infringement claims, that allows someone other than the copyright owner to use copyrighted material in a reasonable and limited manner without the author's permission.¹⁵³ It is arguable that without the fair use doctrine, copyright law in America would become excessively harsh by simultaneously granting authors too much power while limiting future creations.¹⁵⁴ Notably, the Second Circuit has stated that fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle creativity which that law is designed to foster."¹⁵⁵ Additionally, fair use performs the vital constitutional function of ensuring the balance between encouraging authors to create through the grant of a limited monopoly and the need to permit reasonable, unconsented uses by second authors so that the public's right to free speech does not suffer at the hands of overbroad assertions of copyright rights.¹⁵⁶

Fair use has its origins in a common law doctrine. Justice Story introduced the concept in the mid-nineteenth century, referring to it as fair abridgement, in *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D. Mass. 1841). Relying on earlier English cases discussing fair abridgement, Justice Story outlined the procedure used to evaluate these types of situations: "In deciding questions of this sort, look at the nature and objects of the selections made, the quantity and value of materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."¹⁵⁷ Eventually, Congress effectively codified Justice Story's framework in the 1976 revision of the Copyright Act.¹⁵⁸ The intent behind

¹⁵³ See generally, BLACK'S LAW DICTIONARY 361 (8th Ed. 2004).

¹⁵⁴ See Mellow, *supra* note 140, at 175.

¹⁵⁵ *Iowa State Univ.*, 621 F.2d at 60. The Supreme Court has also used this language on a number of occurrences. See e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

¹⁵⁶ See *Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003).

¹⁵⁷ *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D. Mass. 1841).

¹⁵⁸ It is readily apparent from the Copyright Act's statutory factors correspond quite closely with those promulgated by Justice Story in *Folsom*. See 17 U.S.C. § 107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

this codification was merely to “restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.”¹⁵⁹ Furthermore, in codifying the fair use doctrine, it was noted, “since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and [thus] each case raising the question must be decided on its own facts.”¹⁶⁰ Guided by the four statutory factors discussed below, this work will discuss whether and to what extent the fair use doctrine protects the types of GIFs enumerated above as used by the players outlined in this work.

1. Overview of Fair Use Factors

a. Purpose and Character of Use

The first factor enumerated by the statute requires courts to evaluate, “the purpose and character of the use, including whether such use is of commercial nature or for nonprofit educational purposes.”¹⁶¹ This factor entails a two-step analysis: (1) determining the purpose and character of the new work and (2) evaluating the commercial use of the work. With regard to the former, after the Supreme Court’s landmark decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), courts now ask, “whether the new work merely supersedes 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 or to what extent the new work is transformative.”¹⁶²

Although such a transformative use is not essential to a finding of fair use, the Court asserted that the goal of copyright is generally much better served by the creation of transformative works.¹⁶³ Therefore, it is logical that the more transformative the new work, the less significant the other factors, such as commercialism, will be in the event that they weigh against a finding of fair use.¹⁶⁴ A secondary work can be transformative, either in function or purpose,¹⁶⁵ when it is critical of a plaintiff’s

¹⁵⁹ H.R. Rep. No. 94-1476 at 66 (1976).

¹⁶⁰ *Id.* at 65.

¹⁶¹ 17 U.S.C. § 107. While the preamble to Section 107 makes note of several purposes suitable for a finding of fair use, such as criticism, comment, news reporting and teaching, it is not meant to represent an exhaustive listing of fair uses. Courts should be guided by the statutory factors even if a use at issue falls within those categories enumerated by the preamble.

¹⁶² *See Campbell*, 510 U.S. at 579 (1994).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See, e.g.,* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (“[A] transformative work is one that serves a new and different function from the original and is not a substitute for it.”); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639-40 (4th Cir. 2009) (holding that making an exact digital copy of a student’s thesis for the purpose of determining whether it included plagiarism is a transformative fair use); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (holding that a search engine’s publication of low-resolution, thumbnail copies of copyrighted images was “highly transformative” because the thumbnails were “incorporate[ed] . . . into a new work, namely, an electronic reference tool”).

work¹⁶⁶ or when the copyrightable expression in the original work is used as “raw material, transformed in the creation of new information...and understandings.”¹⁶⁷

With regard to whether the use of the secondary work is commercial, “the crux of the profit/nonprofit distinction is...whether the user stands to profit from the exploitation of the copyrighted work without paying the customary price.”¹⁶⁸ Determining whether a use exploits a copyrighted work requires careful exploration of the link between the defendant’s precise use of the copyrightable elements of the plaintiff’s work and the defendant’s commercial gain.¹⁶⁹ Nonetheless, “when the copier directly and exclusively acquires conspicuous financial rewards from its use of copyrighted material,” a finding of fair use is much less likely.¹⁷⁰ Finally, courts have decided that, “[s]ince many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use.”¹⁷¹ Thus, in some instances, courts have discounted this consideration where “the link between [the defendant’s] commercial gain and its copying is attenuated” such that it would be misleading to characterize the use as “commercial exploitation.”¹⁷²

b. Nature of the Copyrighted Work

The second factor requires courts to consider the “nature of the copyrighted work.”¹⁷³ Generally, “the law recognizes a greater need to disseminate factual works than works of fiction or fantasy.”¹⁷⁴ As a result, it is more difficult to establish fair use when the case involves the copying of fictional works, rather than factual ones.¹⁷⁵ Additionally, courts must consider whether the underlying copyrighted work is pub-

¹⁶⁶ See, e.g., *Lennon v. Premise Media Corp.*, 556 F. Supp.2d 310,322-23 (S.D.N.Y. 2008) (holding that use of a portion of a John Lennon song was considered transformative when used “as ‘fodder’ for social commentary,” criticizing “the naivet[é] of Lennon’s views”).

¹⁶⁷ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); See also *Castle Rock Entm’t v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998); *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp.3d 379 (S.D.N.Y. 2014) (inclusion of copyrighted content in TVEyes’ index and collection of visual and audio images was transformative as it allowed TVEyes to offer a service otherwise not available that provided subscribers with new information).

¹⁶⁸ *Harper & Row*, 471 U.S. 539, 562 (1985).

¹⁶⁹ See *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537, 551-59 (S.D.N.Y. 2013).

¹⁷⁰ *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006). See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (While a commercial use does not by itself preclude a defense of fair use, “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright”).

¹⁷¹ *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 921 (2d Cir. 1994).

¹⁷² See *Swatch Grp. Mgmt. Services, Ltd. v. Bloomberg, L.P.*, 756 F.3d 73, 83 (2d Cir. 2014) (quoting *Texaco*, 60 F.3d at 922); *Campbell*, 510 U.S. at 594 (holding that “it was error for the court of appeals to conclude that the commercial nature of [a secondary work] rendered it presumptively unfair”).

¹⁷³ 17 U.S.C. § 107(2).

¹⁷⁴ *Harper & Row*, 471 U.S. at 563.

¹⁷⁵ See *Campbell*, 510 U.S. at 586; *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) (noting that informational works may be more freely published under the fair use statute than those with creative characteristics).

lished or unpublished, as the copyright owner holds the right to first publication.¹⁷⁶ This factor will not weigh for or against a finding of fair use where the new work is largely factual, the creative aspects of the underlying copyrighted work are transformed, or the work was already published.¹⁷⁷

c. Amount and Substantiality of the Portion Used

The third statutory factor centers on the court's assessment of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹⁷⁸ This factor has both quantitative and qualitative dimensions¹⁷⁹ and is reviewed "with reference to the copyrighted work, not the infringing work."¹⁸⁰ The quantitative assessment examines the portion of the copyrighted work that was taken in relation to the whole of that work.¹⁸¹ By contrast, the qualitative dimension of this factor considers the importance of the expressive components of the portion copied.¹⁸² Use of even a small portion of a plaintiff's copyrighted work may exceed the bounds of fair use where the material consists of the "heart" of the plaintiff's work.¹⁸³ The reasonableness of the amount and portions copied will vary depending on the character and purpose of the secondary use.¹⁸⁴ Where copying an entire work is necessary to accomplish the transformative purpose advanced by the secondary user, "this factor bows to the importance and priority of the first factor's finding of transformative use."¹⁸⁵

d. The Effect Upon the Plaintiff's Potential Market

The fourth factor directs courts to consider "the effect of the [new] use upon the potential market for or value of the copyrighted work."¹⁸⁶ This analysis is multifaceted as it "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and wide-

¹⁷⁶ See *Harper & Row*, 471 U.S. at 564; *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991).

¹⁷⁷ See e.g., *TVEyes, Inc.*, 43 F. Supp. at 394.

¹⁷⁸ 17 U.S.C. § 107(3).

¹⁷⁹ *NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471, 480 (2d. 2004).

¹⁸⁰ *Wright*, 953 F.2d at 737.

¹⁸¹ See *Associated Press*, 931 F.Supp.2d at 557. See also *Iowa State Univ.*, 621 F.2d at 61 (finding that copying as little as 8% of original work could weigh against a finding of fair use). Cf. *New Era Publ'ns Intern., Aps v. Carol Publ'g Group*, 904 F.2d 152, 158 (2d Cir. 1990) (stating there is no bright-line rule with respect to how much copying is too much).

¹⁸² See *Campbell*, 510 U.S. at 587; *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

¹⁸³ *Harper & Row* 472 U.S. at 564-565 (In finding against fair use, court noted that although defendant did not take a quantitatively significant amount, defendant took "the most interesting and moving parts of the entire manuscript" and thus could be found to have taken "what was essentially the heart of the book").

¹⁸⁴ See, e.g., *Campbell*, 510 U.S. at 587.

¹⁸⁵ See *TVEyes*, 43 F. Supp.3d at 395; *Authors Guild, Inc.*, 755 F.3d at 96 ("The third factor asks whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purpose asserted under the first factor.")

¹⁸⁶ 17 U.S.C. § 107(4).

spread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”¹⁸⁷ Where there is a fully functioning market for the alleged infringer’s use of the copyrighted content, it will be difficult for the infringing party to demonstrate that it made a fair use of that content without paying a license fee.¹⁸⁸ By contrast, “when the only possible adverse effect occasioned by the secondary use would be to a potential market or value that the copyright holder has not typically sought to, or reasonably been able to, obtain or capture,” this fourth factor will favor the infringer.¹⁸⁹ With respect to transformative uses, if the harm resulting from the secondary use is the public’s lowered estimation of the original, then the transformative use will be found to be a fair use, notwithstanding the harm.¹⁹⁰ Finally, this factor also requires, “balancing of the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”¹⁹¹

2. Fair Use Analysis of Individual Fan Uses

a. *Individual Fans and Highlights GIFs*

With regard to the first factor, the individual fans most likely do not intend to use these GIFs as a basis of criticism or new understandings.¹⁹² However, there is a very realistic possibility that such GIFs will nevertheless facilitate new understandings. By sharing sports GIFs with each other, individual fans provoke commentary on aspects of the original broadcast. From this perspective, the footage used in the GIFs is repurposed; it is no longer being consumed for its original entertainment value but is instead being used to gain a better understanding of sports, which can ultimately play a large role in shaping culture. Nonetheless, if these individual fans do not use GIFs as the basis of criticism or to facilitate new understandings, they are

¹⁸⁷ *Campbell*, 510 U.S. at 590.

¹⁸⁸ See *Associated Press*, 931 F.Supp. at 559-561 (citing *Harper & Row*, 471 U.S. at 566 n. 9); *Sony Corp. of Am.*, 464 U.S. at 451.

¹⁸⁹ *Texaco*, 60 F.3d at 929-30 (noting that impact on potential licensing revenues should also be limited to such revenues for traditional, reasonable or likely to be developed markets).

¹⁹⁰ See *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (“As the *Campbell* opinion explained, if the secondary work harms the market for the original through criticism or parody, rather than by offering a market substitute for the original that supersedes it, ‘it does not produce a harm cognizable under the Copyright Act.’” A transformative secondary use that lowers the public’s estimation of the original is materially different from a secondary use that merely offers itself as a market substitute that harms the market value of the original)(internal citations omitted). See also *Castle Rock Entm’t, Inc.*, 150 F.3d at 145 (The concern here is not “whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but [with] whether the secondary use usurps or substitutes for the market of the original”).

¹⁹¹ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)).

¹⁹² *C.f. Lennon.*, 556 F. Supp.2d 310; Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

most likely being shared among social groups for the same entertainment purposes that the content creators intended.¹⁹³

Under the second factor, sports broadcasts most likely fall somewhere in the middle of the continuum of informational and creative works because the creative decisions that go into sports broadcasts are original, but the overall broadcasts nonetheless depict factual bouts between particular teams.¹⁹⁴ Therefore, this factor most likely points either very slightly in favor of a finding of fair use or is inapposite to this analysis.

With respect to the third factor, it is readily apparent that the content embodied in highlights GIFs constitutes the “heart” of the sports broadcast.¹⁹⁵ These GIFs capture the game-winning touchdown, the final penalty kick, and the epic catch, all of which depict the highest quality of athleticism and gamesmanship and embody the core of professional sports. The development and use of additional film technologies to capture and replay such moments in the best manner possible further demonstrates the value of these moments to the overall broadcast. Thus, this factor most likely weighs against a finding of fair use.

With regard to the final factor, given the duration of GIFs, they will most likely not affect the marketability of live game broadcasts. More specifically, it is rather implausible that viewers would refrain from tuning into sports broadcasts solely because short GIFs of those broadcasts have been made available.¹⁹⁶ Similarly, it is rather unlikely that widespread behavior of this sort would have an effect on the marketability of the licensing deals that content owners have with various sports-related television programs. Thus, the availability of sports-related GIFs will not substitute for the overall experience of watching a sports broadcast, which may include additional elements, such as interviews with players and coaches, expert commentary and viewer polls. Still, it is foreseeable that the widespread creation and dissemination of highlights GIFs may interfere not only with the traditional highlight market that content owners have cultivated, but also with content owners’ own offerings of short form content online.¹⁹⁷ The possibility that such GIFs would become substitutes for

¹⁹³ As outlined in this work, individual fans do not engage in commercial activity in this space. These users do not stand to profit from the exploitation of the copyrighted content sans paying the customary price. Therefore, this lack of commerciality points slightly in favor of a finding of fair use. *See Harper & Row*, 471 U.S. at 562.

¹⁹⁴ *See Mellow, supra* note 141, at 185.

¹⁹⁵ *See Harper & Row* 471 U.S. at 545-65.

¹⁹⁶ This possibility of such a market substitution becomes even more implausible when one considers that “bite-sized morsels of a single match-up cannot offer the same type of experience that Americans crave when they turn on the television to watch an entire game.” *See Mellow, supra* note 141, at 193.

¹⁹⁷ The traditional highlight market is different from the sports television market as the former consists of licensing content where it will be accompanied by a minimal amount of commentary (e.g., on the local news). Additionally, examples of short form content offerings online include content owners hosting their own channels on YouTube and content owners creating their own “media players” which can be embedded on the sites of their media partners. Such markets fall within the acceptable sphere of potential market harm as delineated by the case law. *See Am. Geophysical Union*, 60 F.3d at 930-31 (“Only an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should

content owners' own content causes this factor to weigh against a finding of fair use. A determination of whether an individual fan's creation of highlights GIFs constitutes a fair use or not will largely depend on whether that use is in fact transformative or is motivated by the same purpose as the dissemination of the original broadcast.

b. Individual Fans and Expressive GIFs¹⁹⁸

With regard to the first factor, it is likely that individual fans' use of expressive GIFs is transformative because the individual fans infuse sports GIFs with new meaning and a new purpose.¹⁹⁹ By using the GIFs to convey emotion and expression that exist independent of the realm of sports, individual fans have superseded the objective of the original broadcast, which was to provide entertainment to millions of people. The various bits of content from the broadcast that become expressive GIFs are the raw material that allow for the creation of new means of communication. Moreover, given that such GIFs are typically shared amongst fans, the individual fans are not engaging in commercial activity.²⁰⁰ Thus, this factor points in favor of a finding of fair use. Furthermore, given that the underlying broadcast still maintains equidistant standing on the continuum of informational and creative content, the second factor will most likely weigh in favor of a finding of fair use or will be found to be inapplicable.

Under the third factor, despite the importance of these GIFs as modern cultural currency, expressive GIFs are both quantitatively and qualitatively small. GIFs cannot be construed as being made from material that is so integral to the sports broadcast and sports experience as to constitute the heart of the broadcast. This is reaffirmed by the fact that expressive GIFs tend to emerge from "off-moments," which are incidental to the athletic spectacle as captured.²⁰¹ Finally, since the use of expressive GIFs is so transformative, the fourth factor also likely weighs in favor of a finding of fair use.²⁰² Given the substantial transformative use of expressive GIFs and the fact that they do not constitute a quantitatively or qualitatively significant aspect of the broadcast, the use of expressive GIFs by individual fans is most likely defensible as a fair use.

be legally cognizable when evaluating a secondary use's 'effect upon the potential market for or value of the copyrighted work.'").

¹⁹⁸ Since individual fans are more likely to engage in the creation and dissemination of expressive GIFs, largely due to the widespread use of GIFs via text and GIFs' cultural currency, this work will only conduct the fair use analysis for this type of GIF on the individual fan level.

¹⁹⁹ See *Campbell*, 510 U.S. at 579.

²⁰⁰ See *Harper & Row*, 471 U.S. at 562 (these users do not stand to profit from the exploitation of the copyrighted content without paying the customary price).

²⁰¹ "Off moments" consist of those broadcast moments depicting activity occurring off the playing field and not on-field play or developments (e.g., in-stand fan interactions, sideline interactions, etc.).

²⁰² See *Fox News Network, LLC*, 43 F.Supp.3d at 395 (S.D.N.Y. 2014) (The fourth factor is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original. Such economic harm caused by transformative use does not factor into this analysis, "because such uses, by definition, do not serve as substitutes for the original work") (quoting *Authors Guild, Inc.*, 755 F.3d at 99.).

3. Fair Use Analysis of Content Providers

a. *Content Providers and Highlights GIFs*

Under the first factor, it is readily apparent that the content providers are commercial entities. Much like newscasters, online content providers, “are commercially supported by advertisers who pass the costs of sponsorship on to those who purchase their products.”²⁰³ By providing “sports news,” complete with content appropriated from content owners, for commercial gain, the content providers stand to profit from the exploitation of such copyrighted content without paying the customary price.²⁰⁴ Furthermore, content providers’ use is not transformative because it does not provide any new insights or meanings and instead offers the copyrighted content for the same entertainment purposes that motivated the content owners to create and disseminate the original broadcast. Such a lack of a transformative use is further exacerbated by the fact that the highlight-like GIFs are often posted without any commentary or impetus for discussion.²⁰⁵ Given the blatant commerciality of these types of GIFs and the fact that they effectively misappropriate content from the broadcasts for exactly the same purposes of the broadcasts, this factor most likely points against a finding of fair use.

With respect to the second factor, as mentioned above, sports broadcasts fall in the middle of the informational-creative continuum. As a result, this factor most likely weighs slightly in favor of a finding of fair use, or would be immaterial to the overall analysis.

Under the third factor, as discussed above with regard to individual fan uses of highlight GIFs, although such GIFs are derived from a quantitatively small portion of the overall broadcast, they nonetheless embody the “heart” of the original broadcast.²⁰⁶ Thus, this factor strongly points against a finding of fair use. Lastly, as discussed above, the widespread creation and performance of highlight GIFs would most likely interfere with both traditional highlights markets and content owners’ own offerings of short form content online.²⁰⁷ By refusing to pay a licensing fee in an established market for the content owners’ broadcasts, these content providers lessen

²⁰³ See *Los Angeles News Service v. KCAL-TV Channel 9*, 109 F.3cd 1119, 1121 (9th Cir. 1997) (citing David H. Kramer, *Who Can Use Yesterday’s News?: Video Monitoring and the Fair Use Doctrine*, 81 GEO. L.J. 2345, 2345 n. 2 (1993)).

²⁰⁴ See *Harper & Row*, 471 U.S. at 562. Here, such a customary price would be a license fee for offering short form content over the Internet.

²⁰⁵ This is distinctly different from the possibility that individual fans could utilize such highlight GIFs as a means to achieve new understandings.

²⁰⁶ See *Harper & Row*, 471 U.S. at 545-565. These GIFs capture the game-winning touchdown, final penalty kick and epic catches that depict the highest quality of athleticism and gamesmanship and embody the core of professional sports. The development and use of additional film technologies in order to best be able to not only capture but also replay such moments further demonstrates the value of such moments to the overall broadcast.

²⁰⁷ See also *Associated Press.*, 931 F.Supp.2d at 559-561 (where there is a fully functioning market for the infringer’s use of the copyrighted material, it will be difficult for the infringing party to show that it made a fair use without paying a license fee) (citing *Harper & Row*, 471 U.S. at 566 n. 9)).

the value of content owners' short-form content by directly competing with other content providers that do pay licensing fees to use such content. Given the content providers' blatant commercial purpose, the lack of a transformative use, and their cheapening of the content owners' products, it is most likely that the uses implicated here do not constitute fair uses.

b. Content Providers and Commentary GIFs²⁰⁸

Under the first factor, content providers that use GIFs in conjunction with original commentary do so to render such commentary more effective. They employ aspects of copyrighted broadcasts in a manner that supersedes the objects of the original broadcast and give such content a new meaning, purpose and character.²⁰⁹ However, a determination of fair use in this category may depend on the form and extent of commentary. If the commentary only consists of a caption, it is highly disputable that such a use possesses the same transformative elements as a more robust commentary. Moreover, although the content providers identified in this work are mostly commercial enterprises, it is arguable that using copyrighted content for the purposes of commentary does not constitute exploitation of the copyrighted material without paying the customary price.²¹⁰ This is particularly relevant, as the Supreme Court has held that the more transformative the new work, the less significant the other factors will be in a finding against fair use.²¹¹ In sum, this factor most likely points towards a finding of fair use.

Pursuant to the second factor, since the original broadcast occupies the middle ground between a factual and creative work, this factor will most likely weigh in favor of a finding of fair use or be immaterial to the overall analysis. The applicability of the third factor will vary depending on the subject matter of the content provider's commentary. For instance, a GIF highlighting the danger of concussions in the National Football League may actually make use of highlight content, which lies close to the heart of the broadcast. By contrast, a GIF drawing attention to the widespread use of performance enhancing drugs in the Major League Baseball, may be based on incidental broadcast footage of a player having a rant in the bullpen that resembles a bout of "roid rage." This latter example would not implicate the "heart" of the broadcast in the same manner as the former example.

Even so, under the third factor, the relevant inquiry is whether the secondary use employs more of the copyrighted work than is necessary to achieve its stated purpose, and whether the copying was excessive in relation to any valid purpose asserted under the first factor.²¹² Thus, in the abstract, this factor is inconclusive because it is highly dependent on the particular GIF and line of commentary.

²⁰⁸ Given that content providers are much more likely to utilize this GIF type, this work will only go through the fair use analysis of this type of GIF as used by content providers.

²⁰⁹ See *Campbell*, 510 U.S. at 579.

²¹⁰ See generally, *Harper & Row*, 471 U.S. at 562.

²¹¹ See *Id.*

²¹² *Authors Guild, Inc.*, 755 F.3d at 96.

Finally, under the fourth factor, although commentary may result in a lower public valuation of the original product, this use would still be considered a fair use.²¹³ Although commentary that uses GIFs to make the piece more compelling may result in the suppression of the market of the original work, it does not serve as a market substitute for the original. Moreover, the fourth factor also calls for the balancing of the “benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”²¹⁴ In this instance, the public benefit of enabling effective commentary in a realm of great cultural importance outweighs the miniscule benefit to content owners if such a use were denied. Overall, given the transformative use involved, the lack of market harm and minimal takings from the original, content providers’ use of GIFs to engage in commentary most likely constitutes a fair use.

D. *The Question of Secondary Liability*

Since the adoption of the Digital Millennium Copyright Act (“DMCA”)²¹⁵ and the rise of peer-to-peer file sharing services, a number of copyright cases have outlined the contours of secondary liability for service providers,²¹⁶ without whose services third parties would not be able to engage in infringement.²¹⁷ Given that there

²¹³ *On Davis*, 246 F.3d at 175. *See also Castle Rock Entm’t, Inc.*, 150 F.3d at 145 (the concern is not “whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but [with] whether the secondary use usurps or substitutes for the market of the original”).

²¹⁴ *Bill Graham Archives.*, 448 F.3d at 613 (quoting *MCA, Inc.*, 677 F.2d at 183).

²¹⁵ 17 U.S.C. § 512 (promulgating a number of conditions that, if met, limit the liability of an Internet Service Provider such that monetary relief is not available and the Internet Service Provider may be subject only to narrow injunctive relief set forth in § 512(j)).

²¹⁶ For the purposes of this work, service providers are those entities that support and operate the GIF-creating web-based applications. Notably, there are two forms of service providers. First, there are those that allow users to create GIFs from images that the users take on their own. For instance, such an application would allow users to make GIFs from pictures taken at a game they attended. Given that copyright protection does not extend to the actual game but only to the broadcast, this work will not analyze situations in which a user-spectator creates a GIF from his or her images taken while attending a game. Second, there are web-based applications that grant access to copyrighted content from which one may make GIFs. For example, the currently defunct Yahoo! LOOPS application would allow users to make GIFs from copyrighted content that Yahoo had from various sports leagues with features allowing the user to “transform” the content by superimposing text on the final GIF product. This is the category of service provider on which this work is most focused.

²¹⁷ Today, there are three main theories of secondary liability for copyright infringement. First and traditionally, “one who, with knowledge of the infringing activity, induces causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). *See also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). Phrased differently, liability exists if the defendant engages in “personal conduct that encourages or assists the infringement.” *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998). *See generally, A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Second, “the common law imposes liability for vicarious copyright infringement when the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials, even in the absence of actual knowledge that the copyright monopoly is being impaired.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36 (2d Cir. 2012) (internal

are at least some incidents of third party copyright infringement, it is at least plausible that secondary liability could attach to those Internet Service Providers who are not afforded DMCA protection.²¹⁸ However, taking into account that GIFs can be created via web-based applications and are created and shared in a highly participatory context, it would be interesting to consider whether there is a material amount of encouragement in the realm of GIFs and GIF creation such that secondary liability is likely to attach. For example, Disney recently had a series of issues with the web-based application, GIF Finder, which enabled its users to discover GIFs that had been curated by the application into a general library and further sorted into categories or search results for users to browse. Disney's primary issue with the application was that it included Disney-related categories, such as "Doctor Who" and "Star Trek."²¹⁹ It is plausible that concern over the inclusion of such categories was rooted in the belief that it would encourage the infringement of Disney characters to various extents. Given the many examples of direct infringement by third party users and the participatory culture in which GIFs thrive, the growth in scope of secondary liability in copyright directly affects GIF-service providers.

VI. ALTERNATIVE APPROACH: DOES BUSINESS OFFER A BETTER SOLUTION?

In the current sociocultural environment, there are no longer clearly delineated categories of infringing behavior and fair uses as there were when the traditional model of copyright, marked by control over the creation, copying, and distribution of content, was more stable than it is today.²²⁰ Therefore, it is worthwhile to discuss potential remedies outside of the law that could mitigate the effects of widespread unauthorized uses of copyrighted content.²²¹ For example, in attempting to hold

quotation omitted). Under this standard, "the ability to block access of copyright infringers to a particular environment for any reason whatsoever is evidence of the right and ability to supervise." *Id.* at 37 (internal quotation omitted). Finally, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), guided by the inducement rule in patent law, the Supreme Court established the inducement theory for secondary liability for copyright infringement, whereby "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Grokster*, 545 U.S. at 936-37. Further, "liability for inducement of infringement is premised on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 937.

²¹⁸ See *Fox Broad. Co., Inc. v. Dish Network, LLC*, 747 F.3d 1060 (9th Cir. 2013) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.")

²¹⁹ See Mitchel Broussard, "GIF Finder" Pulled from App Store Over Copyright Issues with Disney Characters, *MACRUMORS* (Feb. 18, 2015), <http://www.macrumors.com/2015/02/18/gif-finder-copyright-issues/>.

²²⁰ See, e.g., Arewa, *supra* note 20, at 436 (noting that digital era technological innovations such as the MP3 and other digital formats and the Internet have significantly broadened access to technologies of creation, copying and dissemination, thereby effectively reducing industry control).

²²¹ See, e.g., Arewa, *supra* note 20, at 436 ("[D]uring the digital era, business competitors have emerged with new business models that do not rely as heavily on control of copying and distribution. [For instance,] UGC websites and Web 2.0 illustrate the impact of such new business models and new intermediaries that implement them. These new business models are the result of disruption, as well as the cause

onto the traditional model, content owners could attempt to assert their rights over the copying and dissemination of their content as robustly as possible while also engaging in licensing schemes. Such licensing schemes for short-form content, such as GIFs, could potentially take two forms. First, content owners would grant licenses to web-based applications, such as GIF Finder and Yahoo! LOOPS. This would allow fans to continue to engage with the copyrighted content while ensuring that the content owners receive some form of compensation for applications using their content. Additionally, such a scheme would only permit fans to engage with the copyrighted work on the terms provided by the content owners. Although this may preempt the creation of some of the more innovative GIFs, it would work towards providing legitimate channels in which fans could engage with one another and their favorite content.²²²

Second, content owners could license GIFs to online content providers. As noted at the start of this work, GIFs have achieved a unique status in the sports journalism community. Therefore, there is likely a market for GIFs that does not give rise to legal action and instead allows for the creation of potentially higher quality GIFs than those currently offered by the editors of content providers. Furthermore, such a scheme would provide more alternatives to video highlights, which may be entirely too expensive for some less established media outlets, and would demonstrate an attempt to speak to and engage with today's generation through modern technological mediums and expressive vehicles.

It is also worthwhile to consider how technological innovation often facilitates new ways to create value for copyright owners.²²³ For instance, although Hollywood was initially threatened by the creation and sale of VCRs and unsuccessfully attempted to ban them, the technology eventually brought movie studios their biggest source of revenue.²²⁴ In that vein, is it possible that technology that allows for the manipulation and sharing of copyrighted content could add to copyright owners' bottom lines? Perhaps this is the case, as many content owners have not shied away from engaging in more bottom-up business plans in attempts to monetize current user participation practices.²²⁵ With regard to GIFs in particular, content owners could

of further disruption among the cultural industries.”).

²²² See, e.g., Lee, *supra* note 16, at 1517 (“[M]ost major content owners today want to see fans fully engage with their favorite content and are working hard to provide legitimate ways to do that,” quoting NBC Universal’s General Counsel, Rick Cotton).

²²³ See Monseau, *supra* note 12, at 96.

²²⁴ See *id.*

²²⁵ See, e.g., James Vincent, *Hulu is Trying to Hijack GIF Culture to Drum Up New Subscribers*, VERGE (Apr. 7, 2015), <http://www.theverge.com/2015/4/7/8359105/hulu-gifs-tumblr-reaction> (Detailing how Hulu launched a new website for sharing GIFs from its TV shows in an attempt to capitalize on the revival of the GIF format via stealth marketing); National Football League, *NFL, YouTube Announce Partnership Including Official Channel*, NFL.com (Jan. 26, 2015), <http://www.nfl.com/news/story/0ap3000000463404/article/nfl-youtube-announce-partnership-including-official-channel> (Noting the formation of a partnership between the National Football League and YouTube that will enable fans to engage with NFL video content on computers, tablets and mobile phones; the deal represents the latest in a series of partnerships that the NFL has made with digital platforms).

provide their own platform on which fans could engage with sports content rather than relying on third-party applications. Such a business model is inspired by the recent creation of the Electronic Art's Madden GIFerator, which was created so that gamers could create customizable GIFs from content predetermined by Madden.²²⁶ The GIFerator demonstrates how content owners can circumscribe what can and cannot be done with their content because the application, which is its own platform created and controlled by EA Sports, limits users to a specific set of images, prohibits offensive language and easily allows for the removal of controversial content.²²⁷ In addition to these features of the GIFerator, content owners should also consider whether such an application would be governed by a body of rules that informs user behavior across many applications, such as the Principles for User Generate Content Services.²²⁸ Though copyright infringement was the focus of the original Principles, subsequent versions could focus on respect for brand integrity and brand markets, such as traditional highlights markets in this case. Employing such a business plan would not only allow fans to continue engaging with copyrighted content but would inherently serve as additional marketing for the content owners as well as a means of maintaining control over user manipulation and the content owners' bottom lines.

Lastly, content owners may seek to formalize a regime of tolerated use. Such a regime would be premised on those uses of copyrighted works that the copyright owners may be aware of, but do nothing about for reasons ranging from laziness and high enforcement costs to a desire to create goodwill and calculations that the infringement actually benefits copyright owners.²²⁹ These tolerated uses would be complemented by the creation of an "opt-in" copyright enforcement system that would require copyright owners to provide notice before the usage of a work becomes infringing.²³⁰ This would allow content owners to have more control than they currently do in deciding which content is available for user modification and which content is categorically unavailable for such modifications. Notably, Google used a similar "opt-in" system for its Google Books program, which created a searchable database that entailed displaying excerpts of thousands of books.²³¹ When a book's copyright owner declared that he or she did not agree with his or her work being

²²⁶ See Dillon Baker, *Together We Make GIFs: Why the Madden GIFerator is Viral Content Marketing at Its Best*, CONTENTLY (Oct. 6, 2014), <http://contently.com/strategist/2014/10/06/together-we-make-gifs-why-the-madden-giferator-is-viral-content-marketing-at-its-best/> (the process of making a Madden GIF entails picking a team, player and background and the inclusion of up to 40 characters).

²²⁷ See *id.* Although the application was intended to allow fans to "trash-talk" each other via GIFs, it has become an outlet for humorous GIFs that have nothing to do with football.

²²⁸ See, e.g., Lee, *supra* note 16, at 1518-19 (so called "principles for user generated content services" were proposed to encourage web services to implement filtering of infringing material uploaded by users and were adopted by a number of media companies in 2007).

²²⁹ See Wu, *supra* note 11, at 619. Many of the uses that typically fall in the category of tolerated use arguably fall close to, if not within, the category of fair use.

²³⁰ See *id.* at 620-21 (stating that such a system most closely resembles an ex post notice property system, in which the use of property is safe and not illegal, until the owner takes some action i.e., complaining or issuing notice).

²³¹ *Id.* at 622-623.

displayed in this manner, Google Books would comply with this request. However, if the copyright owner did not surface, Google Books would continue its use of the work. Although this regime appears to be plausible, it is not necessarily clear how this system would be implemented without the creation of a new sphere, such as Google Books, where the system would be the default.

VII. CONCLUSION

From this country's inception, Congress has been charged with both promoting creativity and being creative sometimes necessarily "involves using the work of another."²³² As Justice Story pragmatically held, "every book in literature, science and arts, borrows, and must necessarily borrow, and use much which was well known and used before."²³³ While Justice Story was most likely conceptualizing borrowing in the more formal sense of creating independent works, today, individuals borrow from the content disseminated by copyright owners not only to express themselves but also to participate in creating the culture in which we all live. With borrowing as the cultural standard, copyright legal frameworks and business models must adjust. While there are instances where infringement liability will indefinitely attach and others where the prospect of establishing liability is much more tenuous, "copyright legal frameworks [nonetheless] should reflect a process of accommodation, renegotiation and recalibration that adapts to new technologies and new contexts."²³⁴ Such a process of renegotiation will necessarily entail content owners questioning not only whether to sue for infringement, but also whom to sue. Perhaps more importantly, it will also cause content owners to reconsider the extent to which they will tolerate user modifications and engage individuals, not solely as consumers, but as co-participants in the creation of cultural products and meaning. Looking forward, content owners should engage in legal and business practices that more closely account for the changing landscape, an era in which exclusive rights are not nearly as clearly defined as they once were. They can facilitate this by focusing less on attempting to exercise greater legal control over content, and more on renegotiating the producer-consumer dichotomy against the backdrop of the law and embracing new consumer attempts to make creative contributions to the continual growth of a robust culture in which we all partake.

²³² See Mellow, *supra* note 140, at 200 (citing *Campbell*, 510 U.S. at 575 (quoting Justice Story's idea that "in truth, in literature, in science and, in art, there are, and can be, few, if any, things which in an abstract sense, are strictly new and original throughout")).

²³³ *Campbell*, 510 U.S. at 575 (quoting Story, J.).

²³⁴ Arewa, *supra* note 20, at 474.