

# PICTURE THIS: APPLYING THE FAIR USE DOCTRINE TO DOCUMENTARY FILMS AFTER *GOOGLE/ORACLE* AND *WARHOL*

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## INTRODUCTION

The genre of documentary films has grown in both importance and audience reach over the past few decades, in no small part because of filmmakers' reliance on the copyright doctrine of fair use. The expansion started after the passage of the 1976 Copyright Act and accelerated in the wake of the Supreme Court's unanimous, landmark 1994 decision, *Campbell v. Acuff-Rose Music, Inc.*,<sup>1</sup> concerning a parodic rap-music send-up of a classic rock 'n' roll song. Over the years, a consistent body of case law evolved that provided a basis for making edit-room decisions about third-party content that filmmakers and their legal counsel could reasonably expect to be protected as fair use.<sup>2</sup> Twenty-seven years later, the Court's ruling in *Google LLC v. Oracle America Inc.*<sup>3</sup> reaffirmed *Campbell's* principles and the case law on which documentarians relied.

However, the Supreme Court's recent decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*<sup>4</sup> raised important questions about the proper application of the fair-use doctrine. The *Warhol* case involved the licensing of a work Warhol based, in his signature style, on Lynn Goldsmith's photograph of Prince, the iconic musician and performer.<sup>5</sup> After the Andy Warhol Foundation ("AWF") prevailed in the district court,<sup>6</sup> the Second Circuit reversed, rejecting the claim of fair use.<sup>7</sup> In its petition for certiorari, AWF raised only a single question: whether the Second Circuit erred in holding that

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1. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
  2. *See infra* note 35.
  3. *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183 (2021).
  4. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (2023).
  5. Warhol created sixteen images in what came to be known as the "Prince Series." Only the licensing of one of these works (the "Orange Prince") to the publisher Condé Nast for a magazine cover was at issue before the Court. *Id.* at 1269, 1278 n.9.
  6. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019), *rev'd and remanded*, 992 F.3d 99 (2d Cir. 2021), *rev'd in part, vacated in part sub nom.* *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), and *aff'd sub nom.* *Warhol*, 143 S. Ct. 1258.
  7. *Warhol*, 11 F.4th 26.

the first statutory fair-use factor prescribed by section 107 of the 1976 Copyright Act<sup>8</sup> favored Goldsmith.<sup>9</sup>

The Supreme Court affirmed the Second Circuit's ruling in a 7–2 decision, focusing its holding on the potential competition between Warhol's work and Goldsmith's photograph and downplaying Warhol's aesthetic efforts and new message. Justice Sonia Sotomayor's majority opinion thus diverged from the *Campbell* Court's previous focus on the transformative nature of the content of the secondary work.<sup>10</sup>

Some commentators—and Justice Elena Kagan's stinging, eloquent dissent<sup>11</sup>—have suggested the majority decision imposes changes that will constrain fair-use rights that were previously well established.<sup>12</sup> But there are

8. Section 107 provides as follows:

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

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

9. *Warhol*, 143 S. Ct. at 1266, 1272–73. AWF's strategic decision not to address the other fair-use factors and the Court's certification of this single issue, eschewing a full fair-use analysis, will likely generate substantial debate and litigation for years to come. Another impact of AWF's waiver is the potential application of the Second Circuit decision favoring Goldsmith by lower courts in their consideration of the second through fourth factors. *See infra* notes 150, 157.
10. While it affirmed the decision below, the Court pointedly did not adopt the Second Circuit's approach, which required a court to assess transformativeness by comparing the original and second works side-by-side to ascertain whether the second work impermissibly retains “the essential elements of its source material” without “comment[ing] on or relat[ing] back to the original.” *Warhol*, 11 F.4th at 41–42.
11. In her dissent, Justice Kagan criticized the majority's failure to recognize the differences between the photograph and Warhol's work and warned that the majority's pinched reading of fair use “will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge.” *Warhol*, 143 S. Ct. at 1312 (Kagan, J., dissenting).
12. Some of the initial reactions applauding the result exaggerate its scope, overlooking the Court's explicit direction that the decision was limited to AWF's commercial licensing. *See infra* notes 14–18. For example, the General Counsel for the National Press

compelling reasons to conclude that the decision should not unduly impact documentary film uses of archival content. First, the decision addresses only a single factor of the four-factor fair-use analysis, as emphasized in the majority's efforts to circumscribe the holding and in Justice Neil Gorsuch's concurrence (joined by Justice Ketanji Brown Jackson). In contrast, a plenary analysis will generally favor documentarians' use of archival materials.<sup>13</sup>

Second, the Court limited its holding solely to competitive commercial licensing of the Warhol image, not the creation of the secondary work or its use in other contexts, even potentially different commercial uses.<sup>14</sup> As Justice Gorsuch concluded:

Before us, Ms. Goldsmith challenges only the Foundation's effort to use the portrait as a commercial substitute for her own protected photograph in sales to magazines looking for images of Prince to accompany articles about the musician. And our only point today is that, *while the Foundation may often have a fair-use defense for Mr. Warhol's work, that does not mean it always will.*<sup>15</sup>

Accordingly, the Court "expresse[d] no opinion" on the creation, display or other uses of the Warhol work.<sup>16</sup> However, Justice Gorsuch offered that hanging Warhol's image of Prince in a nonprofit museum or publishing it in a for-profit book commenting on 20th-century art "might well point to fair use."<sup>17</sup> The majority also suggested the use of the image for educational purposes might be fair.<sup>18</sup>

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Photographers Association reacted to the decision by stating, "[h]opefully this opinion will now cause those who believe that images are free for the taking to reconsider their position and seek to obtain permission from the photographer, along with a proper license, credit, and fair compensation." Jaron Schneider, *Supreme Court Rules Andy Warhol's Prince Art Is Copyright Infringement*, PETAPIXEL (May 18, 2023), <https://petapixel.com/2023/05/18/supreme-court-rules-andy-warhols-prince-art-is-copyright-infringement> [<https://perma.cc/LJQ8-GGZY>]. The CEO of the Recording Industry Association of America said: "We hope those who have relied on distorted – and now discredited – claims of 'transformative use' . . . will revisit their practices in light of this important ruling." Dylan Smith, *Music Industry Applauds Supreme Court Ruling in Prince Artwork Case — Emphasizing the Potential Implications for AI*, DIGITAL MUSIC NEWS (May 18, 2023), <https://www.digitalmusicnews.com/2023/05/18/music-industry-prince-artwork-supreme-court-opinion> [<https://perma.cc/2HV2-A6HY>].

13. See *infra* Part II.

14. The Court emphasized its ruling was only about the "AWF's commercial licensing of Orange Prince to Condé Nast," the specific use "alleged to be infringing." *Warhol*, 143 S. Ct. at 1278. Goldsmith waived any claims regarding other uses of Warhol's Prince Series. Notably, Goldsmith did not sue Condé Nast, so there is no attention given to whether the magazine's publication constituted a fair use.

15. *Id.* at 1291 (Gorsuch, J., concurring) (emphasis added).

16. *Id.* at 1278.

17. *Id.* at 1291.

18. See *id.* at 1278 n.10.

Third, *Warhol* concerned artworks, which are distinctly different in kind from documentary films. Commercial licensing of Warhol's appropriation art raises concerns about market competition between the copyrighted and secondary works that are not typically present in documentary films.<sup>19</sup> Like alternative uses of Warhol's work that the Court suggested could be fair use, documentary films typically use archival content to achieve the purposes specified in section 107's preamble: criticism, comment, news reporting, scholarship, and research.<sup>20</sup> Documentaries do not threaten to supersede or supplant the third-party materials they incorporate, the harm the majority identified in *Warhol*.<sup>21</sup>

Finally, the *Google/Oracle* decision emphasized that a fair-use analysis should "take into account the public benefits the copying will likely produce."<sup>22</sup> This principle flows from First Amendment protections that inhere in the fair-use doctrine and are reflected in the preamble examples of favored works. The *Warhol* Court reaffirmed its prior holding in *Google/Oracle*, which found Google's use of a competitor's software code to be fair use, due, in large part, to the public benefit of Google's use. Since fact-oriented works like documentaries serve the public's "interest in the free flow of ideas and information"<sup>23</sup> in addi-

19. We do not contend that cases treating art, parody, technology and other secondary works cannot inform a court's conclusions about a documentary. But fair-use decisions must be sensitive to context. As Justice Anthony Kennedy explained in his concurring opinion in *Campbell*, Section 107 provides "only general guidance"; the common-law method of applying the four-factor test dictates that "rules will emerge from the course of decisions" for different categories of works. Documentary fair-use cases should, as Justice Kennedy defined the Court's holding for parodies, apply "principles [that] are . . . discernible to define the fair use exception" for documentaries and eschew rationales that make sense for other categories but are wholly inappropriate to a documentary use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 596–97 (1994) (Kennedy, J., concurring).
20. The *Warhol* majority acknowledged these specified purposes weigh in the second user's favor. *Warhol*, 143 S. Ct. at 1274. This has long been the prevailing reading of the statutory intent. *E.g.*, *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 944 (4th Cir. 2013), *as amended* (Jan. 14, 2014); *see also* *Brown v. Netflix, Inc.*, 855 F. App'x. 61, 62–63 (2d Cir. 2021) (documentary video of burlesque song performance "fits the description of uses described in section 107" entitling it to "a strong presumption that factor one favors the defendant"); *cf.* *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (in connection with a print biography of author Richard Wright, finding there exists "a strong presumption that factor one favors the [second user] if the allegedly infringing work fits the description of uses described in section 107").
21. "The central question . . . is whether the new work merely supersede[s] the objects of the original creation . . . supplanting the original, or instead adds something new, with a further purpose or different character . . . . In that way, the first factor relates to the problem of substitution – copyright's *bête noire*." *Warhol*, 143 S. Ct. at 1274 (internal quotations and citations omitted).
22. *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183, 1206 (2021).
23. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *see also Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (copyright law

tion to “copyright’s concern for the creative production of new expression,”<sup>24</sup> their creators should continue to be receive considerable latitude to quote or exhibit content from copyrighted works.<sup>25</sup>

## I. THE CLOSE NEXUS BETWEEN DOCUMENTARIES AND THE PUBLIC INTEREST WARRANTS BROAD FAIR USE LATITUDE

### A. *Documentarians’ Need for Fair Use*

Since the passage of the 1976 Copyright Act, documentaries have graduated from a niche, sometimes-nerdy film subclass into a widely popular genre, to the point that no community seems to lack for programming responsive to its interests. Documentary filmmakers explore topics of public importance, often instructing on their historical, political, or cultural context and offering insights that were not available when the covered events were occurring.<sup>26</sup> Documentaries also cover little-known stories and provide access to cultures, communities and viewpoints that are underrepresented in other media. The range is truly vast: filmmakers have unpacked the stories of everything from the phenomenon of domino artistry to the American Psychiatric Association’s 1973 decision to remove homosexuality from its authoritative Diagnostic and Statistical Manual of Mental Disorders to the theory that an English nobleman named Edwin de Vere was the playwright known as William Shakespeare,<sup>27</sup> not to mention biographies of countless heroes, villains, and celebrities, historical and contemporary.<sup>28</sup>

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was intended by the Framers “to be the engine of free expression”).

24. *Google/Oracle*, 141 S. Ct. at 1206.
25. See *Golan v. Holder*, 565 U.S. 302, 324 (2012) (citing fair use’s role in “the creation and spread of knowledge and learning”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (discussing the “profound national commitment” to “uninhibited, robust and wide-open” discussion of public issues).
26. *E.g.*, *ABACUS: SMALL ENOUGH TO JAIL* (WGBH Educational Foundation and Abacus Film LLC 2016) (directed by Steve James) (detailing the only criminal prosecution of a financial institution in connection with the 2008 financial crash); *FREE CHOL SOO LEE* (Chol Soo Lee Documentary LLC 2022) (directed by Julie Ha and Eugene Yi) (the life story of a Korean immigrant wrongfully convicted of murder); *PROCESSION* (4th Row Films et al. 2021) (directed by Robert Greene) (detailing the battle for justice of a group of survivors of sexual abuse by Catholic priests).
27. *LILY TOPPLES THE WORLD* (Wheelhouse Creative Inc. 2021) (directed by Jeremy Workman); *CURED* (Story Center Films, LLC and Singer & Deschamps Productions, Inc. 2020) (directed by Bennett Singer and Patrick Sammon); *NOTHING IS TRUER THAN TRUTH* (Controversy Films LLC 2019) (directed by Cheryl Eagan-Donovan).
28. *E.g.*, *I AM NOT YOUR NEGRO* (Velvet Film, Inc. et al. 2016) (directed by Raoul Peck) (author James Baldwin); *WON’T YOU BE MY NEIGHBOR* (Tremolo Productions 2018) (directed by Morgan Neville) (Fred (Mr.) Rogers); *ERNIE & JOE: CRISIS COPS* (E&J Film LLC 2019) (directed by Jenifer McShane) (two Texas police officers helping to change police response to mental health calls).

There are several reasons for documentaries' increasing ubiquity. For one, advances in filming and editing equipment technology have enabled individuals to enter what was once the domain of well-funded studios. Technology has also broadened the audience for documentaries. Ever-increasing portions of the population take in the world through audiovisual works accessible 24/7 on internet streaming sites, social media platforms, and mobile devices. These developments coincide with the decline in traditional news sources, creating opportunity and demand for new purveyors of stories that might otherwise be left untold.

An additional, key reason for the explosive growth of documentaries has been the copyright fair-use doctrine. Notwithstanding the heightened respect documentary filmmakers have garnered, most have straitened budgets, often derived from a patchwork of sources: grants, crowd-sourcing and personal networking, the filmmakers' day-job salaries, sweat equity, and (if they are lucky) advance sales. Third-party copyrighted material is an important element of many documentaries, but using pre-existing material with permission is oftentimes not practicable for a range of reasons.

Sometimes content owners will not license their works for any price, such as when they disapprove (or likely would, if asked) of the filmmakers' point of view.<sup>29</sup> Others make permission subject to overly burdensome conditions, demanding content restrictions,<sup>30</sup> or insisting that no edits be made in an original sequence, so that the filmmaker must pay for and/or incorporate repetitive or inapt material in order to use the bits she asked to license.<sup>31</sup> Another problem filmmakers confront is that some copyright owners are impossible to communicate with or even identify.<sup>32</sup>

Sometimes the price demanded is simply unaffordable, either on its own or when the cumulative archival uses are added up.<sup>33</sup> In the context of a Rich-

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29. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (noting “the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions”); see also *Katz v. Google Inc.*, 802 F.3d 1178 (11th Cir. 2015) (landlord brought infringement suit to prevent tenant from posting unflattering photograph of him on internet blog criticizing his business practices); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004) (cult sued to block publication of defendant’s critical reports that quoted the cult’s training manual).
  30. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (owner of rights to *Gone With the Wind* placed restrictions on potential derivative uses, forbidding references to homosexuality and miscegenation).
  31. Some content providers also impose minimum content lengths for licenses: for example, some news networks will not license fewer than 15 or 30 seconds; some movie and music owners require that excerpts be accounted separately with one-minute minimums for each one.
  32. See generally *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183, 1195 (2021) (reciting some of copyright’s “negative features”).
  33. See *Warhol*, 143 S. Ct. at 1300 (“[S]ometimes copyright holders charge an out-of-range price for licenses”) (Kagan, J., dissenting); see also Anthony Falzone & Jennifer

ard Prince painting or Andy Warhol silkscreen that reworks a different, single creative work, Justice Sotomayor's tart comment in *Warhol* seems fair enough: "It will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work."<sup>34</sup> However, given the micro budgets of many documentaries, their treatment of historical, sociological, or cultural subjects would be far less informative and impactful without fair use, and inevitably there will be worthwhile projects that would be impossible to complete.<sup>35</sup>

### B. *Fair Use and the Public Interest*

From its inception, fair use was historically understood to be a bulwark, sustained by both Congress and the courts, to protect, in the first instance, the public good, balancing that interest against the private interests of copyright owners. Construing the Copyright Act of 1909 and particularly "the gloss of 'fair use,' which the courts have put upon the words of [that] statute," the court in *Williams & Wilkins Co. v. United States* stated:

The House committee which recommended the 1909 Act said that copyright was "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public." The Supreme Court has stated that "The copyright

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Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC'Y U.S.A. 337, 340 (2010). Unlike in *Warhol*, which involved one photo, documentary films often use many pieces of archival content. The licensing costs alone for those works would overwhelm many documentary budgets, to which the filmmaker must add the expense of production staff, licensing agents and attorneys to handle the negotiation and execution of licenses.

34. *Warhol*, 143 S. Ct. at 1286. Justice Sotomayor was referring only to a share of the \$10,000 licensing fee AWF received from the magazine publisher. Despite the Court's stated solicitude for the plaintiff-photographer's financial interests, the decision fails to address the presumably millions of dollars associated with another "reuse" of the Prince silkscreens: the sale to private collectors and museums.
35. Without stable jurisprudence about fair use, documentary filmmakers who avail themselves of the doctrine may find it impossible to secure distribution for their works. Most distributors, broadcasters and platforms require that a filmmaker provide them coverage as additional insureds on an "errors and omissions" insurance policy having no exclusions, including for any fair-used content. The consistent body of case law relating to documentary films that has developed over the past several decades has enabled legal counsel to provide opinion letters to insurance companies that lead to positive coverage decisions. See Rebecca Tushnet, *Fair Use's Unfinished Business*, 15 CHI.-KENT J. INTELL. PROP. 399, 408 (2016) ("[F]air use has in fact developed over time to be broadly predictable. Scholars have identified categories of fair uses that provide reasonable certainty, and professional bodies have adopted best practices in fair use to guide practitioners . . .; and insurers now accept fair use determinations in documentary filmmaking . . ."); see generally Neil W. Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (presenting data showing that, rather than being unpredictable, a discernible order had developed in fair-use law post-*Campbell*, including an increase in second-user win rates correlating with the courts' embrace of the *Campbell* transformative-use paradigm).

law, like the patent statutes, makes reward to the owner a secondary consideration.”<sup>36</sup>

This same view of the importance of the public interest was reiterated by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, where it defined the role of copyright law as reflecting “a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad availability of literature, music, and the other arts.”<sup>37</sup>

Justice Ruth Bader Ginsburg explicitly emphasized that fair use has First Amendment underpinnings in *Golan v. Holder*, identifying fair use as one of two “‘traditional contours’ of copyright protection,” along with the idea/expression dichotomy:

Both are recognized in our jurisprudence as “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); see *Harper & Row*, 471 U.S. at 560 (First Amendment protections are “embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas,” and in the “latitude for scholarship and comment” safeguarded by the fair use defense).<sup>38</sup>

In *Eldred v. Ashcroft*, also authored by Justice Ginsburg, fair use was described as affording “considerable latitude for scholarship and comment.”<sup>39</sup>

The Court has continuously advanced the view that the fair-use doctrine and the First Amendment work together to protect “the creation and spread of knowledge and learning” — or, in the words of the Constitution’s Copyright and Patent Clause, “promote the progress of Science and useful Arts.”<sup>40</sup> Indeed, the Court has emphasized the importance of “breathing space” for new expression in both copyright and free-speech decisions.<sup>41</sup> On First Amendment grounds, the Court has struck down regulations that would prevent the public from being exposed to diverse ideas and new information, including cases involving

36. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff’d per curiam*, 420 U.S. 376 (1975) (citations omitted). The revamped Copyright Act enacted by Congress in 1976 contains eleven statutory exceptions to section 106’s enumeration of copyright owners’ exclusive rights—and fair use was inserted at the head of the line.

37. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 431–32 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

38. *Golan v. Holder*, 565 U.S. 302, 328 (2012).

39. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (emphasis added; internal quote marks omitted).

40. U.S. CONST. art. I, § 8. See *Golan*, 565 U.S. at 324 (internal quote marks omitted).

41. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (citing the “breathing space” needed for freedom of expression to survive) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

political advertising expenditures,<sup>42</sup> commercial speech,<sup>43</sup> and access to court proceedings.<sup>44</sup> And the Court similarly advanced the public interest in finding fair use in *Campbell*, where the defendant's song added "something new,"<sup>45</sup> and in *Google/Oracle*, where a new platform for programmers was "consistent with that creative 'progress' that is the basic constitutional objective of copyright itself."<sup>46</sup>

The Second Circuit aptly captured the essence of the free-speech/public-benefit element in fair-use analysis in *Bill Graham Archives LLC v. Dorling Kindersley Limited*:

The ultimate test of fair use is whether the copyright law's goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than preventing it.<sup>47</sup>

The same conviction is reflected in *Google/Oracle*, where the Court, in its consideration of the fourth fair-use factor, stated, "[w]e must take into account the public benefits the copying will produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression?"<sup>48</sup>

Section 107's preamble embraces fair use's status as a First Amendment accommodation. As the *Warhol* Court acknowledged, the purposes listed in the preamble "reflect 'the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses, and so guide the first-factor inquiry.'"<sup>49</sup> Artworks (except where they have a "plus factor" such as parody or other

42. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) ("the First Amendment goes beyond the protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw").
43. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976), where the Court struck down a Virginia statute that prohibited pharmacies from advertising prescription drug on First Amendment grounds, to enhance the consumer interest "in the free flow of commercial information."
44. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that the First Amendment protects the public's right to receive information about criminal trials).
45. *Campbell*, 510 U.S. at 579.
46. *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183, 1203 (2021) (internal quotation marks omitted).
47. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (quoting *Castle Rock Ent., Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998)). The 11th Circuit also recognized the First Amendment principles at the core of the fair-use doctrine in its decision denying a preliminary injunction against a parody of the classic novel *Gone with the Wind*. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001).
48. *Google/Oracle*, 141 S. Ct. at 1206. Justice Breyer also approved of Judge Pierre Leval's formulation of the critical question in considering the first factor: "asking whether the copier's use 'fulfill[s] the objective of copyright law to stimulate creativity for public illumination.'" *Id.* at 1203 (emphasis added) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).
49. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1274 (2023).

targeted commentary on the original work) do not come within the favored purposes of “criticism, comment, news reporting, teaching . . . , scholarship, or research.”<sup>50</sup>

Most documentaries, in contrast, often fulfill several of these purposes.<sup>51</sup> They are among the works that reside at the very core of the First Amendment, protecting and enhancing the public interest in the free flow of information and “encouraging open debate and the free exchange of ideas.”<sup>52</sup> Therefore, when conducting the four-factor analysis in connection with documentaries and other works in the favored categories, courts have an affirmative, constitutionally-based *duty* “to construe [fair use] to accommodate First Amendment concerns.”<sup>53</sup>

Despite its failure to acknowledge the close nexus between fair use and free speech, the *Warhol* majority did counsel that the first-factor analysis includes weighing the justification for the secondary use—where this constitutional consideration certainly arises.<sup>54</sup> This was well expressed by the Fourth Circuit:

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50. Perhaps the (unarticulated) conclusion that the Prince silkscreen did not come within the preamble is the reason that the *Warhol* majority, disappointingly, fails to reference fair use’s role as a guarantor of First Amendment rights, or even to cite any of the precedents, *Wilkins* (affirmed by the Court), *Eldred* and *Golan*, mentioned above. However, the Court does list fair use, “including all its factors,” as one of several “escape valves” in copyright law to “provide . . . space for artists and other creators to use existing materials to make valuable new works.” *Id.* at 1287.
51. *See, e.g.,* *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494–95 (S.D.N.Y. 1996) (biographical documentary “undeniably constitutes a combination of comment, criticism, scholarship and research”); *Hofheinz v. Discovery Commc’ns, Inc.*, No. 00 CIV. 3802 (HB), 2001 WL 1111970, at \*3 (S.D.N.Y. Sept. 20, 2001) (documentary was entitled to a strong presumption under factor one, since it fell within several of the categories described in section 107 preamble).
52. *See SunTrust Bank*, 268 F.3d at 1264.
53. *See Eldred v. Ashcroft*, 537 U.S. 186, 221 n.24 (2003). The same deference to the First Amendment is required when addressing the fact/expression dichotomy under the second and third factors (discussed *infra*), due to its status as another of copyright’s “internal safeguards.” *Id.*
54. Justice Blackmun acknowledged this public-interest justification in his dissent from the Supreme Court’s finding of fair use in *Sony Corp.*: “There are situations, nevertheless, in which strict enforcement of [the copyright] monopoly would inhibit the very ‘Progress of Science and Useful Arts’ that copyright is intended to promote.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting). Addressing a hypothetical case of a scholar who is unable to secure permission to utilize a prior work, Justice Blackmun explained:

When the scholar foregoes the use of the prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar’s work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author’s expense—to permit the second author to make limited use of the first author’s work for the public good.

Fair use, then, is crucial to the exchange of opinions and ideas. It protects filmmakers and documentarians from the inevitable chilling effects of allowing an artist too much control over the dissemination of his or her work for historical purposes. Copyright law has the potential to constrict speech, and fair use serves as a necessary “First Amendment safeguard[ ]” against this danger. The case-by-case nature of the inquiry offers the advantage of flexibility, but it also lacks predictability and clarity, which is often an impediment to free expression. As a result, fair use must give speakers some reasonable leeway at the margins. As the Supreme Court has noted, the “considerable latitude for scholarship and comment” secured by the fair use doctrine protects the core value of free expression from excessive litigation and undue restriction.<sup>55</sup>

The relevance of the public interest was also recognized in connection with documentary footage in *Monster Communications v. Turner Broadcasting System*.<sup>56</sup> At issue was a television biography of Muhammad Ali that incorporated footage clips owned by the producer of an as-yet publicly unreleased documentary about Ali’s “Rumble in the Jungle” prize fight against George Foreman. Holding that the television network’s use was fair, the court stated:

Only a finite number of photographers capture images of a given historical event. Hence, without denying for a moment the creativity inherent in the film clips of actual events relating to the Zaire fight, the degree of protection that properly may be afforded to them must take into account that too narrow a view of the fair use defense could materially undermine the ability of the Ali biographers to tell, in motion picture or perhaps still photographic form, an important part of his story.<sup>57</sup>

The foregoing precedents lose none of their potency post-*Warhol*. Consonant with fair use’s embodiment of First Amendment accommodations,

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*Id.* at 477–78.

55. *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 944 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (citations omitted) (finding fair use of a copyrighted logo in a documentary). Other circuits have equally reflected the need for this solicitude. *E.g.*, *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 83–84 (2d Cir. 2014) (re-transmission by commercial news outlet to its subscribers of a corporation’s invitation-only earnings presentation to investment professionals) (Bloomberg’s “overriding purpose here was not ‘to scoop[ ]’ Swatch or ‘supplant the copyright holder’s commercial valuable rights of first publication’ but rather simply to deliver newsworthy financial information to investors and analysts. That kind of activity, *whose protection lies at the core of the First Amendment*, would be crippled if the news media and similar organizations were limited to sources of information that authorize disclosure”) (citations omitted; emphasis supplied); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (incorporating Barbie dolls in parodic artworks; “because parody is a form of social and literary criticism, it has socially significant value as free speech under the First Amendment”) (internal quotes omitted).

56. *Monster Commc’ns*, 935 F. Supp. 490.

57. *Id.* at 494.

courts should remain “more solicitous of the fair use defense in works, which though intended to be profitable, aspire [ ] to serve broader public purposes.”<sup>58</sup>

## II. DOCUMENTARY FILMS WILL TYPICALLY SATISFY THE FOUR FAIR-USE FACTORS

Section 107 specifically requires that courts consider all four factors in evaluating fair-use claims (in addition to other factors that may inhere in a particular case, since they are non-exclusive).<sup>59</sup> Over the years, this holistic analysis has repeatedly supported the application of fair use by documentarians.<sup>60</sup>

### A. *The First Factor: “Transformativeness” Transformed*

In addressing the single factor upon which *Warhol* rules, it is helpful to revisit the 1994 *Campbell* decision’s introduction of the term “transformativeness” in the first-factor analysis that worked a sea change in fair-use jurisprudence:

The central purpose of [the first-factor] investigation is to see whether the new work merely supersedes the objects of the original creation (“supplanting the original”), or instead adds something new, *with a further purpose or different character*, altering the first with *new expression, meaning, or message*; it asks, in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.<sup>61</sup>

The underscored words in this passage were not merely an exercise in repetition, but were intended to prescribe breadth—a multitude of ways!—in which a second user can transform the original, including supplying a new

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58. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993).

59. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1287 (2023) (“The Court has cautioned that the four statutory fair use factors may not ‘be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.’”) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

60. Based upon this body of case law, filmmakers, attorneys and scholars published a set of guidelines in 2005 advising:

[Documentary uses] usually satisfy the ‘transformativeness’ standard easily, because copyrighted material is typically used in a context different from that in which it originally appeared. Likewise, documentarians typically quote only short and isolated portions of copyrighted works. Thus, judges generally have honored documentarians’ claims of fair use in the rare instances where they have been challenged in court.

CTR. FOR MEDIA AND SOC. IMPACT, DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE 2 (2005).

61. *Campbell*, 510 U.S. at 579 (emphasis added) (citations omitted).

message.<sup>62</sup> Notably, the Court's plain language focused on the manner of the use in the content of the secondary work.

In *Warhol*, the Court expressed discomfort with the potential breadth of *Campbell's* transformativeness test, particularly in the context of derivative uses:<sup>63</sup>

*Campbell* cannot be read to mean that § 107(1) weighs in favor of any use that adds some new expression, meaning or message.

Otherwise, “transformative use” would swallow the copyright owner’s exclusive right to prepare derivative works. Many derivative works, including musical arrangements, film and stage adaptations, sequels, spinoffs and others that “recast, transfor[m] or adap[t]” the original, add new expression, meaning or message, or provide new information, new aesthetics, new insights and understandings.<sup>64</sup>

Accordingly, the Court concluded, “although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, *without more*, dispositive of the first factor,”<sup>65</sup> in order to ensure that a work claimed to be “transformative” is not a derivative-work wolf in a first-factor sheep’s clothing.<sup>66</sup>

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62. See Leval, *supra* note 48, at 1111 (“Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in order to defend or rebut it”).
63. Section 106 of the Copyright Act sets out a copyright owner’s exclusive rights in connection with copyrighted works, including the right “to prepare derivative works based on the copyrighted work.” 17 U.S.C. § 106(2). The Act defines a derivative work as one that is “based upon” and “recast[s], transform[s], or adapt[s]” a pre-existing work or works. 17 U.S.C. § 101. The statute’s examples are “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement [and] condensation.” *Id.*
64. *Warhol*, 143 S. Ct. at 1282 (citation omitted). The concern about the difficulty of distinguishing between transformative and derivative uses is surprising. There is ample case law finding uses to be unauthorized derivative works that do not have fair-use protection. See, e.g., *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998) (book describing “Seinfeld” sitcom storylines not a fair use; affirming a decision by U.S. District Judge Sotomayor); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (same; book written in rhyming style of “The Cat in the Hat” satirizing the events of the O.J. Simpson murder trial.); see generally R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 476 (2008) (concluding, after a review of circuit court copyright cases involving a potential overlap, that “circuit courts have not used *Campbell's* view that transformative uses are more entitled to fair use to contract the scope of the copyright owner’s derivative work right”).
65. *Warhol*, 143 S. Ct. at 1273 (emphasis added).
66. One wishes that when the justices were conferencing over *Campbell*, they had hashed out this nomenclature problem with Justice Souter, since he might then have chosen another term for the fair-use context, possibly even “justification.”

Thus, after 30 years in which case law has put flesh on the bones of the *Campbell* approach “across a wide range of copyrightable material,”<sup>67</sup> *Warhol* has, in the context of appropriation artworks, announced modifications in the first-factor analysis. It redirects the focus from whether the secondary’s work’s content is transformative to whether its use is for a transformative (or different) purpose.<sup>68</sup>

This in itself is a major shift, although one that should not impede documentaries for reasons discussed further below. But trying to parse the Court’s discussion of the need for a “sufficiently distinct purpose and character,” or “a manifestly different purpose” from the original work,<sup>69</sup> is challenging. After acknowledging section 107’s preamble examples as “easily understood” since they serve a “distinct end” that does not supersede or supplant the first work,<sup>70</sup> the Court muddied the waters, stating that a difference in purpose is often a “matter of degree.”<sup>71</sup> So, apparently, further consideration may be required.

That further consideration appears to turn in large part on the “justification” for the secondary use:

In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, . . . without diminishing the incentive to create. . . . A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide the public with a substantial substitute for matter protected by the [copyright owner’s] interests in the original wor[k] or derivatives of it . . . .

If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.<sup>72</sup>

What guidance does the Court give concerning what will qualify as acceptable justification? Very little:

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67. *Warhol*, 143 S. Ct. at 1274.

68. *Id.* at 1277 (“The fair use provision, and the first factor in particular, requires an analysis of the specific ‘use’ of a copyrighted work that is alleged to be ‘an infringement’”) (quoting 17 U.S.C. § 107).

69. *Id.* at 1273–74.

70. *Id.* at 1274.

71. *Id.* at 1275.

72. *Id.* at 1277 (citations and internal quotation marks omitted). Justification is apparently the ultimate first-factor litmus test. Importantly, the Court recognizes that a justification may exist even in circumstances where the secondary work strikes out on both the nature of the purpose and the commerciality of the use. It concluded that AWF’s purpose for licensing the *Warhol* silkscreen to Condé Nast for a magazine publication was both “highly commercial” and similar to Goldsmith’s “typical use.” Therefore, it held, AWF was required to provide “a particularly compelling justification,” which it found AWF had not even attempted to do: “AWF offers no independent justification, let alone a compelling one, for copying the photograph, other than to convey a new meaning or message.” *Id.* at 1285.

[A] use may be justified because copyright is reasonably necessary to achieve the user's new purpose. Parody, for example, needs to mimic an original to make its point. Similarly, other commentary or criticism that targets an original work may have compelling reason to "conjure up" the original by borrowing from it. An independent justification like this is particularly relevant to assessing fair use where an original work and copyright use share the same or highly similar purposes, or where wide dissemination of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it. . . .<sup>73</sup>

The Court concludes, "[t]he question [is] how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner."<sup>74</sup> The Court's primary examples of fair use are ones that target the original work.<sup>75</sup> As discussed, this seems to derive from an unjustified über-protectiveness of an owner's derivative-works right.<sup>76</sup>

Sometimes pre-existing copyrighted works are the target of a documentary film's commentary. In *Lennon v. Premise Media Corp.*,<sup>77</sup> the filmmaker included the performance of a line from John Lennon's song "Imagine" and critiqued Lennon's "secular utopian vision." However, documentary commentary frequently is not critical, but nonetheless is educational. For example, in *Hofheinz v. Discovery Communications, Inc.*,<sup>78</sup> movie trailer clips from a 1957 movie were used in an hour-long program about popular fascination with the idea of alien visitations, montaged with commentary "about the alien visitation genre [that] would be of interest to any cinema buff, cultural historian or science fiction aficionado."<sup>79</sup>

73. *Id.* at 1276–77 (emphasis added).

74. *Id.* at 1277. Justice Sotomayor seemed unsure what should suffice. She initially taxed AWF for not providing a "particularly compelling justification"; later referred only to "a compelling justification"; and in her conclusion reverted to defining AWF's failure as involving just a "persuasive justification." *Id.* at 1265, 1282, 1287.

75. *Id.* at 1283, 1285 n.21, 1275 n.5. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (two popular songs); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (two novels); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (two photos).

76. Even after 30 pages of argument, derivative works consume the majority in its closing. See *Warhol*, 143 S. Ct. at 1287. It charges that the dissent is "wav[ing] away the statute's concern for derivative works." *Id.* But its analysis misconstrues the relationship between derivative works and fair use. All of the exclusive rights conferred by copyright are expressly limited by fair use. 17 U.S.C. § 107. There is no statutory or principled basis for suggesting that an author's right to create derivative works should receive greater weight than the exclusive rights to reproduce, display, distribute, or perform. See 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:21 (2007).

77. *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322–23 (S.D.N.Y. 2008).

78. *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 CIV. 3802 (HB), 2001 WL 1111970 (S.D.N.Y. Sept. 20, 2001).

79. *Id.* at \*2.

But “targeting” is not the only distinct purpose that should satisfy the first factor under *Warhol*.<sup>80</sup> Documentaries use archival materials in a number of other ways that do not threaten to supersede or supplant the original works. Very often, the purpose of a documentarian’s use of a pre-existing work is to enhance the film’s treatment of a larger or independent subject, not the borrowed work itself. For example, in *Brown v. Netflix*, the use of a children’s song in a documentary film was fair because the performance was part of the film’s cultural commentary on “gender, sexuality and the artistic process.”<sup>81</sup> The *Warhol* Court recognized that such uses are within the purview of fair use: it described Warhol’s famous Campbell’s Soup Cans as using the copyrighted logo “for an artistic *commentary on consumerism*,” which was a non-superseding, “completely different purpose” from advertising soup.<sup>82</sup>

Other non-targeted content includes written narratives, photographs, fictional and documentary footage,<sup>83</sup> music, and a host of other content that can be vital for viewers to understand accounts of people, places, things, and events they may remember imperfectly, or have never witnessed or considered through the filmmaker’s contextual lens. So, in *National Center for Jewish Film v. Riverside Films LLC*, clips from 1930s fictional movies that were staged in a Polish town were used to convey nineteenth-century, Eastern-European village life in a documentary about the Jewish author Sholem Aleichem. Though the fictional movies were not themselves commented on, the court found fair use because the documentary “aims to teach and enlighten its audience about Aleichem’s work and Jewish history.”<sup>84</sup>

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80. See *Warhol*, 143 S. Ct. at 1277, 1278 n.10, 1291, for references in the majority and concurring opinions to other potential uses of the Prince Series prints that might be fair. Each one fits the preamble categories of section 107; see generally Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 115–16 (2014) (discussing the role of fair use in providing social benefit of enhanced discussion of public matters and excavating knowledge from copyrighted works).
81. *Brown v. Netflix, Inc.*, 855 F. App’x 61, 63 (2d Cir. 2021). In *Brown*, the court held that the documentary character of the film about the burlesque art form and its resurgence in Portland, Oregon, fit within the uses identified by section 107. While the use of the song was not targeted, it was “consistent with the Film’s nature as a documentary providing commentary and criticism. Accordingly, the Film is entitled to a presumption in favor of fair use with regard to factor one.” *Id.*
82. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1281 (2023) (emphasis added).
83. Documentary filmmakers who rely on fair use for their projects may find their own works being incorporated in other creators’ projects. *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996) is an example of the fair use’s application permitting such borrowing.
84. *Nat’l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12-cv-00044, 2012 WL 4052111, at \*3 (C.D. Cal. Sept. 14, 2012); see *Red Label Music Publ’g Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 984 (N.D. Ill. 2019) (use of music video clips to comment on a sports phenomenon provides historical commentary distinctly different than the original purpose to entertain and raise money for charity); see also *Marano v. Metro. Museum*

Many documentary uses of a photograph also may not come within *Warhol's* narrow examples (parody and targeted commentary) but should meet *Warhol's* justification test of being “reasonably necessary to achieve the user’s new purpose.”<sup>85</sup> The documentary *RBG*, released when its subject, Supreme Court Justice Ruth Bader Ginsburg, was in her mid-80s, explored Justice Ginsburg’s pivotal role in American jurisprudence and the formative experiences that shaped her values and her accomplishments. Among other archival content, the film contains photos showing her as she looked at different junctures in her life that are discussed: as a student; a wife and mother; a professor; a practicing attorney; and a jurist.

Unlike derivative works, the filmmakers’ purpose was certainly *not* “I can make it better.”<sup>86</sup> The on-screen appearance of these photos does not supplant the original purposes of the photographs, which likely included personal memories, family entertainment and accompaniment of spot news reporting on then-contemporary events. Rather, they enhance the knowledge and understanding of the audience, including the Justice’s young admirers (or her detractors) who might know her best (or only) as a stooped, elderly lady dozing in an oversized chair at President Obama’s State of the Union address.<sup>87</sup>

The public interest in the distribution of *RBG* and other documentaries—or, as the *Warhol* Court would have it, the justification for uses such as these—should weigh in favor of fair use.<sup>88</sup> As the Second Circuit recognized,

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of Art, 472 F. Supp. 3d 76, 84 (S.D.N.Y. 2020), *aff'd*, 844 F. Appx. 436 (2d Cir. 2021) (professional photographer’s image of rock guitarist Eddie Van Halen performing onstage used in museum online catalogue for an exhibition on rock and roll instruments, “to reference and contextualize” the historical significance of the guitar).

85. *Warhol*, 143 S. Ct. at 1276.

86. *Id.* at 1285 n.21. Documentary films are not included in the copyright statute’s examples of derivative work (“translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement [and] condensation.”). Nor did *Warhol* suggest that documentaries are “follow-on,” derivative works. See *supra* note 64.

87. There is also support for these photo uses in cases finding fair use where the purpose was to add historical perspective to biographies. See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 610 (2d Cir. 2006) (posters served as “historical artifacts graphically representing the fact of significant Grateful Dead concert events”); *SOFA Ent., Inc. v. Dodger Prods.*, 709 F.3d 1273, 1278 (9th Cir. 2013) (clip from *The Ed Sullivan Show* was a transformative use since it served as a biographical anchor marking an important point in the subject band’s career); *Arrow Prods., Ltd. v. Weinstein Co., LLC*, 44 F. Supp. 3d 359, 368 (S.D.N.Y. 2014) (in critical biographical film, the first factor favored fair use because “defendants’ use, or recreation, of the three scenes from *Deep Throat* constitutes transformative use, adding a new, critical perspective on the life of Linda Lovelace and the production of *Deep Throat*”).

88. See, e.g., *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (finding fair use in print biography of author Richard Wright, in part, because “there is a strong presumption that factor one favors the [second user] if the allegedly infringing work fits the description of uses described in section 107”); see also *Norse v. Henry Holt &*

“[c]ourts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects.”<sup>89</sup>

An additional justified, non-targeted use occurs when a documentarian incidentally captures archival material as an element of events is filming and recording, particularly in *vérité* moments. These uses may include music playing on a car radio or in a bar or dance class, artworks hanging on the walls of a room, or a line of poetry quoted by an interviewee.<sup>90</sup> As with the examples discussed earlier, these uses are distinctly different in purpose from the originals, serving to ensure the accuracy of the scene being conveyed.<sup>91</sup> Such typically fleeting or background uses present no risk of substitution for the original works.<sup>92</sup>

These various purposes should easily be found to be transformative since their contribution to public knowledge is a justification—and a powerful one—under *Warhol's* approach to the first factor. The majority quoted approvingly

Co., 847 F. Supp. 142, 145 (N.D. Cal. 1994) (unpublished letter used in print biography of author William Burroughs; “[T]he public benefits from the additional knowledge that [the biographer] provides about [Burroughs] . . . . And a biographer must, in order to be accurate, cite and quote things said by the subject and said about him by others”).

89. *Bill Graham Archives*, 448 F.3d at 609.

90. The court decision that most squarely addressed such “fortuitous captures” is *Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978), which upheld the inclusion in a TV news report on New York City’s San Gennaro Festival of a song played by a band in the parade:

The filming and recording of the song as part of the television news report was wholly fortuitous, entirely uncomplicated by any prior intent on ABC’s part to film that particular song. The resulting news broadcast in no manner constituted a subterfuge or cover for private or commercial exploitation. Use of the song was incidental to the overall, informative purpose of the newscast.

*Id.* at 68.

91. See *CTR. FOR MEDIA AND SOC. IMPACT*, *supra* note 60, at 7 (“Fair use should protect documentary filmmakers from being forced to falsify reality. . . . Any other rule would be inconsistent with the documentary practice itself”); *cf.* *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (“the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration”).

92. When Congress was considering fair use during the 1976 revision of the Copyright Act, the House Committee on the Judiciary quoted from a 1961 Report of the Register of Copyright that included as an example “the incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.” See H.R. REP. NO. 94–1476, at 65 (1976), *cited in* *Italian Book Corp.*, 458 F. Supp. at 70–71; see also *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 949 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (uses of an NFL team logo, while not fortuitous, “were not only transformative, but also . . . fleeting, incidental, de minimis, innocuous[, and] [i]f these uses failed to qualify as fair, a host of perfectly benign and valuable expressive works would be subject to lawsuits”).

the conclusion in *Campbell* that “parody has an obvious claim to transformative value” because “*it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.*”<sup>93</sup> As the majority also acknowledged, Google’s use of Oracle’s software code in its new platform was “justified” because of the benefits the use provided to the public.<sup>94</sup>

What, then, about the other *Warhol* first-factor element, the “commercial character” of the use, which *Warhol* requires courts to “weigh[ ] against the degree to which the use has a further purpose or different character”?<sup>95</sup> Section 107 requires consideration “whether such use is of a commercial nature or is for nonprofit educational purposes,” as part of the first factor.<sup>96</sup> *Warhol* merely restates to its own liking *Campbell’s* pronouncement on the relationship between transformativeness and commerciality. That is, it has been understood that the more transformative a work (read, the stronger the justification), the less a commercial use will weigh against the second user in the first-factor analysis.<sup>97</sup> Here, as *Warhol* recasts it, the less transformative (the weaker the justification), the more a commercial use will weigh against fair use.

This verbal spin may appear meaningful in a case involving the licensing of a non-transformative work,<sup>98</sup> but it does not pertain to documentary films.

93. Andy Warhol Found. For the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1276 (2023) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)) (emphasis added).

94. *Id.* at 1278 n.8 (“[T]he use was justified in that context because ‘shared interfaces are necessary for different programs to speak to each other’ and because ‘reimplementation of interfaces is necessary if programmers are to be able to use their acquired skills’”) (quoting *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183, 1203–04 (2021)).

95. *Warhol*, 143 S. Ct. at 1276. The Court characterized AWF’s use as having an “undisputed commercial character” that “tends to weigh against a finding of fair use.” *Id.* at 1279. This commercial character, combined with the absence of justification, led to the Court’s conclusion that the first factor favored Goldsmith. *See id.* at 1276–77.

96. There can be little doubt that the unique “commercial” facts in *Warhol* intensified the Court’s focus on this sub-element. Goldsmith received a \$400 fee (and credit) for licensing the one-time use of her photograph as a “source photograph.” *Warhol* exceeded the scope of that grant by creating the Prince Series and licensing another work in the Series for the cover of a commemorative magazine issue without payment or credit to the photographer. *Id.* at 1266, 1269. While the Court did not wade into the judicial debate about the import of the second user’s good or bad faith in fair-use cases, it remains clear that unpalatable facts may influence fair-use outcomes. *Compare Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (fair use presupposes good faith and fair dealing) with *Google/Oracle*, 141 S. Ct. at 1204 (“[O]ur decision in *Campbell* expressed some skepticism about whether bad faith has any role in a fair use analysis. We find this skepticism justifiable.”).

97. *Campbell*, 510 U.S. at 515.

98. This is an example of how the nature of categories of second works can fundamentally impact a court’s case-specific analysis of the first factor. As a category, appropriation-art cases, going back to *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), and reaching an apex in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), have uniquely troubled courts

Litigants have long sought, unsuccessfully, to strip newspapers, motion picture producers, and other defendants of the protections of the First Amendment and fair use based on claims of commerciality.<sup>99</sup> But, as *Campbell* held:

If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are all generally conducted for profit in this country.” Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that “no man but a blockhead ever wrote, except for money.”<sup>100</sup>

Courts need to look at the “commercial” issue in the context of the particular category of documentary films, as *Warhol* instructs we may.<sup>101</sup> As one court described the “commercial/nonprofit dichotomy,” it:

concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work. . . .

Consistent with these principles, courts will not sustain a claimed defense of fair use when the secondary use can fairly be characterized as a form of commercial exploitation, *i.e.*, when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material. Conversely, courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest. The greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair.<sup>102</sup>

Most particular archival uses in documentaries are largely insignificant to the commercial purposes of the filmmakers. Each piece of archive in itself

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and scholars. In its first case in this arena, the Court felt the need to revise *Campbell*'s transformativeness test just two years after reaffirming it in the context of computer software in *Google/Oracle*.

99. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (rejecting the notion that speech receives lesser protection due to presentation in a commercial form); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (“That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment”; holding motion pictures to be similarly protected).

100. *Campbell*, 510 U.S. at 1174 (citations omitted).

101. *Warhol*, 143 S. Ct. at 1274 (the application of the fair-use statutory principles “requires judicial balancing, depending upon relevant circumstances”) (quoting *Google/Oracle*, 141 S. Ct. at 1197).

102. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (internal quotation marks and citations omitted).

generally constitutes only a small element of the film that is combined with other sources (both archival and original) to elucidate a subject. As the Fourth Circuit held in *Bouchat*,<sup>103</sup> the “limited nature of these uses” counsels against placing significant weight on the commercial nature of documentary films, especially in the context of the relatively small budgets and revenues that are generally associated with documentary filmmaking.<sup>104</sup>

Finally, what distinguishes documentary films from the commercial licensing purpose at issue in *Warhol* is the filmmaker’s expressive purpose. Whether a filmmaker shows her film at festivals, distributes it through a non-profit organization, signs with an educational distributor, or lands a contract with a television or cable network or a high-profile subscription streaming platform, she does so with the same purpose: to engage in “criticism, comment, teaching, scholarship, research” (from the preamble categories) and contribute to the “spread of knowledge and learning.”<sup>105</sup>

With such a distinct purpose and strong independent justification that outweigh commercial character, the first factor should in a wide range of circumstances weigh in favor of documentary uses under *Warhol*, as much as under *Campbell and Google/Oracle*.

#### B. *The Second Factor: The Central Importance of the Fact/Expression Dichotomy*

Although AWF placed its bet on the first factor exclusively and the Court agreed to consider that factor alone, an analysis of the respective purposes of the original and secondary works is not the be-all and end-all of the fair-use analysis.<sup>106</sup> In evaluating the second factor—“the nature of the copyrighted work”—courts consider “whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a

103. *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 941–42 (4th Cir. 2013), *as amended* (Jan. 14, 2014).; *see also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 83 (2d Cir. 2014) (when considering uses by engines of public discourse, courts should discount commerciality where “the link between [the filmmaker]’s commercial gain and its copying is . . . attenuated”) (quoting *American Geophysical Union*, 60 F.3d at 922).

104. A 2020 survey of documentary filmmakers found that only 21 percent of the respondents reported that their most recent film made a profit, and 42 percent said their films did not make any revenue. Caty B. Chattoo & William Harder, *The State of the Documentary Field: 2020 Study of U.S. Documentary Professionals*, CTR. FOR MEDIA AND SOC. IMPACT (2021), <https://cmsimpact.org/report/the-state-of-the-documentary-field-2020-study-of-u-s-documentary-professionals> [<https://perma.cc/QU4G-TQ7Y>].

105. *Golan v. Holder*, 565 U.S. 302, 324 (2012).

106. *Campbell* made clear that transformativeness is not “absolutely necessary” to find fair use; the findings on the other elements of the analysis may be sufficient. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). *Warhol*, similarly, stated that, where a secondary use shared substantially the same purpose and was very commercial, factor one could be found to favor fair use if there were “some other justification for copying.” *Warhol*, 143 S. Ct. at 1277.

claim of fair use where the work is factual or informational.”<sup>107</sup> The “factual” category refers to “works that are ‘essentially factual in nature’ or ‘primarily informational rather than creative.’”<sup>108</sup> Since this describes much of the archival content used in documentaries, the second factor is particularly important in evaluating those uses.

In recent years, some courts have ignored the second factor,<sup>109</sup> transporting to other contexts the Supreme Court’s pithy guidance in *Campbell* that this factor was “[not] likely to help much in separating the fair use sheep from the infringing goats in a parody case.”<sup>110</sup> However, *Campbell* did not suggest that the second factor should be written out of the fair-use analysis for all types of works.

*Google/Oracle* should trigger renewed respect for the second factor. There, in its consideration of Google’s copying of 11,500 lines of Oracle’s software code, the Court commenced its analysis with the second factor and noted, “[i]n applying [the fair use] provision, we, like other courts, have understood . . . that some factors may prove more important in some contexts than in others.”<sup>111</sup> It then held that the second factor favored Google’s use, in part, because the lines of software code copied from Oracle were “bound together with uncopyrightable ideas . . . and new creative expression”:<sup>112</sup>

“[C]opyright protection is narrower, and the corresponding application of the fair use defense greater, in the case of factual works than in the case of works of fiction or fantasy.” Similarly, courts have held that, in some circumstances, say, where copyrightable material is bound up with uncopyrightable material, copyright protection is “thin.”<sup>113</sup>

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107. *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (citation omitted); see also *Campbell*, 510 U.S. at 586 (“some works are closer to the core of intended copyright protection than others”).
108. *New Era Publ’ns Int’l, ApS v. Carol Pub. Grp.*, 904 F.2d 152, 158 (2d Cir. 1990) (permitting quotation in biography of Scientologist L. Ron Hubbard from his unpublished diaries).
109. In 2015, Judge Pierre Leval observed that the second factor “has rarely played a significant role” in fair use cases. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (citing WILLIAM F. PATRY, PATRY ON FAIR USE § 4.1 (2015)).
110. *Campbell*, 510 U.S. at 586 (emphasis added). *Campbell*’s metaphor is similarly apt in cases where creative copyrighted works are not parodied, but are nonetheless the direct subject of the second user’s commentary. E.g., *Blanch*, 467 F.3d at 257 (second factor had limited weight “because Koons used Blanch’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues”); *Wade Williams Distrib. Inc. v. American Broadcasting Cos.*, No. 1:00-cv-05002(LMM), 2005 WL 774275, at \*8 (S.D.N.Y. Apr. 5, 2005) (clips from 1950s alien movies in television news piece on alien-themed movies; the second factor “holds little weight when the purpose of using the work is to criticize it or comment on the ‘substance or style’ of the work itself”) (citing *Campbell*, 510 U.S. at 580).
111. *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183, 1197 (2021).
112. *Id.* at 1202.
113. *Id.* at 1198 (first quoting 4 MELVILLE B. NIMMER AND DAVID NIMMER, *Nimmer on Copyright* § 13.05[A][2][a] (2019) (internal parentheses omitted); then citing Feist

The copyright is “thin” because copyright law does not protect the facts an author addresses nor his “sweat of the brow” in the production of the work, but only the author’s creative and original expression.<sup>114</sup> And since thinner copyright exists in a factual work, “fair use is more likely to be found.”<sup>115</sup>

In so holding, the *Google/Oracle* Court was applying the “idea/expression dichotomy”<sup>116</sup>—the distinction between uncopyrightable facts and ideas versus copyrightable expression—a concept that the Supreme Court has described as another First Amendment “‘contour[ ]’ of copyright protection.”<sup>117</sup> This explains the Court’s reasoning when it addressed news reporting, more than 100 years ago, in *International News Service v. Associated Press*:

[T]he news element – the information respecting current events contained in the literary production – is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.<sup>118</sup>

As the Court stated unequivocally in 1985, “copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of *the author’s originality*.”<sup>119</sup>

Consider one example: a documentary film about a famous personality that relies upon facts first revealed in a published biography. The discovery of those personal facts cannot be “owned” by the biographer; once she makes them known by publishing the biography, subsequent chroniclers may avail themselves of those facts, however much the biographer may have labored to uncover them.<sup>120</sup>

The Second Circuit focused on another primarily factual copyrighted work in *Swatch Group Management Services Ltd. v. Bloomberg L.P.*<sup>121</sup>

*Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 349 (1991)).

114. *Feist*, 499 U.S. at 352–60 (discussing at length the history and ultimate repudiation of the misguided “sweat of the brow” doctrine).

115. *Stewart v. Abend*, 495 U.S. 207, 237 (1990). *Google/Oracle* reaffirmed the continuing relevancy of *Stewart*, quoting its description of fair use as an “equitable rule of reason” to avoid applying the copyright statute “to stifle the very creative which that law is designed to foster.” *Google/Oracle*, 141 S. Ct. at 1196 (quoting *Stewart*, 495 U.S. at 236).

116. This notion derives from “the most fundamental axiom of copyright law – that no one may copyright facts or ideas.” *Feist*, 499 U.S. at 353.

117. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

118. *Int’l News Serv. V. Associated Press*, 248 U.S. 215, 234 (1918); *see also* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“No author may copyright his ideas or the facts he narrates”).

119. *Harper & Row*, 471 U.S. at 547–48 (emphasis added).

120. *See Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (holding that defendants “had the right to avail [themselves] of the facts contained” in the plaintiff’s history of the infamous Hindenburg dirigible) (citations omitted); *see also* *Authors Guild v. Google, Inc.*, 804 F.3d 202, 224 (2d Cir. 2015) (explaining a Franklin D. Roosevelt biographer does not have a copyright interest in the facts communicated in his book).

121. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014).

Bloomberg distributed in its entirety a recorded earnings call Swatch Group had conducted with invited investment advisors. The Second Circuit noted that Swatch's copyright in the earnings call was thin, "at best," and stated:

[W]hile we assume without deciding . . . that the call contained sufficient original expression – in the form of the executives' tone, cadence, accents, and particular choice of words – to be copyrightable, the purpose of the call was not in any sense to showcase those forms of expression. Rather, the call's sole purpose was to convey financial information about the company to investors and analysts.<sup>122</sup>

On this basis, and the fact that the call was previously shared by Swatch with its invitees, the court held that the second factor favored Bloomberg's use, since "one must permit expressive language to be copied, in order to assure dissemination of the underlying facts."<sup>123</sup>

The Supreme Court recognized this analytical problem in *Harper & Row*. The Court noted that President Ford's creative expressions in his memoirs "are arguably necessary adequately to convey the facts. For example, Mr. Ford's characterization of the White House tapes as the 'smoking gun' is perhaps so integral to the idea expressed as to be inseparable from it."<sup>124</sup>

The same consideration may arise in connection with pictorial works. One notable example is *Bill Graham Archives*.<sup>125</sup> There, the court held that a book author's use of artistic concert posters "as historical artifacts graphically representing *the fact* of significant Grateful Dead concert events selected by the author for inclusion in the book's timeline" was a fair use.<sup>126</sup> While the court focused its analysis on factor one, finding the defendant's use was "to emphasize the images' historical rather than creative value,"<sup>127</sup> it could just as well have found thin protection under the second factor due to the book's focus on the factual aspects of the posters.<sup>128</sup> The Ninth Circuit employed just

122. *Id.* At 89; see *New Era Publ'ns Int'l, ApS v. Carol Pub. Grp.*, 904 F.2d 152, 157 (2d Cir. 1990) (quoted works in an unflattering biography were "properly viewed under the second factor as factual or informational" because they were included "in part to convey the facts contained therein, and not for their expression"); see also *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) ("The biography's use of [author Richard] Wright's expressive works is modest and serves to illustrate factual points or to establish [the biographer's] relationship with the author, not to 'enliven' her prose").

123. *Swatch Grp.*, 756 F.3d at 89 (citations omitted).

124. *Harper & Row*, 471 U.S. at 563.

125. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

126. *Id.* at 610 (emphasis added).

127. *Id.* at 612–13.

128. Similarly, in *Red Label Music Publ'g Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 985 (N.D. Ill. 2019), the court held that the defendant's use of clips from a music video in a film revisiting the Chicago Bears' Super Bowl season was fair, being used as a "historical guidepost" and as contextual information. Due to the nature of the use, the court found factor two "largely neutral" despite the underlying work's creative elements. *Red Label* relied upon a similar decision in the Fourth Circuit that concerned a documentary's use

such reasoning in finding the second factor “clearly point[ed] toward fair use” in *Los Angeles News Service v. KCAL-TV Channel 9*:

The Denny beating tape is informational and factual and news; each characteristic strongly favors [the user] . . . . Although the Videotape is not without creative aspect . . . , still this factor makes it a great deal easier to find fair use.<sup>129</sup>

Professor Melville Nimmer highlighted the constitutional aspects of this “Wedding of Idea and Expression” in both an early seminal article and in his treatise.<sup>130</sup> As Nimmer explained, discussing pictorial works of public import, the facts and ideas associated with certain works can only be adequately conveyed through the observation of the images.<sup>131</sup> Nimmer cites two searing examples: photos of the Vietnam War’s My Lai massacre and the Zapruder home movie of the Kennedy assassination.<sup>132</sup> One can easily apply the same

of a copyrighted logo in *Bouchat*. *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 948 (4<sup>th</sup> Cir. 2013), *as amended* (Jan. 14, 2014) (“Here, the [plaintiff’s] logo is displayed for its historical significance rather than its intrinsic creative worth”).

129. *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 940 (9<sup>th</sup> Cir. 2002) (quoting *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9<sup>th</sup> Cir. 1997)); *see* *N. Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 623 (S.D.N.Y. 2015) (finding the second factor favors fair use since the photograph at issue was a non-fictional rendering of an event of public importance); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 190 (D. Mass. 2007) (candid photograph of alleged mobster leaving police station was a primarily factual work for purposes of the second factor). The courts in *Pirro* and *Fitzgerald* ultimately rejected fair use defenses on other grounds.
130. *See* 5 NIMMER & NIMMER, *supra* note 113, § 19E.03 (2023); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1196 (1970).
131. *Id.*; *see* *L.A. News Serv.*, 305 F.3d at 929 (“In this age of television news, it is frequently the image accompanying the story that leaves an event seared into the viewership’s collective memory”) (discussing video of Reginald Denny beating during Los Angeles riots in 1992). In *Swatch Group*, the court made a similar observation about audio:  
 [B]y disseminating not just a written transcript or article but an actual sound recording, Bloomberg was able to convey with precision not only the raw data of the Swatch Group executives’ words, but also more subtle indications of meaning inferable from their hesitation, emphasis, tone of voice, and other such aspects of their delivery . . . . As courts have long recognized in the context of witness testimony, “a cold transcript contains only a dead body of the evidence, without its spirit,” and “cannot reveal . . .” [the speaker’s] hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration.”
- Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (citations omitted).
132. 5 NIMMER & NIMMER, *supra* note 113, § 19E.03 (2023); *see* *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (finding fair use, in part, due to the “public interest in having the fullest information available on the murder of President Kennedy”).

reasoning to contemporary videos of the George Floyd murder or the insurrection at the U.S. Capitol on January 6, 2021.

These principles should apply in settings other than sensational news events, as well. Spot photography, like most photographs, is certainly copyrightable, since the originality threshold to qualify for copyright is very low: “only an unmistakable dash of originality need be demonstrated, high standards of uniqueness in creativity are dispensed with.”<sup>133</sup> However, mere copyrightability does not suffice in a fair-use inquiry: the bar is decidedly higher under section 107’s second factor, for which “the work must be ‘creative, imaginative, and original.’”<sup>134</sup> Works that do not surmount that bar are subject to broader fair-use rights.

Applying the fact/expression dichotomy, the second factor protects only the creativity the photographer contributes.<sup>135</sup> In the case of staged photos, a photographer may well succeed in establishing that significant copyrightable creative content resides in an image, as the photographer Lynn Goldsmith successfully argued in *Warhol*.<sup>136</sup>

In contrast, snapshots—candid photos generally taken for personal memories or family entertainment, where the photographer’s main contribution to capture an image is to push the button on his camera—will be largely devoid of creative elements. And so equally will be the case with many *vérité* photos of places, people, and events, even when taken by professional photographers. To paraphrase *Swatch Group*, “the purpose of the[se] [photographs] was not in any sense to showcase those [creative elements contributed by the photographer].”<sup>137</sup>

133. *Weissman v. Freeman*, 868 F.2d 1313, 1321 (2d Cir. 1989); *cf.* *Bridgeman Art Libr., Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (photographic reproductions of works of art did not qualify for copyright; while “it may be assumed that this required both skill and effort, there was no spark of originality – indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity”).

134. *Mathieson v. Associated Press*, No. 90 CIV. 6945 (LMM), 1992 WL 164447, at \*6 (S.D.N.Y. June 25, 1992) (second factor favored fair use where borrowed headshot was at issue) (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981)); *see also Fitzgerald*, 491 F. Supp. 2d at 188 (“[Plaintiff] incorrectly cites to *Feist* for the proposition that only minimal authorial control is necessary to make a work creative. *Feist* actually held that minimal authorial control is necessary to make a work *copyrightable* at all. Creativity for the purposes of fair use is harder to establish than threshold copyrightability”) (citation omitted).

135. *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998) (a photographer “is entitled to such artistic elements as the particular lighting, the resulting skin tone on the subject, and the camera angle that she selected”).

136. Goldsmith dressed, applied make-up to, and posed Prince for the photo at issue in the lawsuit, as well as taking measures to relax him and to build a rapport. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 33 (2d Cir. 2021), *aff’d sub nom.* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

137. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 89 (2d Cir. 2014); *see also Katz v. Google Inc.*, 802 F.3d 1178, 1183 (11th Cir. 2015), where the court described

Nor can one properly qualify as a creative element the fact that the photographer, professional or amateur, was “in the right place at the right time.” In this regard, the court in *Galvin v. Illinois Republican Party*, properly found that factor two favored the defendant’s use of a photograph, explaining:

Because Plaintiff Galvin took the Photograph during a live parade, he obviously did not stage the action depicted in it. Whatever artistry he contributed (by way of the angle, framing, or other composition of the Photograph) could not plausibly outweigh its factual nature.<sup>138</sup>

Similarly, while the gut-wrenching response we have to shots of people falling from the burning Twin Towers (some taken by professional photographers) or of the callous murder of George Floyd (captured by bystander Darnella Frazier on her cellphone) cannot be denied, the takers of those images did not conceive or pose them; they did not deliberate over the framing, the lighting, or the context. They pointed and shot. If the place or time presents challenges or even danger for the photographers, this is their unprotectible “sweat of the brow.”<sup>139</sup>

The authors do not suggest that all images, even those relating to matters of public interest, should be free of copyright protection.<sup>140</sup> However, since documentaries come within the favored categories of section 107, their inclusion of copyrighted works should be entitled to greater latitude in the second-factor analysis, as is true for factor one. Independently, when the filmmakers’ focus is on factual elements in the original work, greater latitude is warranted in order to afford due consideration to the First Amendment dimensions of the fact/expression dichotomy.

### C. *The Third Factor: Quantity and Reasonable Use*

Section 107’s third factor directs a court to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” As *Campbell* expressed it, the proper inquiry is whether the defendant’s use of the underlying work is “reasonable in relation to the purpose of

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a professional photographer’s photo of a businessman standing outside a basketball practice as “merely a candid shot in a public setting, and there is no evidence . . . that [the photographer] attempted to convey ideas, emotions, or in any way influence Katz’s pose, expression, or clothing.”

138. *Galvin v. Illinois Republican Party*, 130 F. Supp. 3d 1187, 1195 (N.D. Ill. 2015). *Accord Katz*, 802 F.3d at 1183 (“While [professional photographer’s] photojournalistic timing was fortuitous . . . , this alone was not enough to make the creative gift of the Photo predominate over its plainly factual elements”).

139. See *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 352–60 (1991).

140. *Cf. Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985) (“The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use “news report” of the book”). In his effort to balance interests, Professor Nimmer suggested a compulsory licensing scheme for news photographs in which idea and expression are inseparable. No such system has emerged and the four-part fair use test still provides the best opportunity to resolve this conflict.

the copying.”<sup>141</sup> As with the other three factors, this analysis must be done in a context-sensitive manner,<sup>142</sup> and with attention to First Amendment concerns.

Frequently, courts have unhesitatingly held that the third factor favored documentary filmmakers’ use of content to advance knowledge and understanding of their subjects.<sup>143</sup> Reasonableness is most easily found when the uses are quantitatively small in proportion to the copyrighted work.<sup>144</sup> Yet, since the test is “reasonable[ness] in relation to the purpose of the copying,”<sup>145</sup> courts will, where warranted, find more extensive use does not disfavor the secondary user, including where he used the entire work.<sup>146</sup>

The third-factor analysis is not solely quantitative; “the value of the materials used” equally matters.<sup>147</sup> But even in cases where the original copyright owner claimed that the documentary’s use captured the “heart” of the copyrighted work, courts have found that the third factor may favor fair use.<sup>148</sup>

141. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

142. As with factor one, this factor will also tend to address the fourth factor “by revealing the degree to which the [secondary use] may serve as a market substitute for the original or potentially licensed derivatives.” *Id.* at 587.

143. For example, in *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 139 (E.D.N.Y. 2001), *aff’d by summary order*, No. 01-7060 (2d Cir. May 20, 2002), the court found that the uses in a documentary about a movie studio of movie clips ranging from 10 to 54 seconds, a poster, monster models and unpublished photos of the studio owner were not substantial nor “the ‘heart’ of the copyrighted works,” concluding, “No more seems to have been taken than as necessary for defendants to produce the Documentary.” *See also* *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98 CIV. 7128IBSJ, 2001 WL 1518264, at \*7–\*8 (S.D.N.Y. Nov. 28, 2001) (video obituaries of actor Robert Mitchum) (finding reasonableness in relation to defendants’ purpose because the “obituaries sought to effectively detail Mitchum’s career . . . [and] [t]he clips . . . related solely to Mitchum’s performance”).

144. *E.g.*, *Red Label Music Publ’g Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 986 (N.D. Ill. 2019) (2 percent of plaintiff’s song and 17 percent of video found to be “insubstantial”); *Nat’l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12-cv-00044, 2012 WL 4052111, at \*5 (C.D. Cal. Sept. 14, 2012) (finding third factor favored fair use where use of clips from four earlier films in documentary was “minimal”); *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996) (finding third factor weighed heavily in favor of fair use where the allegedly infringing film clips in the documentary were, at most, two minutes of the copyrighted film).

145. *Campbell*, 510 U.S. at 586.

146. *E.g.*, *Hofheinz v. AMC*, 147 F. Supp. 2d at 140 n.12 (entire photos). In *Bouchat*, the court held that this factor should carry little weight where the use of the plaintiff’s full copyrighted logo in a historical documentary was reasonable: “It would be senseless to permit the NFL to use the Flying B logo for factual, historical purposes, but permit it to show only a half, or two-thirds of it.” *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 943 (4th Cir. 2013), *as amended* (Jan. 14, 2014); *see also Campbell*, 510 U.S. at 588 (approving extensive use of copyrighted song: “When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable”).

147. *See Campbell*, 510 U.S. at 586 (citation omitted).

148. *E.g.*, *Brown v. Netflix, Inc.*, 855 F.App’x 61, 65 (2d Cir. 2021) (“although the refrain used

As with factor two, the third factor often implicates the fact/expression dichotomy in the analysis of documentary uses. When an original work is primarily factual or the filmmaker's focus is on the original's factual elements, as opposed to the creative elements, it supports the reasonableness of a broader secondary use.

In *Bill Graham Archives*, the publisher's reduction of the size of the complete concert posters at issue supported a finding of fair use: "While the small size is sufficient to permit readers to recognize the historical significance of the posters, it is inadequate to offer more than a glimpse of their expressive value."<sup>149</sup> Filmmakers may also minimize the creative elements of visual materials with techniques such as camera pans, zooms and "graying out" or blurring nonrelevant portions of the content so as to focus a viewer's attention on the pertinent facts presented in the images. Other times, documentarians obscure creative details by overlaying definitional or other text, or presenting print, film and photographic materials in montages and arrays that divert focus from creative to factual elements.

These edits to the original work diminish or even effectively remove the original's expressive elements.<sup>150</sup> In an analogous context, the Seventh Circuit held that changes in an unlicensed photograph of a town mayor as t-shirt art rendered the use fair, since the defendant removed the background, the color and shading, and almost the entirety of the original lighting effect from the original photograph, leaving "a hint of [the subject's] smile [and] the outline of his face, which can't be copyrighted."<sup>151</sup>

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may be the 'heart' of the [song at issue], a recognizable chorus can be used fairly when use of that segment of the song is 'reasonable in relation to the purpose of the copying,' here a documentary providing commentary and criticism") (citations omitted); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 327 (S.D.N.Y. 2008) ("both quantitatively and qualitatively," the 15-second portion of "Imagine" utilized in documentary was reasonable in light of defendant's purpose).

149. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006).

150. In its discussion of the third factor, the Second Circuit panel in *Warhol* accepted the "uncontroversial proposition [that copyright only protects] the original or unique way that an author expresses . . . ideas . . ." As discussed, this proposition applies equally to the second factor. Yet the panel took issue with the district court's having "stripped away" the photograph's discrete expressive qualities. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 47 (2d Cir. 2021), *aff'd sub nom.* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023). The panel's disapproval of Warhol's silkscreen was tightly tethered to the view that the work "[was] readily identifiable as *deriving* from a *specific* photograph of Prince." *Id.* at 47 (first emphasis added), veering into derivative-work territory. Most documentary film uses should be readily distinguishable from the facts that prompted the circuit court's conclusion. Helpfully, the panel emphasized, "we do not hold that this factor always favors the copyright holder where the work at issue is a photograph and the photograph remains identifiable in the secondary work." *Id.* at 48.

151. *Kienitz v. Scannie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

Here again, *Google/Oracle* offers valuable support for documentary filmmakers, recognizing not only the fact/expression dichotomy, but also weighing the public benefit of the new works. Considering the copying of 11,500 lines of software code, the Court held that even “copying a larger amount of material can fall within the scope of fair use where the material copied captures little of the material’s creative expression or is central to a copier’s valid purpose.”<sup>152</sup>

D. *The Fourth Factor: Balancing Public Benefit and Private Harm*

The fourth statutory factor addresses “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>153</sup> It “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 work.”<sup>154</sup> Although the *Warhol* majority did not discuss the fourth factor, it declared that market substitution is copyright’s “bête noire.”<sup>155</sup> Key to the Court’s decision was its conclusion that the Warhol portrait of Prince was a direct competitor with—or a substitute for—Goldsmith’s photographic portrait in the commercial market for sales to magazines.<sup>156</sup>

*Google/Oracle*, the Court’s most recent exploration of the fourth factor, instructed that this factor also must support the fundamental animating principle invoked at the outset of this article: the advancement of public knowledge. As the Court held, even if the copyright owner can establish a loss of revenue from a secondary user’s copying:

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152. *Google LLC v. Oracle Am., Inc. (Google/Oracle)*, 141 S. Ct. 1183, 1205 (2021).

153. 17 U.S.C. § 107(4).

154. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87,99 (2d Cir. 2014) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994)) (emphasis added); *accord Warhol*, 143 S. Ct. at 1279 n.12. Other economic injury, such as reputational harm to the plaintiff or her work, is not a cognizable copyright injury. See *Campbell*, 510 U.S. at 591–92; see also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 n.7 (2d Cir. 1998) (rejecting claim that parodic movie poster could harm the plaintiff photographer’s “relationships with the celebrities whom she has made a living photographing” because that alleged harm is not within the purview of copyright).

155. *Warhol*, 143 S. Ct. at 1274. Strangely, the majority scoffed at the notion that the fourth factor could play an important role in distinguishing transformative fair uses from derivative works like book-to-film adaptations, referring to AWF’s argument on this point as a “Hail Mary.” *Id.* at 1282 n.17. But, as Justice Kagan noted, the Court previously recognized that factor’s role in forcing filmmakers to pay for adapting books into movies in *Google/Oracle*. *Id.* at 1297 n.5 (Kagan, J., dissenting) (citing *Google/Oracle*, 141 S. Ct. at 1206).

156. Justice Kagan criticized the Court for precisely this point: transplanting factor 4 into factor 1 by conducting “a kind of market analysis”:

Under the statute, courts are supposed to strike a balance between the two [factors]—and thus between rewarding original creators and enabling others to build on their works. That cannot happen when a court, à la the majority, double-counts the first goal and ignores the second.

*Id.* at 1290 (Kagan, J., dissenting).

[W]e must take into account the public benefits the copying will likely produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression? Are they comparatively important, or unimportant, when compared with dollar amounts likely lost . . . ?<sup>157</sup>

Despite Oracle's evidence that it sustained revenue losses that could total billions of dollars, the Court concluded that the fourth factor favored Google, since the public interest outweighed the plaintiff's potential pecuniary benefit. A contrary finding, according to the Court, "would interfere with, not further, copyright's basic creativity objectives."<sup>158</sup>

The Court cited *MCA, Inc. v. Wilson*,<sup>159</sup> where the Second Circuit wrote:

[W]here a claim of fair use is made, a balance must sometimes be struck between 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. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need to be shown to justify the use.<sup>160</sup>

In striking the balance between public and private benefit, transformiveness (and justification) will impact the fourth-factor analysis. As *Campbell* held, "market substitution is at least less certain, and market harm may not be so readily inferred," where the second use is transformative, since the secondary use and the original work "usually serve different market functions."<sup>161</sup> *Warhol* effectively amplifies *Campbell's* holding by defining transformiveness in reference to the market-competition inquiry in the first-factor analysis. Therefore, where a secondary use satisfies *Warhol* on the first factor, the fourth factor will likely follow.

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157. *Google/Oracle*, 141 S. Ct. at 1206 (citations omitted). The Second Circuit also recognized the need to take into account "the public benefits the copying will likely produce," but found none in a work "that is . . . turned into a commercial replica of its source material" and competes in its market. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 51 (2d Cir. 2021), *aff'd sub nom. Warhol*, 143 S. Ct. 1258 (2023). As discussed throughout this article, documentary uses can be easily distinguished from AWF's use and are entitled to "significantly more 'breathing space.'" *Id.*

158. *Google/Oracle*, 141 S. Ct. at 1208. The *Warhol* majority cited *Google/Oracle's* outcome approvingly. 143 S. Ct. at 1277 n.8.

159. *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

160. *Id.* at 183; *see also Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd per curiam*, 420 U.S. 376 (1975) (courts must "occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry") (citation omitted).

161. *Campbell*, 510 U.S. at 591.; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (no presumption of harm arises when work is transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (use of images as historical artifacts fell "within a transformative market, [and owner] does not suffer market harm due to the loss of license fees").

Courts examining documentary film fair-use disputes have repeatedly recognized that transformative and justified uses of archival materials do not usurp their market. In *Brown v. Netflix*, where a documentary chronicling a group of burlesque dancers included the performance of the chorus of a children's song about school lunches, the court held that the fourth factor favored the filmmaker: "[T]he intended audience for the Song would be unlikely to purchase the [documentary] 'in preference to the original.'"<sup>162</sup> Similarly, as the court in *Hofheinz v. AMC Prods.* explained in finding fair use in a documentary:

The allegedly infringing clips "are too few, too short, and too small in relation to the whole" to undercut the plaintiff's copyrighted works. To the contrary, . . . the Documentary may increase market demand for plaintiff's copyrighted works and make more people aware of the influence [the movie studio] had in developing the "B" movie genre. . . .<sup>163</sup>

The fourth-factor analysis must also take into account the impact on licensing markets.<sup>164</sup> However, where the claim is against a secondary user, such as a documentary filmmaker, who might have licensed the work, claims of lost licensing revenue must be carefully considered so as not to fall prey to circular reasoning. As the Second Circuit has warned, "were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would always favor the copyright holder."<sup>165</sup> Or, as Professor Nimmer framed the issue, "it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar."<sup>166</sup>

162. *Brown v. Netflix, Inc.*, 855 F. App'x 61, 64 (2d Cir. 2021).

163. *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001) (quoting *Monster Commc'ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996)); see also *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 949 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (documentary use of plaintiff's logo "serves a different market function" and "does not supplant or substitute for the original"); *Red Label Music Publ'g Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 987–88 (N.D. Ill. 2019) (holding that "no one would purchase" the defendant's documentary as a substitute for the original music and videos of the *Super Bowl Shuffle*); *Nat'l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12-cv-00044, 2012 WL 4052111, at \*5 (C.D. Cal. Sept. 14, 2012) (excerpted clips did not displace original movies, and "the Court is unconvinced that the use of the copyrighted clips – as background for scholarly commentary . . . would dissuade consumers from patronizing the original full-length films").

164. See *Campbell*, 510 U.S. at 590 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985)).

165. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 n.17 (2d Cir. 1994); see *Leval*, *supra* note 48, at 1124 (stating that "[b]y definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties").

166. NIMMER & NIMMER, *supra* note 113, § 13.05[A][4] (2005); accord *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001) ("[P]laintiff's argument, if carried to its logical conclusion, would eviscerate the affirmative defense of fair use since every copyright infringer . . . could have potentially sought a license from the owner of the

A proper licensing-harm analysis includes only those markets that are “traditional, reasonable, or likely to be developed markets.”<sup>167</sup> This rule bars claims based on speculative assertions of market harm.<sup>168</sup> It also explains why *Campbell* held that “there is no protectible derivative market for criticism” of the original work.<sup>169</sup>

The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.<sup>170</sup>

Lower courts have applied similar reasoning in denying claims for hypothetical lost revenues in derivative markets for other transformative uses specified in section 107’s preamble. As one court stated, even if a copyright owner “develop[s] or licens[es] a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.”<sup>171</sup> Therefore, where a documentary filmmaker makes a transformative, justified use of archival material, the fourth factor is likely to favor that use despite claims of lost licensing opportunities.

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infringed work”).

167. *American Geophysical Union*, 60 F.3d at 930; *see also* *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (noting that fourth factor will favor secondary user when use “filled a market niche that the [copyright owner] simply had no interest in occupying”).
168. *Brown v. Netflix, Inc.*, 855 F. App’x 61, 64 (2d Cir. 2021) (rejecting claim of lost licensing revenue because “the film’s brief use of a small portion of the [plaintiff’s song] as a component of an event recorded for documentary purposes does not plausibly fall within a traditional or well-developed market for the [s]ong.”)
169. *Campbell*, 510 U.S. at 592.
170. *Id.*; *see also* *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 207 (4th Cir. 1998) (“If there were a protectible derivative market for critical works, copyright holders would only license to those who would render favorable comment. The copyright holder cannot control the dissemination of criticism”); *cf.* *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (11th Cir. 2015) (copyright owner’s effort to extinguish the dissemination of an embarrassing photo demonstrated “there is no potential market for his work”).
171. *Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998); *see also* *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (holding that, in a case involving transformative use, “copyright holder cannot prevent others from entering fair use markets”); *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 WL 3295671, at \*12 (11th Cir. May 8, 2023) (“the Copyright Act doesn’t afford creators a monopoly over *transformative* markets”) (emphasis in original); *see also* *Twin Peaks*, 996 F.2d at 1377 (“A copyright holder’s protection of its markets for derivative works of course cannot enable it to bar publication of works of comment, criticism or news reporting whose commercial success is enhanced by the wide appeal of the copyrighted work”).

A court could reach a different conclusion where the secondary use is directly competitive with the copyrighted work, as it was in *Warhol*. This concern about direct competition was evident in *Harper & Row*, where the Court rejected the fair-use defense of the non-transformative scooping of President Ford's soon-to-be-published memoir.<sup>172</sup> *The Nation's* pre-publication release of excerpts from of the memoir usurped the publisher's planned licensing of valuable first-serial rights to the book.<sup>173</sup>

A similar case involved a video of the Reginald Denny beating during the 1992 Los Angeles race riots, where the court held that Reuters' licensing of the video to its customers interfered with the plaintiff's core licensing business:

Reuters and [the plaintiff] are in the business of providing audiovisual news material to reporting organizations. When such an organization buys footage from Reuters, it does not need to purchase it from LANS, thus lessening the market for LANS's footage.<sup>174</sup>

Under *Warhol's* first-factor reasoning, this competitive licensing use would not qualify as transformative.<sup>175</sup>

However, the same circuit court held another use of this same footage was fair.<sup>176</sup> Unlike the licensing use in *Reuters*, Court TV's use was to promote its coverage of the criminal trial of those who attacked Denny, which took place several years after the riots. Therefore, "Court TV was not competing with LANS to show riot coverage, or even breaking news of the same general type."<sup>177</sup> This holding is consistent with *Warhol's* reasoning; recall that the majority considered that other uses of the Prince Series might constitute fair use.<sup>178</sup> Additionally, Justice Gorsuch suggested that use of the Warhol work in

172. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539 (1985). The Court ultimately rejected the *Nation's* fair-use claim based on other factors, particularly the unpublished nature of President Ford's manuscript and the second use's impact on the market. The facts in the *Harper & Row* case may have unduly skewed the decision. See Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009) ("In *Campbell*, for instance, the Court repudiated *Harper & Row's* general endorsement of a presumption of harm as to commercial uses. Congress also repudiated the *Harper & Row* presumption of unfairness for use of unpublished works"); *id.* at 2537 n.190 ("In 1992, Congress amended § 107 to clarify that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors").

173. *Harper & Row*, 471 U.S. at 542.

174. *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998).

175. Since there is no suggestion in the opinion that Reuters has a "particularly compelling justification," the first factor would favor the plaintiff. *Warhol*, 143 S. Ct. at 1265. See *supra* note 74.

176. *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002).

177. *Id.* at 942.

178. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1277, 1278 n.10, 1291 (2023).

a “for-profit book commenting on 20th-century art” might be a fair use.<sup>179</sup> Like Court TV’s use of the Denny video, Justice Gorsuch’s hypothetical use would be for an expressive purpose covered by section 107’s preamble: a distinct, albeit commercial, non-competitive purpose.<sup>180</sup>

Similarly, most expressive uses of archival materials in documentaries do not compete against the copyright owners in their licensing markets as the uses did in *Harper & Row, Reuters* and *Warhol*.<sup>181</sup> Accordingly, the loss of potential licensing revenues should not influence the fourth-factor analysis, absent clear evidence of substantial harm.<sup>182</sup>

Moreover, balancing the public interest and private harm, as *Google/Oracle* instructs, the value of the dissemination of the information and ideas presented in a documentary should often outweigh the financial impact on the copyright owners’ primary and licensing markets. As the court in *Monster Communications* stated: “[H]istory has its demands. There is a public interest in receiving information concerning the world in which we live. . . . [T]oo narrow a view of the fair use defense will deprive the public of significant information.”<sup>183</sup>

179. *Id.* at 1291 (Gorsuch, J. concurring).

180. The same reasoning might apply to Condé Nast’s use of the Warhol work in its magazine. Though the Court did not address that use, Goldsmith might be collaterally estopped from raising such a claim now. And her waiver of all other claims against AWF would likely bar any further claim against AWF in connection with Condé Nast’s use.

181. *See, e.g., Red Label Music Publ’g Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 988 (N.D. Ill. 2019) (the documentary filmmakers “are not in the business of licensing audio video clips like the plaintiffs are. The parties operate in significantly different markets. The defendants do not compete with the plaintiffs in any way, shape, or form.”); *Arrow Prods., Ltd. v. Weinstein Co., LLC*, 44 F. Supp. 3d 359, 372 (S.D.N.Y. 2014) (court gave no weight to copyright owner’s argument that it lost a licensing opportunity for a competing documentary film on Linda Lovelace when news of the biopic came out; “market harm for licensing revenues will only be recognized if the market is traditional, reasonable, or likely to be developed *and is not a protected transformative use*”) (emphasis added).

182. *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014) (the question under the fourth factor is “whether Defendants’ use—taking into account the damage that might occur if “everybody did it”—would cause *substantial* economic harm such that allowing it would frustrate the purposes of copyright by materially impairing Defendants’ incentive to publish the work”).

183. *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996); *see also Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 949 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (the Copyright Act was never intended to “discourage the makers of all sorts of historical documentaries and displays” or “deplete society’s fund of informative speech”); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (finding fair use, in part, due to the “public interest in having the fullest information available on the murder of President Kennedy”).

### III. THE RISK OF MISAPPLYING WARHOL

*Warhol* spawned a multitude of opinion pieces decrying or extolling its analysis and outcome. Many of them misinterpreted or overstated the case.<sup>184</sup> As discussed above, the Court changed the focus of the first-factor analysis from the purpose and content of the work at issue to the purposes of different end uses of that work, and it applied its revamped definition of transformative-ness solely to AWF's commercial licensing of Orange Prince.

For the reasons explored in this article, documentary uses can be distinguished from the uses that offend the first factor under the *Warhol* test, and well-defined law on the remaining factors should provide strong support for documentaries. Thus, while the path to fair-use judgments may deviate somewhat from the past, the results for documentary uses of archival content should largely continue unchanged.

However, the exponential growth of licensing opportunities associated with documentary projects in recent decades appears to have spurred increased income expectations on the part of some copyright holders. It is also evident that some members of the bar, seeing a potential financial bonanza, have aggressively pursued copyright claims of questionable merit against media companies and documentary producers, demanding unreasonable usage fees and adding claims for statutory damages and attorneys' fees.<sup>185</sup>

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184. See *supra* note 12; see also Winston Cho, *Andy Warhol Ruling Limits Fair Use for Copyrighted Images, With Far-Reaching Hollywood Implications*, THE HOLLYWOOD REP. (May 18, 2023), <https://www.hollywoodreporter.com/business/business-news/supreme-court-andy-warhol-prince-copyright-1235495647> [<https://perma.cc/RWJ7-NHHD>] (claiming that *Warhol* “has rewritten an entire body of case law” and incorrectly stating that the Court ruled that “Andy Warhol wasn’t allowed to use a photographer’s portrait of Prince for a series of pop-art images”). Litigants have also exaggerated *Warhol*’s impact. One ironic example is a brief recently filed on Apple Inc.’s behalf by AWF’s counsel in the Supreme Court for the *Warhol* case. See Petition for Rehearing and Rehearing En Banc, *Apple Inc. v. Corellium, Inc.*, No. 21-12835 (11th Cir. June 27, 2023). There, Apple argued, based on *Warhol*, for reversal of a decision that found all four factors squarely favored fair use because there is some overlap in potential uses of the two works at issue. This overlooks *Warhol*’s focus on the “typical use” of the plaintiff’s work and, more generally, fails to acknowledge the Court’s admonition on the narrow scope of its decision. Although the case involves software and computer operating systems, Apple’s petition does not address *Google/Oracle*, a decision the 11th Circuit panel had relied upon.

185. A group of litigants and law firms, often referred to as “copyright trolls,” has emerged. These trolls rely on the risk of litigation costs, delay and uncertainty to persuade secondary users to settle, even in situations where the users have a strong claim of fair use. See *McDermott v. Monday Monday, LLC*, No. 17CV9230 (DLC), 2018 WL 5312903, at \*3 (S.D.N.Y. Oct. 26, 2018) (upholding the use of the term “copyright troll” to refer to one law firm’s copyright-litigation practice and detailing the firm’s exploits); *Sands v. Bauer Media Grp. USA, LLC*, No. 17-CV-9215 (LAK), 2019 WL 4464672, at \*1 (S.D.N.Y. Sept. 18, 2019) (referring to “the creation of a lawyer business model that has deluged this Court with photographic copyright infringement cases”); see also Pamela

Even before *Warhol* appeared on the Supreme Court docket, there were troubling lower-court cases that misapplied decisional law, disregarding fair use's First Amendment contours and skewing results to favor copyright owners in circumstances that should reasonably protect secondary users. The result in *Warhol*, amplified by Justice Sotomayor's sympathetic portrayal of the plight of the photographer-plaintiff, could encourage further claims and mistaken decisions.<sup>186</sup>

Two emblematic recent cases that misapply fair use principles illustrate the risk. One concerns use of a photograph in a magazine; the second addresses documentary footage clips. Both issued from the Southern District of New York, in the Second Circuit, a court and circuit that, pre-*Warhol*, historically articulated the importance of fair use in the exercise of First Amendment rights.

In *Otto v. Hearst Communications, Inc.*,<sup>187</sup> the work at issue was a photo "snapped [by a wedding guest, a banker by profession] on his iPhone, and later texted . . . to another guest," showing the then-President at a Trump-owned golf club in June 2017 when he unexpectedly dropped in "and lingered" at the reception.<sup>188</sup> The only creative input plaintiff—"self-described as just a 'guy with an iPhone'"—claimed to have in the photo's creation was to push a button and "modify" it with the iPhone's editing application.<sup>189</sup>

While Mr. Otto did not publish the photo on social media, the "[o]ther guest" did not keep the snapshot to himself. He shared it, it migrated to various social media accounts almost immediately, and it subsequently appeared in several news outlets. *Esquire* magazine published it in conjunction with a short

Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 759 (2013) (defining copyright trolls as "rightsholders who threaten or bring infringement lawsuits in order to induce users to pay to settle weak claims"); Nancy J. Mertz, *Strategies for Avoiding and Responding to Copyright Troll Litigation*, N.Y. L.J., (Mar. 23, 2020, 2:20 PM), <https://www.law.com/newyorklawjournal/2020/03/20/strategies-for-avoiding-and-responding-to-copyright-troll-litigation> [<https://plus.lexis.com/api/permalink/dc27f9bb-0498-4a5b-8ffa-c33f566c13a2/?context=1530671>] (detailing, as an example, the history of two law firms that filed over two thousand copyright infringement lawsuits during the period from 2016–2019). The chilling effect of potential copyright claims is now exacerbated by automated takedown procedures on platforms such as YouTube. See Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 549 (2017) (automated content identification software and takedown notices "are particularly likely to fail to recognize that [secondary uses do] not infringe because any similarity to the reference file is *de minimis*, not substantial, or qualifies as fair use"); see also Diane L. Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403, 410 (1994) ("If technology allows owners to monitor and control uses made online, including copying the law would allow as fair use, this may force would-be users to negotiate paid permissions").

186. See, e.g., *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1266, 1269, 1277 (2023).

187. *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018).

188. *Id.* at 419–20.

189. *Id.* at 420–21.

article about President Trump, reporting that he had “become a fixture at nuptials at his resorts.” It also reported that the golf club advertised the possibility of President Trump dropping in on the festivities without notice as a potential bonus in renting the premises, and described how he conducted himself on these occasions and how guests responded.<sup>190</sup>

The second troubling fair use decision is *Fioranelli v. CBS Broadcasting Inc.*,<sup>191</sup> decided shortly after the Second Circuit’s *Warhol* decision was announced. Unlike Mr. Otto, this plaintiff was a professional photojournalist who specialized in covering newsworthy events that he “licenses . . . for use in spot news.”<sup>192</sup> When the World Trade Center towers were destroyed on September 11, 2001, Mr. Fioranelli was one of only four journalists given access to Ground Zero. His copyright-infringement lawsuit, filed fourteen years after 9/11, in 2015, targeted two newsreels produced by CBS that contained footage he had filmed, as well as programming by numerous film and television companies that used clips from the newsreels.<sup>193</sup>

The parties in both of these cases made competing summary-judgment motions. In *Otto*, both sides’ motions were denied, setting the parties up for discovery and trial. In *Fioranelli*, the court found fair use in connection with two fictionalized productions, granted summary judgment to plaintiff on seven documentary films that incorporated clips of his footage, and held that a jury would need to decide the fair use question on the remaining documentaries.<sup>194</sup>

Neither court accorded favored status to the challenged uses, despite their coming squarely within the favored uses in section 107’s preamble. The *Otto* opinion baldly signaled that court’s conception of Esquire’s use in the second paragraph, describing the magazine as “[s]tealing” the image from one of the Instagram accounts on which it was posted.<sup>195</sup> The court acknowledged only that “an entity’s status as a news publication *may* be highly probative on . . . whether that entity has a fair use defense,”<sup>196</sup> but rejected the application of decisional precedent that “news reporting is a widely-recognized ground for finding fair use.”<sup>197</sup> Instead, in its discussion of the first factor, the court focused on its concern that “amateur photographers would be discouraged from creating works and there would be no incentive for publishers to create their own content to illustrate articles.”<sup>198</sup>

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190. *Id.* at 421.

191. *Fioranelli v. CBS Broad. Inc.*, 551 F. Supp. 3d 199 (S.D.N.Y. 2021).

192. *Id.* at 208.

193. *Id.* at 206.

194. *Id.* at 258.

195. *Otto*, 345 F. Supp. 3d at 419.

196. *Id.* at 426 (quoting *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007)) (emphasis added).

197. *Id.* at 428.

198. *Id.*

This reasoning is specious on its face. Amateurs, by definition, generally take photos to satisfy personal yens, either as a hobby or to record memories for themselves, their friends, and their family. That was true of Mr. Otto, who acknowledged that he was not incentivized to take the photo by commercial motivations.<sup>199</sup>

Equally untenable is the court's conclusion that Hearst "used the Photograph for the same reason Otto took the Photograph" to bolster the conclusion that the use was not transformative:

Otto took the picture of President Trump with the bride because he wanted to capture something he determined was a noteworthy event. Esquire reported on the wedding and published the Photograph for this same purpose.<sup>200</sup>

This conclusion is incorrect under pre-*Warhol* case law and incorrect under *Warhol*. It mischaracterizes the two works' purposes, by oversimplification, and ignores the favored categories identified in section 107's preamble. Hearst's use of the photo was distinctly different from Mr. Otto's intended use, especially since he did not intend to distribute his iPhone photo publicly, let alone to license it. Hearst's publication of the snapshot, accompanied by its text, was "commentary" and "news reporting" addressed to the public on matters of public interest: how our country's leader was spending his time and how his golf club leveraged his presence.<sup>201</sup> Unlike in *Warhol*, there was no competition between Mr. Otto and Hearst. Certainly then, this use "may reasonably be perceived" as a transformative use for purposes of the first factor.<sup>202</sup>

199. *Id.* at 420. Compare this with Justice Sotomayor's concern that "[s]uch licenses (as the AWF-Condé Nast license), for photographs or derivatives of them, are how photographers like Goldsmith make a living." *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 1278 (2023).

200. *Otto*, 345 F. Supp. 3d at 429.

201. The court attempted to distinguish two cases from other circuits that specifically held that news uses of photographs created for other purposes satisfied the first-factor test, *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000) (newspaper's use of photos from a modeling portfolio to illustrate an article about a controversy regarding a beauty pageant winner), and *Calkins v. Playboy Enters. Int'l, Inc.*, 561 F. Supp. 2d 1136 (E.D. Cal. 2008) (high school portraits of *Playboy* bunny used as biographical context in photo spread). In fact, *Calkins* is a particularly apt precedent, since it involved high-school photographs taken "for the limited purpose of being used as a gift by Shannon's family and friends" and later used by *Playboy* magazine as biographical context in a centerfold containing more recent pictures. *Calkins*, 561 F. Supp. 2d at 1141. Just as in *Otto*, these are two distinct purposes that do not involve substitution or competition. Moreover, Hearst's use does not threaten to diminish the incentive of photographers like Mr. Otto to create original photographs of this kind.

202. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582, 582 n.16 (1994). There, where the second use was a parody, the Court explained, "The threshold question when fair use is raised in defense of parody is whether the parodic character may reasonably be perceived."

Moreover, the *Otto* court failed to provide appropriate weight to the second fair-use factor. Despite acknowledging that the photograph was factual in nature and previously published, it brushed the second factor aside entirely with the excuse that “the second factor does not carry much weight in the fair-use analysis and is rarely found to be determinative.”<sup>203</sup> As demonstrated above, the factual nature of photographs of this sort must be acknowledged in the consideration of the second factor.<sup>204</sup> As a threshold matter, the photo had almost no creative elements, being a “point and shoot” product of technology inside the iPhone. This is a case where the second factor should have been determinative in a fair-use finding.<sup>205</sup>

*Fioranelli* matched *Otto* in its quick dispatch of the favored-categories presumption, disparaging defendants’ invocation of unacceptable “bright line rules.” In light of *Warhol*, the court was likely correct to deny CBS’ (and two licensing agents’) fair-use claim. CBS included portions of the plaintiff’s work in 9/11 newsreels and marketed them to news and entertainment clients; the marketing of these newsreels was directly competitive with plaintiff’s licensing efforts and, therefore, not transformative.<sup>206</sup>

The other defendants produced new works—including fourteen documentaries—that included brief clips of Fioranelli’s work. In responding to their fair-use claims, the court distinguished the three authorities “heavily relied on by defendants,” solely on the ground that they all involved biographies, whereas the 9/11 programming did not.<sup>207</sup> Instead of considering the analogous elements of biographies and accounts of historical events, the judge in *Fioranelli* expressed his policy bias, worrying:

If I were to accept Defendants’ argument that because the allegedly infringing works document a historical event, the secondary use should be

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203. *Otto*, 345 F. Supp. 3d at 430.

204. See *supra* Part II. B. As Susan Sonntag famously observed: “Photographs are a way of imprisoning reality.” SUSAN SONTAG, ON PHOTOGRAPHY 163 (1977).

205. See *supra* Part II.B.

206. As in *Warhol*, CBS exceeded its license agreement with the plaintiff by including the clips in the 9/11 newsreels and sublicensing them to clients. *Fioranelli v. CBS Broad. Inc.*, 551 F. Supp. 3d 199, 211 (S.D.N.Y. 2021). Plaintiff’s breach of contract claim against CBS was barred by the statute of limitations. *Id.* at 257.

207. *Id.* at 236–37. The three cases discussed were *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996), *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001), and *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442 (S.D.N.Y. 2001) (a television documentary on actor Peter Graves). See *supra* notes 56–57, 163 and accompanying text. The court acknowledged in a footnote that *AMC Productions* “might be more appropriately categorized as a documentary,” *id.* at 237 n.30, but that did not move the court off its bottom line that none of the challenged documentaries “deserve favored status under § 107,” *id.* at 237. In any event, there is no principled basis for declining to apply these rules to other forms of criticism, commentary, news reporting, and scholarship.

considered fair, photojournalists like Plaintiff “would be unable to license photos, and would effectively be out of a job.”<sup>208</sup>

The court’s stripped-down formulation of the documentarians’ position—disregarding the purpose and context of their uses, and the factual nature and brevity of the clips—effectively sublimates First Amendment and public-interest considerations, replacing the presumption afforded section 107’s favored categories with one favoring a copyright owner’s financial return.<sup>209</sup>

The *Fioranelli* court then proceeded to evaluate each of the secondary uses, after accepting the plaintiff’s characterization of his use in the broadest possible terms (in the same expansive spirit as the *Otto* court): the creation of “a photographic memory of the events of 9/11 for posterity,” a level of generality that effectively swallows up virtually any factual secondary use.<sup>210</sup> As a result, the court determined that seven of the documentaries were non-transformative because their brief uses of the plaintiff’s work “depict what the original work itself illustrates—what happened at Ground Zero on September 11, 2001, and over the course of the following days.”<sup>211</sup>

This characterization of plaintiff’s use failed to take into account the plaintiff’s acknowledgment that his work consists of “spot news” that was “time-sensitive, and would sometimes be broadcast within minutes of the filming.”<sup>212</sup> The documentary producers, in contrast, used the clips to educate the public and contextualize the cataclysmic events from different points of view years after they occurred.<sup>213</sup> Nor did the court give any weight to the fact that, unlike CBS, these documentarians were not competing with the plaintiff in the licensing market or offering their work as a substitute for Mr. Fioranelli’s work.

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208. *Id.* at 237 (quoting *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 405 n.6 (S.D.N.Y. 2016)). The *Fioranelli* court does not appear to have considered that the court in *BWP Media* found the republication of the celebrity photographs at issue “contributes no information to [the accompanying gossip website] articles; and is otherwise extraneous to its reporting function.” *BWP Media*, 196 F. Supp. 3d at 405.

209. See *supra* section II.D. for discussion of the balancing of public and private interests in the fourth-factor analysis.

210. *Fioranelli*, 551 F. Supp. 3d at 209.

211. *Id.* at 234. The court granted the plaintiff summary judgment in connection with these documentaries.

212. *Id.* at 208.

213. Oddly, after finding there was no transformative use in the first set of documentaries, in part because they did not include targeted commentary about Mr. Fioranelli’s work, the court denied both parties’ motions for summary judgment regarding other documentaries, finding that reasonable jurors could disagree about the contention that their purpose was to “educate viewers about conspiracy theories surrounding 9/11.” *Id.* at 240. The court also found a docudrama and a related documentary featurette were transformative since they “enrich” the unique fictionalized setting in the film and the featurette provided “new insights and understanding” about the docudrama itself. *Id.* at 241–42.

As in *Otto*, the *Fioranelli* court also misunderstood the relevance of the fact/expression dichotomy, veering back and forth in its second-factor review. It acknowledged that the 9/11 footage was “a nonfictional rendering of an event of utmost historical importance” and that Mr. Fioranelli “did not create the scene or stage his subjects” or provide any evidence on editing decisions, such as why he captured what he did.<sup>214</sup> Obligated to factor in that the footage was previously published, the court, clearly reluctantly, opined that the second factor favored the defendants. But, as in *Otto*, this was immediately neutralized in the next sentence, as the court concluded (incorrectly, as we have shown, for original works used for their factual elements) “that this factor is rarely determinative.”<sup>215</sup> Here, it most certainly could have been determinative.

Finally, as will be expected from their concern about photographers’ need for financial incentives, both the *Otto* and *Fioranelli* courts misapplied the fourth factor. The *Otto* court focused solely on the plaintiff’s opportunity to license his snapshot.<sup>216</sup> Since plaintiff was in no way motivated by an intention to exploit the photo (or even to share it) when he took it,<sup>217</sup> there was no danger that a fair-use finding would adversely impact his incentive to create. But, without even a feint to the judicial obligation in the fourth-factor analysis to balance the public interest against Mr. Otto’s opportunistic desire to cash in on the serendipitous chain of events, the court held that the factor favored the plaintiff.<sup>218</sup>

As for *Fioranelli*, the court appreciated the momentousness of the events captured by the plaintiff and noted the exclusive nature of Mr. Fioranelli’s work. But, yet again, it showed disregard for the public interest in the fourth-factor analysis. Nor did the court properly account for other market factors, such as the defendants’ intended use in a different market or the unlikely impact of the brief snippets on plaintiff’s economic well-being.<sup>219</sup>

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214. *Id.* at 244.

215. *Id.*

216. *Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412, 419–20 (S.D.N.Y. 2018).

217. *Id.* at 420.

218. *Id.* at 433. The court belatedly took a more measured view of plaintiff’s circumstances in a bench trial on damages, following extensive motion practice and discovery. It held that a reasonable license fee for the photo would be \$100 and accordingly awarded the plaintiff the minimum statutory damages award, \$750. The court also denied the plaintiff’s application for attorney’s fees as the prevailing party. *Otto v. Hearst Commc’ns, Inc.*, No. 1:17-CV-04712-GHW, 2020 WL 377479 (S.D.N.Y. Jan. 23, 2020). Of course, by then, the Hearst Corporation had borne substantial legal fees and related costs.

219. Of course, plaintiff had not collected licensing fees for any of these documentaries. While a claim might lie against CBS for these amounts, the failure to pay Fioranelli a fee is not an appropriate consideration against the documentary producers (who had paid CBS a license fee, in the good-faith belief that it controlled the footage) in the fourth-factor analysis. *See supra* Part III.

The duration of the clips used by the *Fioranelli* defendants was short, in a number of instances ludicrously so. The court stated that the cumulative uses in the seven documentaries ranged between approximately two and 42 seconds; in all of them, the uses were a small percentage of the original footage. As numerous courts have held in evaluating the fourth factor, such brief uses are “too few, too short and too small in relation to the whole” to displace the market for plaintiff’s copyrighted works.<sup>220</sup>

Overall, both the *Otto* and *Fioranelli* courts failed to apply the four-part test appropriately, starting with an incorrectly perceived absence of transformativeness, and then misapplying the other factors. The courts also failed to balance public interest against private financial gain as *Google/Oracle* instructs.

Both courts would have done well to consider Judge Wyatt’s conclusion in *Time Inc. v. Bernard Geis Associates*.<sup>221</sup> There, the court held that the incorporation of copies in charcoal, “with no creativity or originality whatever,”<sup>222</sup> of frames from the famous Zapruder video footage of another traumatic national tragedy, the assassination of President John Kennedy in 1963, in a book on that subject was fair use, observing:

There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. While doubtless the theory could be explained [in other ways], the explanation actually made in the Book with copies is easier to understand. The Book is not bought because it contained the Zapruder pictures; the Book is bought because of the theory of Thompson and its explanation, supported by Zapruder pictures.<sup>223</sup>

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220. *E.g.*, *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996) (network’s cumulative use totaled as much as two minutes); *accord Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001) (quoting *Monster Commc’ns*, 935 F. Supp. at 495). The extremely brief documentary uses in *Fioranelli* should equally have tipped the third factor in favor of defendants. Instead of judging this factor independently, the court reversed the rule that *greater* transformativeness reduces the weight of the other factors; it held that its finding of an absence of transformativeness rendered the third factor neutral. *Fioranelli*, 551 F. Supp. 3d at 246.

221. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

222. *Id.* at 139.

223. *Id.* at 146. The Fourth Circuit has held:

[w]ere we to require those wishing to produce films and documentaries to receive permission from copyright holders for fleeting factual uses of their works, we would allow those copyright holders to exert enormous influence over new depictions of historical subjects and events. Such a rule would . . . force those wishing to create videos and documentaries to receive approval and endorsement from their subjects, who could ‘simply choose to prohibit unflattering or disfavored depictions.’

*Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 944 (4th Cir. 2013), *as amended* (Jan. 14, 2014).

This reasoning self-evidently applies to documentaries incorporating photographic and footage captures of 9/11, Darnella Frazier's cellphone video of George Floyd's death, footage of the January 6 attack on the Capitol, and video of the Russian invasion of Ukraine. It equally should have informed the *Otto* court's consideration of the iPhone capture illustrating the magazine's discussion of how President Trump spent his time during his tenure.

### CONCLUSION

Before the Supreme Court's decision in *Warhol*, as *Otto* and *Fioranelli* illustrate, a disturbing trend appeared to be developing among some lower courts: failing to give appropriate weight in their analysis of fair use to the doctrine's role as a "built-in First Amendment accommodation." When the Court granted AWF's writ of certiorari, many practitioners hoped the Court would scotch that trend. Unfortunately, instead, the *Warhol* majority decision raises new issues for future litigation regarding "degrees" of new use, "justification" for unlicensed use, and the relationship between the first and fourth factors.

On the bright side, the Court refused to endorse the Second Circuit's inappropriate first-factor side-by-side comparison test. It also reaffirmed its commitment to the decisions in *Google/Oracle* and *Campbell*. However, the Court's decision to limit its focus to AWF's singular question was disappointing since the Court failed to give a strong endorsement of the need to protect the public interest.

As set forth above, there is little reason to believe that the statutory four-factor analysis in documentary fair-use cases will change in light of *Warhol*'s narrowly focused holding on the commercial licensing of Warhol's Prince Series. This article does not propose that all uses of photos, footage and other archival content in documentary projects should automatically be treated as fair use. Rather, it contends that if each use is thoughtfully reviewed, applying all the factors in accordance with the principles discussed above, fair use will continue to prevail in most cases, if filmmakers continue their exercise of due care.

For documentary filmmakers, the stakes are not small. The inappropriate elevation of copyright owners' right to compensation over the public's interest could restrict investigative journalism, political and cultural commentary, and explorations of interesting characters, places, culture, and historical events that enlighten us and strengthen our democracy. Contrary to the dark view of some commentators, however, fair-use principles and the First Amendment considerations underlying them do not sanction such a result.

