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## COPYRIGHT LAW AS AN ENGINE OF PUBLIC INTEREST PROTECTION

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**COPYRIGHT LAW AS AN ENGINE OF PUBLIC  
INTEREST PROTECTION**

*Haochen Sun*



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## COPYRIGHT LAW AS AN ENGINE OF PUBLIC INTEREST PROTECTION

*Haochen Sun\**

**ABSTRACT**—Courts around the world have been confronted with bewilderingly complex challenges in protecting the public interest through copyright law. This article proposes a public interest principle that would guide courts to settle fair use cases with better-informed decisions. I argue that the proposed principle would legally upgrade fair use from serving as an engine of free expression to serving as an engine of public interest protection.

Based on comparative study of the conflicting rulings handed down by the U.S. and Chinese courts on Google Library, the article first considers the necessity of adopting the public interest principle in guiding the judicial settlement of fair use cases substantively and procedurally. The article then canvasses the two substantive legal standards to be embodied in the public interest principle. First, the principle would create a public interest use standard for courts to utilize in weighing the first fair use factor without applying the dichotomy of transformative and non-transformative use. At the same time, it would also require courts to employ the significant market harm standard when considering the fourth fair use factor. Second, the public interest principle would also modify the procedural rules concerning the assignment of burden of proof in fair use cases. It would place only the burden of proving a public interest use under the first factor on the user of a work who is the defendant in the judicial proceedings at hand.

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\* Associate Professor of Law and Director of the Law & Technology Center, University of Hong Kong Faculty of Law. I delivered public lectures and faculty workshops on an earlier version of this article at Duke University School of Law, the New York University School of Law, the University of Pennsylvania Law School, and the Center for Law and Internet at Vrije Universiteit Amsterdam. I also presented an earlier version at “The Future of Asian Trade Deals and IP” conference organized by Singapore Management University School of Law; at the “Comparative Dimensions of Limitations and Exceptions in Copyright Law” conference co-organized by University of Pennsylvania Law School, National University of Singapore Faculty of Law, and University of Hong Kong Faculty of Law; at the 2016 ATRIP Congress; at the Works-in-Progress Conference “IPScholars Asia” 2016; at the Third HKU-Tsinghua Law Conference; and at the Annual University of Hong Kong & Peking University Legal Conference. I am grateful to the participants in these events for their comments. For helpful conversations concerning or generous comments on previous drafts, or both, I would also like to thank: Tanya Aplin, Graeme Austin, Shyam Balganes, Barton Beebe, Robert Burrell, Anupam Chander, Jacques deLisle, Ben Depoorter, William Fisher, Jeanne Fromer, Daniel Gervais, Michael Handler, Reto Hilty, Emily Hudson, Ariel Katz, David Law, Jyh-An Lee, David Llewelyn, Wee Loon Loy, David Nimmer, Ruth Okediji, Christoph Rademacher, Jerome Reichman, Pamela Samuelson, Martin Senftleben, Christopher Sprigman, Madhavi Sunder, David Tan, and Christopher Yoo.

Moreover, the article also demonstrates how the public interest principle could be used to develop a meaningful alternative that bridges the gaps between the fair use and fair dealing doctrines. By largely preserving the existing attributes of both, the principle would serve as a commonly shared principle for adjudicating cases and developing further legislative reforms in both fair use and fair dealing jurisdictions.

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## INTRODUCTION

Fair use is an awkward creature. It has been hailed as a legal invention that is essential for human and societal development.<sup>1</sup> At the same time, fair

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<sup>1</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts. . . .’” (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)); Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence From the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008) (pointing out that the fair use doctrine defines “the contours of the private and public domains of human expression and, in doing so, directly impact[s] our capability for human flourishing”); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1661 (1988) (contending that the fair use doctrine “would contribute to the realization of a more just social order”); Ruth L. Okediji,

use has become something of a legal monster, causing no end of troubles owing to its vague and shifting contours. Hence, lamentations that fair use is the most troublesome<sup>2</sup> yet least determinate<sup>3</sup> doctrine in copyright law are hardly surprising.

Accordingly, fair use is fraught with legal dilemmas. Although high hopes are attached to its potential to protect the public interest, fair use has suffered a number of setbacks worldwide. Domestic laws governing fair use are variegated, and, worse still, individual judges may interpret and apply those laws differently.<sup>4</sup> The confluence of these various problems is posing increasingly grave threats to both copyright holders and users of their works domestically and globally, given that the protection and exploitation of copyrighted works now transcends national boundaries more than ever thanks to the liberalization of international trade and development of digital technology.

The legal dilemmas that have beset the Google Books Library Project (Google Library) globally since its inception reflect some of the deep-seated problems with fair use. Although Google Library is structured using the same operational standards worldwide, the judicial fair use rulings on the Library's fate in different countries are diametrically opposed. On the basis of public

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*Reframing International Copyright Limitations and Exceptions as Development Policy*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 445 (Ruth L. Okediji ed., 2017) (arguing that the fair use doctrine protects the public interest through “address[ing] a wide range of conduct enabled by new technologies”); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2540 (2009) (arguing that the fair use doctrine protects “the interests of subsequent authors in drawing from earlier works when expressing themselves, as well as the interests of the public in having access to new works and making reasonable uses of them”); Haochen Sun, *Fair Use as a Collective User Right*, 90 *N.C. L. REV.* 125, 201 (2011) (“Fair use is one of the greatest mechanisms for enriching human society. It sustains and enhances both cultural dynamics and political democracy in a free and just society.”); Rebecca Tushnet, *Intellectual Property as a Public Interest Mechanism*, in *THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW* 95, 99 (Rochelle Dreyfuss & Justine Pila eds., 2018) (pointing out that fair use “serve[s] public functions” and “the goal of promoting progress”).

<sup>2</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (stating that “the issue of fair use . . . is the most troublesome in the whole law of copyright”); *see also Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012) (quoting *Dellar*, 104 F.2d at 662).

<sup>3</sup> Paul Goldstein, *Goldstein On Copyright* § 12:3 (3d ed. Supp. 2019) (arguing that “[n]o copyright doctrine is less determinate than fair use”); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968)) (“Fair use is one of the most unsettled areas of the law. The doctrine has been said to be ‘so flexible as virtually to defy definition.’”); Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 *NW. J. TECH. & INTELL. PROP.* 265, 283–91 (2007) (discussing how and why the U.S. fair use doctrine is indeterminate).

<sup>4</sup> RUTH L. OKEDIJI, *THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES* 20 (2006), available at [https://unctad.org/en/Docs/iteipc200610\\_en.pdf](https://unctad.org/en/Docs/iteipc200610_en.pdf) [<https://perma.cc/8F9N-T8AQ>] (noting that “the actual substance and scope of [fair use as a copyright limitation] are determined by courts in the course of adjudication”).

interest considerations, for example, the U.S. courts have ruled that Google Library constitutes fair use.<sup>5</sup> By contrast, the Chinese courts have ruled against Google, holding that Google Library does not constitute fair use, with scant regard paid to the issue of public interest protection.<sup>6</sup>

Based on comparative study of the Google Library decisions in the U.S. and China, I put forward in this article a public interest principle that I believe would guide courts toward better-informed decisions in fair use cases. I argue that the principle would legally upgrade fair use from serving as an “engine of free expression”<sup>7</sup> to serving as an engine of public interest protection. As I will demonstrate, adoption of the principle would modify the judicial application of the fair use doctrine in two major ways.

First, the public interest principle would offer two substantive legal standards. It would create a public interest use standard for courts to utilize in weighing the first fair use factor without applying the dichotomy of transformative and non-transformative use. Meanwhile, it would also require courts to employ the significant market harm standard when considering the fourth fair use factor.

Second, the public interest principle would also modify the procedural rules concerning the assignment of the burden of proof in fair use cases. It would place only the burden of proving a public interest use under the first factor on the user who is the defendant in judicial proceedings. At the same time, it would shift the burden of proving market harm and the other fair use factors to the copyright holder, the plaintiff who has demonstrated *prima facie* copyright infringement in judicial proceedings.

Moreover, I also examine the implications of the public interest principle for dealing with the differences between the fair use and fair dealing doctrines. Commentators and policymakers alike have explored ways of reforming fair dealing by taking advantage of the open-ended, flexible qualities of fair use<sup>8</sup> and of reforming fair use by injecting the certainties that fair dealing affords.<sup>9</sup> In this article, I argue that the public

<sup>5</sup> See *infra* Section I.B.

<sup>6</sup> See *infra* Section II.C.

<sup>7</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a “free speech safeguard[]” and a “First Amendment accommodation[]”).

<sup>8</sup> See, e.g., Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 677 (2014) (arguing that the fair dealing regimes in the European Union “proved less flexible in responding to technological developments than American fair use”); ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 249–75 (2005).

<sup>9</sup> See, e.g., Barton Beebe, *Fair Use and Legal Futurism*, 25 LAW & LITERATURE 10, 15 (2013) (pointing out that “[t]he very malleability that was once a virtue of fair use doctrine now leaves it exposed to powerful efforts to constrict its scope”); Justin Hughes, *Fair Use and Its Politics – at Home and Abroad*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 234, 235 (Ruth L. Okediji ed.,

interest principle can be used to develop a meaningful alternative that bridges the gaps between the two doctrines. By largely preserving the existing attributes of both, the principle would serve as a commonly shared principle for adjudicating cases and developing further legislative reforms in both fair use and fair dealing jurisdictions.

The remainder of the article is organized as follows. Part I introduces the Google Library litigation in the U.S. and China and discusses how the U.S. and Chinese courts have reached different conclusions on the basis of the fair use doctrine. Part II compares the differences in that doctrine under U.S. and Chinese law, and then offers a preliminary consideration of how those differences led to the differing outcomes of the Google Library litigation in the two countries. Based on this comparative study, I argue that a public interest principle ought to be adopted for the judicial application of the fair use doctrine. Parts III and IV move on to discuss the ways in which the proposed public interest principle will develop new substantive and procedural standards for adjudicating fair use cases. Part V concludes by responding to concerns about the public interest principle and discussing how it offers an alternative approach to bridging the gaps between the fair use and fair dealing doctrines.

## I. LITIGATION OVER THE GOOGLE LIBRARY PROJECT IN THE U.S. AND CHINA

### A. *Litigation in the U.S.*

Google launched the Library Project in December 2004, announcing that it would utilize then newly developed scanning technology to digitize the collections of the world's major research libraries.<sup>10</sup> After delivering

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2017) (“Fair use as a battleground for *the open-ended negation of copyright* leads naturally to the ‘three-step test’ of the Berne Convention. . . .”); Sun, *supra* note 3, at 283 (“The condition that requires copyright limitations [to] be ‘clearly defined’ and ‘narrow in scope and reach’ calls into question whether the first prong of the three-step test [as required by Article 13 of the TRIPS Agreement] will strike down [fair use doctrine that is] by nature flexible and open-ended.”); P. Bernt Hugenholtz & Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities* 9 (Amsterdam Law School Research Paper No. 2012-39; Institute for Information Law Research Paper No. 2012-33, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2013239](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013239) [<https://perma.cc/N9YM-7AWM>] (contending that “the rule of fair use as it presently exists and is applied in the United States has always attracted criticism, particularly for its presumed lack of predictability”).

<sup>10</sup> See *Google Books History*, GOOGLE, <https://www.google.com/googlebooks/about/history.html> [<https://perma.cc/Q75P-MULQ>]. These libraries included the New York Public Library, Library of Congress, Harvard Library, and over forty libraries around the world. *Id.* The project involves scanning books and displaying bibliographic information along with snippets of the scanned books in the form of a card catalog on the Google Books website. *Id.* To facilitate access to global users, Google analyzes each book scan and creates an overall index of all scanned books. By using the index, users can input a particular word or phrase to retrieve the most relevant books containing the search term. *Id.* Online

digital copies to partner libraries, Google created an electronic database of books, enabling readers to view snippets of copyrighted books and the entire texts of public domain books. It also made book texts available for online searching.<sup>11</sup> In the fall of 2005, the Authors Guild, along with several authors, filed a class action lawsuit against Google in the Southern District Court of New York, alleging that Google had committed copyright infringement by scanning copyrighted books and including them in its library without the permission of the copyright owners.<sup>12</sup> The opposing parties attempted to settle the dispute<sup>13</sup> and, after lengthy negotiations, proposed an Amended Settlement Agreement in 2011.<sup>14</sup> However, the district court rejected the Agreement on the grounds that it was not fair, adequate, or reasonable to many other copyright owners.<sup>15</sup> The parties then engaged in further negotiations but were unable to reach a settlement.<sup>16</sup>

In 2013, the district court ruled in Google's favor on the grounds of fair use under Section 107 of the U.S. Copyright Act.<sup>17</sup> The Court evaluated each of the four fair use factors as follows:

- (1) the purpose and character of the use: Google's use of the copyrighted works was transformative in nature and was for nonprofit, educational purposes;<sup>18</sup>
- (2) the nature of the copyrighted work: the copyrighted works in question were mostly published, nonfiction works;<sup>19</sup>

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booksellers can and do avail the opportunity to direct readers to their website from the relevant Google Books webpage. *Id.*

<sup>11</sup> See *About Google Books*, GOOGLE, <https://www.google.com/googlebooks/about> [<https://perma.cc/E4R5-2UYG>] (explaining the searching capacity of the Google Books search feature and the methods by which users may navigate this search tool).

<sup>12</sup> Paul Aiken, *Authors Guild Sues Google, Citing "Massive Copyright Infringement"*, AUTHORS GUILD (Sept. 20, 2005), <https://www.authorsguild.org/industry-advocacy/authors-guild-sues-google-citing-massive-copyright-infringement> [<https://perma.cc/X4JG-6HFA>] (asserting that Google's "unauthorized scanning and copying of books through its Google Library program is a 'plain and brazen violation of copyright law'" because "[i]t's not up to Google or anyone other than the authors, the rightful owners of these copyrights, to decide whether and how their works will be copied").

<sup>13</sup> Jacob Smilovitz, *Google Reaches \$125 Million Settlement with Publishers in Google Book Project Lawsuit*, MICH. DAILY (Oct. 28, 2008), <http://www.michigandaily.com/content/2008-10-29/google-reaches-settlement-university-scanning-continue> [<https://perma.cc/Q8ZK-K5R3>]. In October 2008, the parties entered into a settlement agreement, in which Google agreed to pay a total of \$125 million to copyright holders whose books had already been scanned without their approval, to compensate the plaintiffs' court costs, and to create a Book Rights Registry. *Id.*

<sup>14</sup> *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 671 (S.D.N.Y. 2011).

<sup>15</sup> *Id.* at 686.

<sup>16</sup> *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 288 (S.D.N.Y. 2013).

<sup>17</sup> 17 U.S.C. § 107 (2018).

<sup>18</sup> *Authors Guild*, 954 F. Supp. 2d at 291–92.

<sup>19</sup> *Id.* at 292.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole: while Google reproduced books in their entirety, only a limited amount of text was made visible to users, and users were not provided with full-text copies of the copyrighted books;<sup>20</sup> and

(4) the effect of the use upon the potential market for or value of the copyrighted work: Google did not sell its digital reproductions of the copyrighted works, and the reproductions would not substitute for the works in the marketplace. On the contrary, Google produced market benefits for the copyright holders because it made the copyrighted works easier to find and thereby potentially increased their visibility and sale.<sup>21</sup>

The district court further weighed the four factors holistically in light of the purpose of the Copyright Act, holding that its fair use ruling was buttressed by public interest considerations.<sup>22</sup>

In 2015, the Court of Appeals for the Second Circuit upheld the fair use ruling made by the district court.<sup>23</sup> Moreover, the Second Circuit also provided more detailed analysis of how the four fair use factors should be applied, in particular the first factor concerning transformative use and fourth factor concerning market impact. The Second Circuit took pains to explain what constitutes transformative use. It first considered whether Google's provision of the search and snippet view functions superseded the objects of creation of the original copyrighted works or added something to those works with a further purpose<sup>24</sup> before opining that those functions did indeed add to the original works, facilitating their use in new ways.<sup>25</sup> The Second Circuit further held that "transformative uses tend to favor [a] fair use finding because a transformative use is one that communicates something new and different from the original and expands its utility, thus serving copyright's overall objective of contributing to public knowledge."<sup>26</sup>

The Second Circuit went on to acknowledge that in evaluating fair use, the first factor, i.e., the purpose and character of use, is closely linked with the fourth factor concerning market harm. In elaborating further on the fourth factor, it opined that that factor focuses on whether a copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the copyright holder of significant revenue owing to the likelihood

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

<sup>21</sup> *Id.* at 292–93.

<sup>22</sup> *Id.* at 293–94.

<sup>23</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015).

<sup>24</sup> *Id.* at 214–18.

<sup>25</sup> *Id.* at 218.

<sup>26</sup> *Id.* at 214.

of potential purchasers opting to purchase the copy in preference to the original. In support of Google, and relying on *Campbell v. Acuff-Rose Music, Inc.*, the Second Circuit stated that “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.”<sup>27</sup>

In considering the plaintiffs’ arguments, the Second Circuit recognized that the snippet function “can cause some loss of sales,” or a reduction in library demand, in situations in which the searcher’s need for access to a text is satisfied by the snippet view.<sup>28</sup> However, it concluded that, despite the possibility—or even the probability or certainty—of some loss of sales, the snippet view does not create (and cannot amount to the creation of) an effectively competing substitute that would tilt the fourth factor in favor of the Authors Guild.<sup>29</sup>

### B. Litigation in China

Given the enormous potential of the digital library market in China, Google introduced its Library Project in China in 2007.<sup>30</sup> However, it was immediately confronted with fierce opposition from Chinese copyright owners. For instance, the China Written Works Copyright Society (CWWCS) objected that Google was—without authorization—making available online nearly 18,000 books authored by over 570 Chinese writers.<sup>31</sup> In October 2009, the Chinese writer Wang Shen lodged a complaint with the Beijing First Intermediate Court, contending that Google had infringed her copyright on her novel *Acid Lover* by scanning and uploading it to Google Library without her permission.<sup>32</sup>

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<sup>27</sup> *Id.* at 223.

<sup>28</sup> *Id.* at 224.

<sup>29</sup> *Id.*

<sup>30</sup> See GUAN H. TANG, COPYRIGHT AND THE PUBLIC INTEREST IN CHINA 189 (2011).

<sup>31</sup> Vivian Wai-yin Kwok, *A Copyright Complaint From China*, FORBES (Oct. 21, 2009), <http://www.forbes.com/2009/10/21/chinese-writer-google-markets-copyrights.html> [https://perma.cc/2359-4DLA]. With regard to compensation, it is noteworthy that under a tentative settlement proposed by Google (to the Authors Guild in the United States), Google offered to pay a sum of \$60 per digitized book as compensation and also agreed to share 63% of its income derived from readers who would pay for online reading. *Id.* However, the parties did not ultimately reach an agreement. *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 288 (S.D.N.Y. 2013). Pursuant to copyright infringement allegations by the CWWCS, Google agreed to provide a list of Chinese books scanned for the collection of its Digital Library, but refused to admit copyright infringement. Chen Jia & Xie Yu, *Writer Sues Google for Copyright Infringement*, CHINA DAILY (Dec. 16, 2009), [http://www.chinadaily.com.cn/china/2009-12/16/content\\_9184029.htm](http://www.chinadaily.com.cn/china/2009-12/16/content_9184029.htm) [https://perma.cc/6SJ5-DS5Y].

<sup>32</sup> Wang Xin v. Google, Inc., Beijing Gu Xiang Information Technology Co., Ltd., Beijing No. 1 Intermediate People’s Court, (2011) Yi Zhong Min Chu Zi No. 1321. Although Google removed the copyrighted work from its digital library soon after the plaintiff filed the lawsuit, she was still concerned about Google’s attitude toward copyrights and its disrespect for authors. She therefore demanded a public

The intermediate court handed down a lengthy decision.<sup>33</sup> At the outset, the court adopted the approach of conceptually separating Google's allegedly infringing acts, namely, its (1) provision of snippet views and (2) scanning and creation of digital copies. It then considered whether those acts infringed copyright or could be exempted from infringement liability as fair use under the Copyright Law of the People's Republic of China (Chinese Copyright Law).<sup>34</sup> In evaluating the act of providing snippet views, the intermediate court held that a novel is a literary work that delivers the thoughts and feelings of its author, whereas a snippet view exposes no more than fragmented and incomplete sentences and is thus incapable of achieving the very purpose of a novel.<sup>35</sup> It further reasoned that an interested user would still likely buy a copy of the novel after seeing, for example, a novel's title and the author's name.<sup>36</sup> Following Article 21 of the Regulation on the Implementation of the Chinese Copyright Law (Copyright Implementation Regulation),<sup>37</sup> the intermediate court then concluded that in this particular case the snippet views of the plaintiff's novel would not adversely affect the market for her novel's sale. It therefore ruled that snippet views did not conflict with the normal exploitation of a novel in the marketplace, nor did they unreasonably prejudice the legitimate interests of its author.<sup>38</sup>

Although the intermediate court deemed the provision of snippets of Wang's novel to constitute fair use, it ruled that Google's digital

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apology and damages from Google. See *Google Is Sued By Chinese Author Mian Mian*, BBC NEWS (Dec. 29, 2009), <http://news.bbc.co.uk/2/hi/business/8433345.stm> [<https://perma.cc/TC3C-Y3WM>]. Google's plans created resentment within the community of Chinese writers. Writers including Chen Cun, Wang Xiaofeng, and You Yunting expressed their anger towards the unauthorized digitalization and the settlement agreement via Chinese media. There were also voices supporting copyright owners to lodge complaints against Google in Chinese courts. See Juliet Ye, *Google Books Settlement: The Chinese Chapter*, WALL ST. J. (Oct. 20, 2009), <http://blogs.wsj.com/chinarealtime/2009/10/20/google-books-settlement-the-chinese-chapter/> [<https://perma.cc/CB5V-XYA2>].

<sup>33</sup> For a discussion about this ruling, see generally Yong Wan, *Similar Facts, Different Outcomes: A Comparative Study of the Google Books Project Case in China and the United States*, 63 J. COPYRIGHT SOC'Y U.S.A. 573 (2016); Samsung Xiaoxiang Shi & Qian Wang, *China's Fair Use Doctrine After the Google Books Search Project*, in ANNOTATED LEADING COPYRIGHT CASES IN MAJOR ASIAN JURISDICTIONS (Kung-Chung Liu ed.) (forthcoming 2019).

<sup>34</sup> See Wan, *supra* note 33, at 582; see Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l Peoples Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 22 [hereinafter Chinese Copyright Law].

<sup>35</sup> See Shi & Wang, *supra* note 33, at 4.

<sup>36</sup> See *id.*

<sup>37</sup> Zhonghua Renmin Gongheguo Zhuzuoquan Fa Shishi Tiaoli (中华人民共和国著作权法实施条例) [Regulations for the Implementation of the Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 2, 2002, amendment promulgated Jan. 30, 2013, effective Mar. 1, 2013), available at <http://www.wipo.int/wipolex/en/details.jsp?id=13428> [<https://perma.cc/VFP4-GAX2>].

<sup>38</sup> See Shi & Wang, *supra* note 33.

reproduction of the novel infringed the author's copyright. It reasoned that the normal exploitation of a work warranted that the right to authorize others to reproduce that work should remain in the full control of the copyright holder. If a work is reproduced without the copyright holder's permission, such reproduction unduly interferes with the normal exploitation of the work because unauthorized reproduction is likely to negatively affect the copyright holder's arrangements to receive royalties from licensing the work.<sup>39</sup> Moreover, the intermediate court held that Google's reproduction of the novel had unreasonably prejudiced the plaintiff's legitimate interests because it had jeopardized the market value of her novel.<sup>40</sup> It further noted that Google's reproduction of the novel might lead to subsequent unauthorized uses. For example, other parties might retrieve copies of the novel from Google's server with the aid of advanced technology.<sup>41</sup>

Dissatisfied with the intermediate court's decision, Google appealed to the Beijing People's High Court.<sup>42</sup> In considering whether Google's digital reproduction of the novel could be legally permitted as fair use, the high court clarified that the conceptual separation of the alleged infringing acts by the intermediate court had been less than ideal,<sup>43</sup> pointing out that reproduction is in many situations a prerequisite for statutory types of fair use to occur. In such situations, the act of copying and subsequent actions related to the use of the copies should not be assessed separately. Rather, in a given case, the actions taken in pursuit of the permitted uses should be treated as a whole.<sup>44</sup> Therefore, if the act of providing a snippet view is considered fair use, then the prior act of full-text reproduction might also constitute fair use.<sup>45</sup> Given that Google's acts did not fall under any exceptions and limitations laid out under Article 22 of the Chinese Copyright Law, the High Court considered whether Google's use of the copyrighted work fell under the broader principles of fair use.<sup>46</sup> It acknowledged that certain situations falling outside the ambit of Article 22 could still be considered fair use.<sup>47</sup>

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<sup>39</sup> *Id.* at 5.

<sup>40</sup> *Id.*

<sup>41</sup> *See* Wan, *supra* note 33, at 582.

<sup>42</sup> Google, Inc. (Appellant) v. Wang Xin (Appellee), Beijing High People's Court, (2013) Gao Min Zhong Zi No. 1211. For a partial translation of this decision, see ROBERT P. MERGES & SEAGULL HAIYAN SONG, *TRANSNATIONAL INTELLECTUAL PROPERTY LAW: TEXT AND CASES* 452–56 (2018).

<sup>43</sup> *See* MERGES & SONG, *supra* note 42, at 455.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 454.

<sup>47</sup> *Id.*

In this regard, the High Court noted that in determining whether Google's act of full reproduction amounted to fair use, the following factors must be considered: (1) the purpose and character of the use by Google; (2) the nature of and amount used in relation to the length of the novel; (3) the effect of Google's use of the novel upon the normal exploitation of the copyrighted work by the copyright owner (the plaintiff in the original suit); and (4) whether Google's use would unreasonably prejudice the legitimate interests of the copyright owner.<sup>48</sup> Although Google alleged that its acts constituted fair use, it did not provide any factual evidence in relation to the aforesaid factors. As a result, the High Court rejected Google's fair use defense on the grounds of its failure to fulfill its burden to prove fair use.<sup>49</sup>

## II. LOCATING THE PUBLIC INTEREST IN FAIR USE CASES

I now move on to consider why the Chinese and U.S. courts handed down conflicting rulings on the Google Library cases. I contend that a central reason for the conflicting rulings lies in how the two countries' courts treated the public interest in their fair use analyses. In deciding the Google Library cases, the U.S. courts regarded the public interest as the principal consideration in their decision-making process. The Chinese courts, by contrast, placed little weight on the public interest in that process. I further suggest that this comparative study actually demonstrates the necessity of creating a public interest principle to guide judicial rulings on fair use cases.

### A. Fair Use Versus Fair Dealing?

There is a major discrepancy in copyright limitations under Chinese and U.S. copyright law. While the U.S. has adopted a flexible fair use regime, China follows the comparatively rigid regime of fair dealing. It could be argued that it is this discrepancy that resulted in the conflicting judicial rulings on the Google Library cases in the two jurisdictions.

Section 107 of the U.S. Copyright Act contains a non-exhaustive list of fair use exemptions,<sup>50</sup> which empowers judges to make judicial decisions based on the four fair use factors<sup>51</sup> and any other relevant factor as well.<sup>52</sup> The legislative history of Section 107 shows that the fair use regime that it

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<sup>48</sup> *Id.* at 455.

<sup>49</sup> *Id.*

<sup>50</sup> 17 U.S.C. § 107 (2010).

<sup>51</sup> *See, e.g.,* Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1377–78 (1997).

<sup>52</sup> *Id.* at 1378.

undergirds is intended to be broad and flexible.<sup>53</sup> For instance, the relevant Senate and House Committee Report states:

[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . . The bill endorses the purpose and general scope of the judicial doctrine of fair use . . . but there is no disposition to freeze the doctrine in the statute. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.<sup>54</sup>

This statement demonstrates that the codification of the fair use doctrine still affords judges ample room for making sensible judicial decisions on what constitutes a fair use.<sup>55</sup> As part of judge-made law, the judicial adoption of transformative use exemplifies the broad and flexible nature of the U.S. fair use regime. Section 107 is silent on whether transformative use is legal or not thereunder. It was the U.S. Supreme Court that first embraced transformativeness as an integral part of fair use analysis.<sup>56</sup> The Court opined that “[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>57</sup> Since then, the U.S. courts have applied the transformative use doctrine in numerous copyright cases.<sup>58</sup>

Chinese copyright law, by contrast, has statutorily adopted a fair dealing regime known for operating an exhaustive list of specifically defined exemptions, thereby affording less flexibility for judges to decide cases.

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<sup>53</sup> Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 176 (2017).

<sup>54</sup> Senate and House Committee Reports, *quoted in* L.E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT: THE EXCLUSIVE RIGHTS TENSIONS IN THE 1976 COPYRIGHT ACT 19–20 (1978).

<sup>55</sup> While the legislative intent behind codification of the fair use doctrine was to “inject some degree of certainty and predictability into its application,” the intent was not to shape the fair use doctrine as bright-line rules. *See* Sun, *supra* note 3, at 284. Flexibilities were retained in the wording of Section 107. The fair use doctrine is seen as “an equitable rule of reason.” H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (stating that fair use factors are nonexclusive because the fair use doctrine “is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts”).

<sup>56</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (“[T]he fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.”).

<sup>57</sup> *Id.* at 569; *see also* *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801–02 (9th Cir. 2003); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271–74 (11th Cir. 2001).

<sup>58</sup> *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 582–621 (2008); Samuelson, *supra* note 1, at 2548–55 (2009); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 736–740 (2011).

Article 22 of the Chinese Copyright Law<sup>59</sup> constitutes the major legal basis for China's fair dealing regime. As noted, it consists of the exhaustive enumeration of twelve specific fair use exemptions, allowing the use of copyrighted works for the purposes of: (1) the user's personal study, research, and appreciation; (2) introducing or commenting on or explaining a certain point with appropriate citation; (3) unavoidable inclusion or quoting in news reporting; (4) publishing or rebroadcasting among media agencies; (5) publishing or broadcasting of a speech delivered at a public gathering; (6) reproducing or translating for teaching and research; (7) fulfilling official duties by state organs; (8) reproducing a work in the collection of a library, archive, memorial hall, museum, art gallery, or any similar institution for the display or preservation of the work; (9) performing a published work under special circumstances; (10) producing, drawing, photographing, or video recording of a work of art displayed in an outdoor public place; (11) translating Chinese works from the Han language into the languages of China's minority ethnic groups; and (12) transliterating works into braille for the blind.<sup>60</sup> Moreover, the Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks (Communication Right Regulation)<sup>61</sup> extends the application of certain fair dealing exemptions enumerated in Article 22.

The application of the fair use exemptions under Article 22 of the Copyright Law and Article 6 of the Communication Right Regulation are further governed by the Copyright Implementation Regulation. Article 21 of the Copyright Implementation Regulation prescribes that "exploitation of a published work which may be exploited without permission from the

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<sup>59</sup> Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 22.

<sup>60</sup> Chinese Copyright Law, *supra* note 34, art. 22.

<sup>61</sup> Xin Xi Wang Luo Chuan Bo Quan Tiao Li (信息网络传播权保护条例) [Regulation on Protection of the Right to Network Dissemination of Information] (promulgated by the Order No. 468 of the State Council of the People's Republic of China on May 18, 2006, as amended by the Decision of the State Council on Amending the Regulation on Protection of the Right to Network Dissemination of Information on January 30, 2013), available at <http://www.wipo.int/wipolex/en/details.jsp?id=13403> [<https://perma.cc/UG85-TG3M>]. Article 6 of the Communication Right Regulation stipulates eight permissible uses of copyright works on the Internet, including: (1) appropriate citation for the purpose of introducing or commenting; (2) news reporting; (3) providing teachers and researchers with a small quantity of published works for classroom use or research; (4) communicating works to the public by state organs for the purpose of fulfilling official duties; (5) translation into minority nationality languages and making available to ethnic minorities; (6) communicating and making published works perceivable to the print-disabled for non-profit purposes; (7) communicating published articles that are relevant to current news events; and (8) communicating speeches addressed to the public. *Id.* art. 6. When courts are dealing with Internet-related fair use cases, they should directly apply the Communication Right Regulation.

copyright owner in accordance with the relevant provisions of the Copyright Law shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.”<sup>62</sup>

Ostensibly, reproducing copyrighted works for the purpose of digital libraries falls outside the ambit of the foregoing Article 22 and Article 6. None of the fair dealing exemptions thereunder permit this type of unauthorized reproduction. Therefore, the statutory provisions do lend strong support to the Chinese courts’ rulings against Google. However, I disagree with the opinion that the differences between the American fair use and Chinese fair dealing regimes led to the conflicting judicial decisions on the Google Library cases.<sup>63</sup> Instead, I contend that it is the diametrically opposed approaches to applying public interest considerations that resulted in those conflicting opinions. In the two following sections, I analyze the extent to which the U.S. and Chinese courts applied such considerations.

### B. *The U.S. Courts: Taking the Public Interest Seriously*

In deciding the Google Library cases, both the Southern District Court of New York and Court of Appeals for the Second Circuit gingerly considered the extent to which the public interest should be protected in their overall fair use assessments. At the macro level, they regarded the public interest as a guiding consideration in conducting the overall fair use analysis. At the micro level, they took the public interest into account in their specific analysis of the fair use factors. Citing the Supreme Court’s *Campbell* ruling, the district court defined fair use as a legal doctrine that functions “to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”<sup>64</sup> The Second Circuit provided further analysis on the public interest by first finding that it is “the public” who should be regarded as “the ultimate, primary intended beneficiary [of copyright protection].”<sup>65</sup> Following a review of the history of fair use,<sup>66</sup> the Second Circuit concluded that it is the mandate of public interest protection that should guide the judicial assessment of a fair use case, which normally centers on a four-factor analysis because a fair use assessment, by nature, requires an effort “to define the boundary limit of the original author’s exclusive rights in order to best

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<sup>62</sup> *Id.* art. 21.

<sup>63</sup> *See, e.g.,* Wan, *supra* note 33, at 574 (“Why did Google win the case in the United States, but lose in China? The goals of this article are to show the differences in the copyright exceptions system between China and the United States, and to highlight how China may learn from the U.S.’s flexible fair use doctrine.”).

<sup>64</sup> *Authors Guild v. Google, Inc.*, 954 F. Supp. 2d 282, 289 (S.D.N.Y. 2013) (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>65</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015).

<sup>66</sup> *Id.* at 213.

serve the overall objectives of the copyright law to expand public learning while protecting the incentives of authors to create for the public good.”<sup>67</sup>

Moving beyond a general discussion of the role of the public interest principle, both the district court and Second Circuit boldly demonstrated that it is appropriate for courts to directly apply public interest considerations in determining the final outcome of their overall fair use assessment. Courts may further consider the broader public interest on top of their analyses of the four fair use factors. The district court first delved into the four-factor fair use analysis, and then applied public interest considerations to decide the outcome of the case as follows:

Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits.<sup>68</sup>

Similarly, the Second Circuit concluded that the case should first be decided by careful scrutiny of the four fair use factors and then by the application of public interest considerations:

[C]onsidering the four fair use factors in light of the goals of copyright, we conclude that Google’s making of a complete digital copy of Plaintiffs’ works for the purpose of providing the public with its search and snippet view functions (at least as snippet view is presently designed) is a fair use and does not infringe Plaintiffs’ copyrights in their books.<sup>69</sup>

Relatedly, in another digital library litigation, *Authors Guild v. HathiTrust*,<sup>70</sup> the District Court also applied the public interest principle to supplement its analysis of the four fair use factors as follows:

The enhanced search capabilities that reveal no in-copyright material, the protection of Defendants’ fragile books, and, perhaps most importantly, the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers in the ways imagined by the [Americans

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<sup>67</sup> *Id.*

<sup>68</sup> *Authors Guild*, 954 F. Supp. 2d at 293.

<sup>69</sup> *Authors Guild*, 804 F.3d at 225.

<sup>70</sup> 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

with Disabilities Act] protect the copies made by Defendants as fair use to the extent that Plaintiffs have established a *prima facie* case of infringement. In addition to the briefs submitted by the parties, the two memoranda filed by amici further confirm that the underlying rationale of copyright law is enhanced by the [HathiTrust Digital Library].<sup>71</sup>

In these decisions, courts did not rely solely on their application of the four fair use factors, as other U.S. courts had previously done. Instead, at the macro level, they asserted that analysis of those factors must be weighed in light of the public interest principle. In rendering their decisions, they considered the concrete public benefits of the Google and HathiTrust libraries. Although they did not explicitly apply the concept of users' rights as other courts have done,<sup>72</sup> their decisions imply that copyright law should protect uses of copyrighted materials if said uses carry "substantial spillover potential associated with dramatically improved public access to millions of books and the ideas, knowledge, stories, and so on contained in them."<sup>73</sup>

At the micro level, the Second Circuit further cast light on how the public interest principle should be applied in interpreting the first and fourth fair use factors, which are normally understood as the most important of the four.<sup>74</sup> Since the Supreme Court's *Campbell* ruling, transformative use has presumptively been deemed fair because it "adds something new, with a further purpose or different character" to the works it copied.<sup>75</sup> These functions of transformative use, according to the Supreme Court, fulfill the goal of copyright protection as they protect the public interest.<sup>76</sup> Building on the *Campbell* ruling, the Second Circuit spelled out the importance of transformative use as follows:

The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work.<sup>77</sup>

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<sup>71</sup> *Id.* at 464.

<sup>72</sup> *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 485 (2d Cir. 2004) (Jacobs, J., concurring); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001).

<sup>73</sup> BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 360 (2012).

<sup>74</sup> *See* Beebe, *supra* note 58, at 578.

<sup>75</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

<sup>76</sup> *Id.* ("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.") (internal citation omitted).

<sup>77</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

With this appreciation of the role of transformative use, the Second Circuit then explained why it is presumptively deemed to constitute fair use:

[T]ransformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge.<sup>78</sup>

In light of such a public interest-oriented understanding of transformative use, the Second Circuit went on to consider whether the new use (i.e., provision of the search and snippet view of copyrighted books) merely superseded the objects of creation of the original copyrighted books or instead added something new to them with a further purpose. If new elements were added, then the new use may be considered transformative. The Second Circuit opined that the search and snippet view functions facilitated the use of the copyrighted books in new ways, and therefore constituted transformative uses thereof.<sup>79</sup> Another major contribution made by the Second Circuit was its direct grounding of the fourth factor of the fair use doctrine in public interest considerations. I discuss this contribution in further detail in Part III.<sup>80</sup>

### C. *The Chinese Courts: Insufficient Consideration of the Public Interest*

While the U.S. courts settled the Google Library disputes based on the public interest, the Chinese courts gave scant consideration to the public interest in their rulings. At the outset of its first-instance ruling, the Beijing First Intermediate Court pointed out that the ultimate goal of Chinese copyright law is to protect the public interest. According to the intermediate court, the law allows authors to receive financial gains from the copyright protection of their works. That protection encourages more people to create original works on the one hand, and promotes the production and dissemination of those works on the other. From this perspective, the intermediate court inferred that the protection of authors' exclusive rights serves as a means to the end of higher societal interests.<sup>81</sup> Fair use, under Chinese copyright law, is intended to fulfill that goal.<sup>82</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 217 (“We cited *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 639–40 (4th Cir.2009), *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir.2007), and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir.2003) as examples of cases in which courts had similarly found the creation of complete digital copies of copyrighted works to be transformative fair uses when the copies ‘served a different function from the original.’”).

<sup>80</sup> See *infra* text accompanying notes 162–64.

<sup>81</sup> See Wan, *supra* note 33, at 582.

<sup>82</sup> See *id.*

Despite making the foregoing point, however, the intermediate court did not situate its fair use analysis in achievement of the goal of Chinese copyright law. Instead, it focused its legal analysis on the extent to which Google Library negatively affected the economic interests of the copyright holders concerned. The court first considered whether Google's full-text reproduction of the copyrighted books conflicted with the books' normal exploitation by the copyright holders.<sup>83</sup> It reasoned that the most important type of normal use of a copyrighted work is its reproduction. If a party seeks to reproduce a copyrighted work, then that party is bound to compensate the copyright holder by paying an appropriate licensing fee.<sup>84</sup> That fee brings in revenue for the copyright holder, and therefore licensed use constitutes a normal use of copyrighted work. Following this line of reasoning, the intermediate court held that if full-text reproduction were not considered to be in conflict with normal use, then a copyright holder would be unable to assert control over his or her right of reproduction.<sup>85</sup>

Furthermore, the intermediate court considered whether Google's full-text reproduction could potentially jeopardize a work's market value, thereby unreasonably prejudicing the legitimate right of copyright holders. It pointed out that the market interest of copyright holders can primarily be harmed in two ways. First, full-text reproduction opens the door for subsequent uses without authorization from copyright holders and without the payment of licensing fees, thereby negatively affecting their commercial interests. Second, full-text reproduction makes digital versions of books more readily available online, making it easier for third parties to also reproduce them, thereby amplifying the risk of further unauthorized exploitation.<sup>86</sup> Accordingly, the intermediate court concluded that, given its potentially negative economic impact on copyright holders, Google's full-text reproduction did not constitute fair use.<sup>87</sup> Being solely focused on the market impact factor,<sup>88</sup> the intermediate court did not make any inquiry into the purpose and nature of the use of the copyrighted books or the beneficial impact on the public.

On appeal, the Beijing High Court agreed with the intermediate court by also finding that full-text reproduction did not constitute fair use as stipulated in Article 22 of the Chinese Copyright Law. The High Court acknowledged the possibility of going beyond the exhaustive list of

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<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See Shi & Wang, supra note 33.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

exceptions and limitations under Article 22, as well as the feasibility of analyzing the case in light of factors akin to the four fair use factors.<sup>89</sup> It did not, however, delve into whether Google Library constituted a new type of fair use that is permissible under Article 22, nor did it apply the factors it posited. Instead, it required Google to supply evidence in support of its fair use defense.<sup>90</sup> Failure to satisfy this burden of proof, according to the High Court, would lead to a rejection of that defense.<sup>91</sup> Although Google did not supply the required evidence, the High Court could have chosen to consider whether Google's full-text reproduction constituted transformative use in the larger interest of the public.

#### *D. The Need to Create a Public Interest Principle*

As discussed in the preceding sections, courts in the U.S. and China took diametrically opposed approaches to determining the outcomes of the Google Library disputes. The U.S. court rulings evince the role of public interest considerations in interpreting the substantive legal standards for settling copyright disputes in general and creating future digital public libraries in particular. On the contrary, the Chinese court rulings demonstrate that if courts do not take the public interest seriously, they will fail to make decisions that are in line with the public interest ethos that copyright law is intended to serve.

Drawing on this comparative study, I argue in the two following parts that courts should adopt a public interest principle that functions to guide judicial consideration of fair use cases both substantively and procedurally. This principle carries two substantive legal standards. First, it creates a new "public interest use" standard which requires courts to consider whether a work was used for the public interest regardless of whether the use is transformative or not. Second, it employs the "market substitution" standard to weigh the impact of the use on the economic value of the work. Following this standard, courts can only rule against any use of a work that significantly replaces the copyright holder's work in the marketplace.

Moreover, procedurally, the proposed principle shifts the burden of proving fair use for the last three factors to copyright holders while keeping the burden of such proof for the first factor firmly with users. This shift in the burden of proof derives from the public interest use standard and is also supported by the redefinition of fair use as a collective user right rather than an affirmative defense.

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<sup>89</sup> See MERGES & SONG, *supra* note 42, at 455.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

At first blush, the public interest principle is grounded in the legitimacy of copyright law as the long-entrenched guardian of the public interest. The Statute of Anne, the very first copyright statute, was designed as “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies. . . .”<sup>92</sup> The Copyright Clause of the American Constitution grants Congress the power to confer copyright upon authors for the purpose of “promot[ing] the Progress of Science and useful Arts.”<sup>93</sup> According to the U.S. Supreme Court, “‘Progress of Science’ . . . refers broadly to ‘the creation and spread of knowledge and learning.’”<sup>94</sup>

Internationally, copyright treaties have also enshrined the public interest as a guiding principle,<sup>95</sup> lending strong support to the adoption of the proposed principle. For instance, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>96</sup> states the public interest objectives of intellectual property protection.<sup>97</sup> Article 8 of the TRIPS Agreement adopts the public interest principle by stipulating that intellectual

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<sup>92</sup> 8 Anne, ch. 19 (1710). Influenced by this legislative tradition, the Canadian Copyright Act, for instance, is structured as “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. . . .” LTC HARMS, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: A CASE BOOK* 181 (3d ed. 2012).

<sup>93</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>94</sup> *Golan v. Holder*, 565 U.S. 302, 324 (2012); *see also Eldred v. Ashcroft*, 537 U.S. 186, 245 (2002) (Breyer, J., dissenting) (describing “the basic Clause objective” as “‘promot[ing] the Progress of Science,’ *i.e.*, knowledge and learning”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (holding that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”) (citations omitted); Orrin Hatch & Thomas Lee, “*To Promote the Progress of Science*”: *The Copyright Clause and Congress’s Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 7 (2002) (“Everyone agrees that the notion of ‘science’ in the founding era referred generally to all forms of knowledge and learning.”).

<sup>95</sup> *See, e.g.*, Daniel Gervais, *Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright*, 57 J. COPYRIGHT SOC’Y U.S.A. 499, 518 (2010) (concluding that “‘public interest’ . . . has always formed part of international copyright law and policy”); Ruth L. Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 81–82 (2000) (finding that “the negotiators and drafters of the [TRIPS] Agreement . . . were primarily concerned with . . . the public interest principles that serve as a basis for copyright”).

<sup>96</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

<sup>97</sup> Article 7 of the TRIPS Agreement states the public interest objectives as follows:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

*Id.* at art.7; *see also* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 Hous. L. REV. 979, 1007 (2009) (pointing out that the official view of Article 7 is that it is “intended to strike a balance that more widely promotes social and economic welfare”).

property protection should “promote the public interest in sectors of vital importance to [countries’] socio-economic and technological development.”<sup>98</sup> Moreover, the Preamble of the WIPO Copyright Treaty emphasizes “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information. . . .”<sup>99</sup>

The U.S. Supreme Court has exemplified how to implement protection of the public interest as the primary goal of copyright law in its fair use rulings. For example, in *Sony Corp. of America v. Universal City Studios, Inc.*, the Court ruled in favor of using a work for a time-shifting purpose because it “yields societal benefits” by “expand[ing] public access to freely broadcast television programs.”<sup>100</sup> In *Campbell v. Acuff-Rose Music, Inc.*,<sup>101</sup> the Court emphasized that the fair use doctrine as a whole furthers the public interest as the primary objective of copyright law. It found that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts. . . .’”<sup>102</sup>

Given the venerable goal of upholding the socially beneficial function of copyright law,<sup>103</sup> I further propose that as long as courts apply the public interest principle in deciding fair use cases, copyright law will serve as an engine of public interest protection. Accordingly, in Parts III and IV of the

<sup>98</sup> TRIPS Agreement, *supra* note 96, at art. 8.

<sup>99</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997).

<sup>100</sup> 464 U.S. 417, 454 (1984) (Blackmun, J., dissenting). The dissenting opinion stated that “[t]he fair use doctrine . . . permits works to be used for ‘socially laudable purposes.’” *Id.* at 478–79 (quoting Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055). The dissenting opinion also pointed out “[t]he 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.” *Id.* at 478.

<sup>101</sup> 510 U.S. 569 (1994).

<sup>102</sup> *Id.* at 575 (quoting U.S. CONST. art. I, § 8, cl. 8). Other U.S. courts have applied public interest as a major consideration in fair use rulings. *See, e.g.*, *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) (finding fair use based partially upon the policy that “the public benefit in allowing artistic creativity and social criticism to flourish is great”); *Wojnarowicz v. Am. Family Ass’n*, 745 F. Supp. 130, 146 (S.D.N.Y. 1990) (concluding that “it is highly significant to the scope of fair use that plaintiff accepted public funds to support his artwork. This fact broadens the scope of the fair use exemption because of the strong public interest, protected by the First Amendment, in free criticism of the expenditure of federal funds.”).

<sup>103</sup> *See* Rebecca Giblin & Kimberlee Weatherall, *If We Redesigned Copyright From Scratch, What Might It Look Like?*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 7 (Rebecca Giblin & Kimberlee Weatherall eds., 2017) (reviewing “[t]he fundamental societal goals commonly described as constituting the public interest in copyright”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (“The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.”).

article, I discuss how the public interest principle should be adopted and applied both substantively and procedurally under the fair use doctrine. I further consider the principle's feasibility for guiding the fair dealing doctrine in Part V.

### III. CREATING TWO SUBSTANTIVE STANDARDS FOR THE PUBLIC INTEREST PRINCIPLE

In this part of the article, I consider how the public interest principle can lead to the adoption of the “public interest use” and “significant market substitution” standards in judicial inquiries into fair use.

#### A. Public Interest Use

As proposed in Section D of Part II, in applying the first fair use factor, namely, “the purpose and character of the use,”<sup>104</sup> courts should instead utilize the public interest use standard to examine whether an unauthorized use of a work primarily benefits the public interest in character. Such utilization would require courts to dismantle the dichotomy between transformative and non-transformative uses. The public interest standard not only treats transformative use as a typical public interest use, but also weighs non-transformative uses in light of the public interest. If a non-transformative use promotes that interest, then it should be deemed to be in compliance with the first fair use factor.

##### 1. Transformative Use

Since the U.S. Supreme Court's ruling in *Campbell*,<sup>105</sup> transformativeness has been the predominant legal standard for weighing the first fair use factor.<sup>106</sup> In *Campbell*, the Court opined that the “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>107</sup>

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<sup>104</sup> 17 U.S.C. § 107 (2018).

<sup>105</sup> 510 U.S. at 585 (“[T]he fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.”).

<sup>106</sup> See Beebe, *supra* note 58, at 606 (pointing out that “a finding of transformativeness may be dispositive of the outcome of the fair use test”); Netanel, *supra* note 58, at 768 (“Since 2005, the transformative use paradigm has come to dominate fair use case law. . . .”); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 84 (2012) (concluding that “transformative use by the defendant is a robust predictor of a finding of fair use”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555 (2004) (arguing that “fair use law has been realigned around transformative use”).

<sup>107</sup> 510 U.S. at 579; see also *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (“The Supreme Court has recognized that parodic works, like other works that comment and criticize, are by their nature often sufficiently transformative to fit clearly under the fair use exception.”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (“The more transformative the new work, the less important the other factors, including commercialism, become.”); *Suntrust Bank v. Houghton*

Transformative use, by its very nature, protects the public interest. Of course, the immediate beneficiary is the copier who uses the work for the transformative purpose concerned. For instance, by making transformative use of copyrighted books, Google received the immediate benefit of creating Google Library. However, the ultimate beneficiaries are members of the public. By adding a “new expression, meaning, or message”<sup>108</sup> or function<sup>109</sup> to the original work, a transformative use communicates a new work or the original to the public with benefits that the copyright holder of the original work did not intend to offer.<sup>110</sup> Therefore, it ultimately “enrich[es] public knowledge.”<sup>111</sup>

As discussed in Part II, transformative use, as required by the first fair use factor, is one of the key reasons the U.S. courts ruled in favor of Google.<sup>112</sup> When weighing the search function afforded by Google Library, the Second Circuit took pains to examine the public benefits that Google’s transformative use produced:

As with HathiTrust (and iParadigms), the purpose of Google’s copying of the original copyrighted books is to make available significant information about those books, permitting a searcher to identify those that contain a word or term of interest, as well as those that do not include reference to it. In addition, through the Ngrams tool, Google allows readers to learn the frequency of usage of selected words in the aggregate corpus of published books in different historical periods. We have no doubt that the purpose of this copying is the sort of transformative purpose described in *Campbell* as strongly favoring satisfaction of the first factor.<sup>113</sup>

The purpose of Google’s reproduction of copyrighted books, according to the Second Circuit, was to add an information search function to the books, a function that the copyright holders did not offer. That function

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Mifflin Co., 268 F.3d 1257, 1271–74 (11th Cir. 2001) (“[C]onsideration of [the transformative nature of the parody] certainly militates in favor of a finding of fair use, and, informs our analysis of the other factors.”).

<sup>108</sup> 510 U.S. at 579.

<sup>109</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (“[M]aking an exact copy of a work may be transformative so long as the copy serves a different function than the original work.” (citing *Kelly*, 336 F.3d at 818–19)). The court found a search engine’s copying of website images in order to create an Internet search index transformative because the original works “serve[d] an entertainment, aesthetic, or informative function, [whereas the] search engine transforms the image into a pointer directing a user to a source of information.” *Id.*

<sup>110</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (concluding that “transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge”).

<sup>111</sup> *Id.*

<sup>112</sup> See *supra* text accompanying notes 24–27.

<sup>113</sup> *Authors Guild*, 804 F.3d at 217.

ultimately benefits readers and researchers, who are members of the public, enabling them to efficiently locate information contained in a book and learn the frequency of select word usage.

Google Library's snippet view function was similarly deemed by the Second Circuit to constitute a transformative use on the same grounds:

Google's division of the page into tiny snippets is designed to show the searcher just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of her interest. . . . Snippet view thus adds importantly to the highly transformative purpose of identifying books of interest to the searcher.<sup>114</sup>

The above passage shows that the ultimate beneficiaries of the snippet view function are information searchers, who again are members of the public. As a transformative use, the function serves their interest in evaluating the content surrounding search words, thereby providing them with a better understanding of search results extracted from a vast pool of information.

A series of other fair use rulings lend support to transformative use being identified as a type of public interest use. Take parodic use cases as an example.<sup>115</sup> In *Campbell*, the U.S. Supreme Court ruled that parody transforms a work for the purpose of humorous comment or criticism, thereby "provid[ing] social benefit, by shedding light on an earlier work, and, in the process, creating a new one."<sup>116</sup> In *Suntrust v. Houghton Mifflin Co.*, the U.S. Court of Appeals for the Eleventh Circuit grounded its ruling on parodic use in policy considerations, writing that "the public interest is always served in promoting First Amendment values and in preserving the public domain from encroachment."<sup>117</sup>

## 2. *Non-Transformative Use*

The public interest use standard also protects non-transformative uses of works that promote the public interest. It requires courts to treat transformative and non-transformative uses equally when they are made in the public interest. The non-transformative use of a work utilizes "the same 'overall function'" of the work from which the user copied.<sup>118</sup> For instance,

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<sup>114</sup> *Id.* at 218.

<sup>115</sup> See David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the "Transformative Use" Doctrine Twenty-Five Years On*, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 311, 345 (2016) (pointing out that parody "advanc[es] democratic debate on matters of public interest through the use of irreverent humor").

<sup>116</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>117</sup> 268 F.3d 1257, 1275 (11th Cir. 2001).

<sup>118</sup> *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1262 (11th Cir. 2014) (citing *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1311 (11th Cir. 2008)).

preparing coursepacks by copying textbooks published by others does not alter the function of the copyrighted materials and therefore constitutes a non-transformative use.<sup>119</sup> Given that such use serves the same purpose or function as the original work,<sup>120</sup> courts have routinely disfavored shielding it, and therefore have generally treated it as tantamount to an infringing use.<sup>121</sup>

Although a non-transformative use can be made for a user's personal interest, it can also be made in the public interest, that is, to benefit others. Commentators have found many instances in which non-transformative use promotes democratic progress and educational development through the wider dissemination of information.<sup>122</sup> Professor Rebecca Tushnet, for example, has convincingly demonstrated how various non-transformative uses not only protect freedom of expression by positively facilitating copiers' free speech activities,<sup>123</sup> but also promote larger social values by affording audiences access to copiers' speech.<sup>124</sup>

Similarly, several landmark copyright cases have demonstrated the necessity of legalizing non-transformative uses that protect the public interest. For instance, *Authors Guild, Inc. v. HathiTrust*<sup>125</sup> epitomizes cases in which non-transformative use may promote social justice. The Second Circuit decided that HathiTrust's reproductions of works to facilitate access to them by the print disabled constituted a non-transformative use.<sup>126</sup> However, it still ruled in favor of HathiTrust under the first fair use factor by recognizing the public benefits accruing to print-disabled readers from the

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<sup>119</sup> See *id.* at 1264 (“In the coursepack cases, . . . the first factor weighed against a finding of fair use when the nontransformative, educational use in question was performed by a for-profit copyshop, and was therefore commercial. In a more recent case, a district court refused to allow a commercial copyshop to sidestep the outcome of the coursepack cases by requiring its student customers to perform the photocopying themselves (for a fee) when assembling paper coursepacks from master copies held by the copyshop.”) (citations omitted).

<sup>120</sup> See Sun, *supra* note 1, at 188 (noting that the transformative uses are differentiated from non-transformative uses because the latter “simply copy the original copyrighted works and thereby make no new contributions to enrich culture”).

<sup>121</sup> See, e.g., *L.A. Times v. Free Republic*, No. CV 98-7840 MMM (AJWx), 2000 U.S. Dist. LEXIS 5669, at \*75 (C.D. Cal. Mar. 31, 2000) (“Conversely, the amount and substantiality of the copying and the lack of any significant transformation of the articles weigh heavily in favor of plaintiffs . . .”).

<sup>122</sup> Tushnet, *supra* note 106, at 566.

<sup>123</sup> *Id.* at 565–66.

<sup>124</sup> *Id.* at 562 (contending that “[pure] copying is of value to audiences who have access through copying to otherwise unavailable speech. It also enhances copiers’ ability to express themselves; to persuade others; and to participate in cultural, religious, and political institutions.”).

<sup>125</sup> 755 F.3d 87 (2d Cir. 2014).

<sup>126</sup> *Id.* at 101–02.

access afforded them.<sup>127</sup> Relying on the legislative history of U.S. law, the court asserted that providing access to works for the print disabled “assure[s] equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>128</sup>

*Cambridge University Press v. Patton* is another leading case that marks a watershed in valuing the social function of non-transformative uses in promoting education. In this case, the Eleventh Circuit ruled that Georgia State University’s operation of an electronic reserve system that allowed its professors to make digital copies of excerpts of copyrighted books available to their students did not constitute a transformative use. According to the ruling, such use did not add new meaning<sup>129</sup> or purpose<sup>130</sup> to the excerpts concerned. Rather, it served the same function as the excerpts, that is, constituting course reading material for university students.<sup>131</sup> The Eleventh Circuit ruled, however, that because the non-transformative use was made by a university, that is, by a nonprofit educational institution, it deserved favorable protection under the first fair use factor.<sup>132</sup> This opinion followed the legislative intention of ensuring the proper treatment of educational use as a paradigmatic example of fair use.<sup>133</sup> It also recognized the value of educational use in fulfilling copyright law’s goal of furthering the public interest.<sup>134</sup>

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<sup>127</sup> *Id.* at 102 (“We conclude that providing access to the print-disabled is still a valid purpose under Factor One even though it is not transformative.”).

<sup>128</sup> *Id.* (citing Congress’s statement in the Americans with Disabilities Act).

<sup>129</sup> *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1262 (11th Cir. 2014) (“Although a professor may arrange these excerpts into a particular order or combination for use in a college course, this does not imbue the excerpts themselves with any more than a *de minimis* amount of new meaning.”).

<sup>130</sup> *Id.* at 1263 (“Nor do Defendants use the excerpts for anything other than the same intrinsic purpose—or at least one of the purposes—served by Plaintiffs’ works: reading material for students in university courses.”).

<sup>131</sup> *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“Although an electronic reserve system may facilitate easy access to excerpts of Plaintiffs’ works, it does nothing to transform those works. . . . Rather, Defendants’ use of excerpts of Plaintiffs’ works ‘supersede[s] the objects of the original creation.’”)).

<sup>132</sup> *Id.* at 1267 (“Furthermore, we find this sufficiently weighty that the first factor favors a finding of fair use despite the nontransformative nature of the use. . . . [W]e are persuaded that, despite the recent focus on transformativeness under the first factor, use for teaching purposes by a nonprofit, educational institution such as Defendants’ favors a finding of fair use under the first factor, despite the nontransformative nature of the use.”).

<sup>133</sup> *Id.* (“Congress devoted extensive effort to ensure that fair use would allow for educational copying under the proper circumstances and was sufficiently determined to achieve this goal that it amended the text of the statute at the eleventh hour in order to expressly state it.”).

<sup>134</sup> *Id.* (“[A]llowing latitude for educational fair use promotes the goals of copyright.”); *id.* at 1282 (“Nonprofit educational uses are more likely to be fair because they promote the ultimate aims of copyright—the creation and dissemination of knowledge.”).

I have demonstrated that the traditional dichotomy between transformative and non-transformative use serves to undervalue certain legitimate public interests. Both can promote the public interest, provided that the ultimate beneficiaries of the use in question are members of the public. As Justice Blackmun wisely ascertained, there is a “humanitarian impulse” built in to the first fair use factor because its intent “is to encourage users to engage in activities the primary benefit of which accrues to others.”<sup>135</sup> Therefore, guided by the public interest principle, courts should replace the dichotomy between transformative and non-transformative use with the public interest use standard in the first fair use factor inquiry. At the same time, given the application of that standard, courts may also consider removing the commerciality standard from the first factor.<sup>136</sup> As demonstrated earlier in this subsection, cases involving transformative and non-transformative uses of works for commercial purposes can actually serve the public interest. Therefore, both commercial and non-commercial uses can promote the public interest.<sup>137</sup> Given that the ultimate goal of the first factor is to consider the public interest, it is unnecessary for courts to consider the commerciality standard.

### 3. *Identifying Group-Based and Society-Based Public Interests*

How then do courts identify a public interest use under the first fair use factor? I propose that they can do so by ascertaining whether the use of a work has produced either group-based or society-based interests.<sup>138</sup>

Group-based interests can be recognized on the basis of the identities of the group members who take part in various social and cultural activities.<sup>139</sup> Examples of groups whose activities constitute fair use include researchers, educators, and journalists. The importance of protecting group-

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<sup>135</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting).

<sup>136</sup> In fact, the U.S. Supreme Court has downgraded the importance of the commerciality standard for transformative use. In *Sony*, the Court stated that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” 464 U.S. at 451. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court further explicated commercial use, noting that it is a “factor that tends to weigh against a finding of fair use” because “the user stands to profit from exploitation of the copyrighted material without paying the customary price.” 471 U.S. 539, 562 (1985). However, in *Campbell*, the Supreme Court refuted its earlier rulings in *Sony* and *Harper & Row* with regard to the commerciality standard, instead ruling that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” 510 U.S. at 579.

<sup>137</sup> See, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 118 (2012) (pointing out that “the history of fair use is replete with commercial uses”).

<sup>138</sup> See Sun, *supra* note 1, at 177 (“Both types of collective rights allow the public to enjoy freedom in asserting collective interests in utilizing copyrighted works.”).

<sup>139</sup> *Id.* at 178.

based interests can be inferred from a number of judicial rulings. In *Sega Enterprises Ltd. v. Accolade, Inc.*,<sup>140</sup> for example, courts applied the fair use doctrine to protect the public interest in reverse engineering technology that allows software engineers as a group of users to achieve the interoperability of different software programs.<sup>141</sup>

Courts may first identify either the identity-based group to which the users of copyrighted works belong or the larger social benefits that may be generated by the unauthorized use of such works. In doing so, courts would place themselves in a better position to consider the extent to which the unauthorized use of copyrighted works affects the protection of group members' interests more widely or promotes the creation of social benefits. For instance, research as a permitted fair use encompasses not only an individual research activity but also research as "a practice or system,"<sup>142</sup> which is a collective activity that many participate in as a group of researchers.

The society-based interests involved in the use of a work are designed to ensure that "the public as a whole can live in a free and just society."<sup>143</sup> These interests are related to the overall economic, political, and cultural needs of the society to which that public belongs. The emergence of Internet-related technologies resulted in a host of new copyright disputes. Relying on the legal concept of transformative use, courts have moved to protect the public interest in benefiting from progress in such technologies. In *Kelly v. Arriba Soft Corp.*,<sup>144</sup> *Field v. Google Inc.*,<sup>145</sup> and their progeny,<sup>146</sup> the U.S. courts ruled that the reproduction in their entirety of numerous photographs or web pages to create and operate Internet search engines constitutes fair use. The U.S. courts ascertained that because they were created by search

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<sup>140</sup> 977 F.2d 1510 (9th Cir. 1992).

<sup>141</sup> *Id.* at 1523 (ruling that reverse engineering "has led to an increase in the number of independently designed video game programs offered for use with the [plaintiff's] console"); see also Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1608–09 (2002) ("From this approximation of source code, reverse engineers can discern or deduce internal design details of the program, such as information necessary to develop a program that will interoperate with the decompiled or disassembled program.").

<sup>142</sup> *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 399 (Can.), ¶¶ 48, 51, 63 (emphases added), available at <http://scc.lexum.org/en/2004/2004scc13/2004scc13.pdf>.

<sup>143</sup> Sun, *supra* note 1, at 180.

<sup>144</sup> 336 F.3d 811 (9th Cir. 2003).

<sup>145</sup> 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>146</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (ruling that the display of thumbnail images of the copyrighted photographs constituted fair use).

engines serving as an electronic reference tool, such reproductions benefited society as a whole by improving public access to information.<sup>147</sup>

Accordingly, courts should apply transformativeness as a means of identifying either a group- or society-based public interest. For example, by first recognizing the new functions that Google Library added to the books it reproduced, the U.S. courts considered how such transformative uses could bring about a society-based public interest. Consequently, they treated Google Library as itself constituting a technological breakthrough in opening up new functions for books. More importantly, they also regarded it as a scheme for enhancing the societal interests in knowledge acquisition and sharing through such technological progress.

However, the utilization of transformativeness does not foreclose the possibility of any inquiry into whether a non-transformative use furthers the public interest identified through the group- and society-based approach. Instead, courts still enjoy the latitude to consider how and why a non-transformative use promotes a group- or society-based public interest. As discussed earlier, the U.S. court rulings on HathiTrust Digital Library exemplify such an application of the group- and society-based approach. Courts determined that HathiTrust's non-transformative use served the interest of the print disabled as a group of readers in accessing books.<sup>148</sup>

### B. Significant Market Substitution

The second component of the public interest principle, as suggested in Part II, is the application of the “significant market substitution” standard, which should guide courts to apply the fourth factor of the fair use doctrine, namely, “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>149</sup> To do so, courts should exclude the public interest use of a work from the full spectrum of the work's market share. Put differently, when courts deal with the fourth factor, they should require copyright holders to legally tolerate public interest uses of their works to the extent that those uses do not cause significant market substitutions of their works.

#### 1. Assessing Market Harm Properly

According to the U.S. Supreme Court, an unauthorized use of a work runs counter to the fourth factor only when it “act[s] as a substitute for”<sup>150</sup> the work. Following from that logic, the fourth factor triggers two inquiries

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<sup>147</sup> *Id.* at 1165 (ruling that “a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool”).

<sup>148</sup> *See supra* text accompanying notes 128–28.

<sup>149</sup> 17 U.S.C. § 107 (2018).

<sup>150</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (deciding that “cognizable market harm” is limited to “market substitution”).

about how such a use would cause harm to both the current and potential market value of the work.<sup>151</sup> Despite the large number of fair use cases heard over the years, uncertainty still surrounds the fourth factor itself and its relation to the other factors.<sup>152</sup> In *Campbell*, the Supreme Court attempted to clarify, stating that “when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”<sup>153</sup> Although this is an authoritative interpretation of the fourth factor, the approach proffered by the Court suffers from two problems. First, the Court did not consider whether a non-transformative use that serves the public interest should be treated on the same footing as a transformative use under the fourth factor.

Second and worse still, the Court utilized the copyright holder-based approach to determine the scope of the protectable market shielded by copyright. It correctly pointed out that a transformative use is unlikely to cause a market substitutive effect because it “usually serve[s] different market functions.”<sup>154</sup> However, it erred by determining the scope of the protectable market by whether the use would generally create or license others to create derivative works. According to the Supreme Court, critical review and parody do not fall within the ambit of a protectable market because copyright holders would not license others to use their works in those particular transformative ways.<sup>155</sup> The Court’s treatment of a copyright holder’s protectable market here fails to capture the essence of fair use. By nature, fair use legally permits unauthorized uses of works in the public interest, provided that they do not violate the fair use factors.<sup>156</sup> Copyright

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<sup>151</sup> *Id.* at 590 (quoting 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05(A)(4) (1993)) (concluding that under the fourth factor, courts should “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’”).

<sup>152</sup> See Sun, *supra* note 3, at 290.

<sup>153</sup> *Campbell*, 510 U.S. at 591.

<sup>154</sup> *Id.*; see also *Authors Guild v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) (citing *Billy Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006)) (“In other words, under Factor Four, any economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.”).

<sup>155</sup> *Campbell*, 510 U.S. at 592 (“This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. 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>156</sup> As Judge Leval correctly pointed out, it is presumptively valid for a fair use to cause a certain amount of harm to the market value of the work concerned. He argues that “[b]y definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. . . . [I]f an

holders are not supposed to enjoy proprietary control over all public interest uses of their works through any of their potential licensing arrangements.<sup>157</sup> Such proprietary control, regardless of whether it incentivizes copyright holders to create works, would be detrimental to public interest protection.<sup>158</sup>

Third, when it comes to fair use such as a critical comment on or parody of a work, neither of these public interest uses of the work would significantly substitute its market because those uses serve the public interest in openly discussing issues relating to the work. They do not intend to replace sales of the work in the marketplace. From this perspective, courts do not need to consider whether the copyright holder would license others to use the work for the purpose of critical review or parody.<sup>159</sup> Therefore, the fourth factor should be read as having already divorced public interest uses from the market of copyright holders. What courts should consider under the fourth factor is whether public interest uses of works would in turn significantly substitute the market of those works. If they would, then courts

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insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user.” Leval, *supra* note 103, at 1124–25.

<sup>157</sup> Professor Shyamkrishna Balganesh argues that it is legally and socially undesirable to define an overly broad scope of copyright, thereby allowing copyright holders to control market share to an extent that disincentivizes them to create new works. Hence, he concludes that “[c]opyright . . . needs to internalize the idea that incentives have limits and develop a mechanism by which to eliminate uninternalized gains from a creator’s entitlement, especially when including them in the entitlement is likely to produce more costs than benefits.” Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1574 (2009). He further contends that the conventional practice of fair use has allowed copyright holders to “internalize all possible benefits, until the fair use determination concludes otherwise.” *Id.* at 1585. Therefore, as he further points out, “[i]n focusing on this presumptive entitlement by itself, fair use does very little in practice to link the defendant’s actions (that is, copying) with the creator’s original incentive.” *Id.*

<sup>158</sup> According to Professor Mark Lemley, all “[e]fforts to permit [copyright] owners to fully internalize the benefits of their creativity [through their proprietary control] will inevitably get the balance [of copyright protection] wrong.” Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005). Professor James Boyle also points out that fair use serves as a limitation on the scope of copyrights. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 66 (2008) (“When society hands out the right to the copyright holder, it carves out certain areas of use and refuse to hand over control of them.”).

<sup>159</sup> See, e.g., William F. Patry, *Patry on Copyright* § 10:151 (2018) (“Too broad an interpretation of the potential market, however, presents its own considerable dangers. If taken to a logical extreme, the fourth factor would always weigh against fair use since there is always a potential market that the copyright owner could in theory license.”) (citations omitted); Rebecca Tushnet, *Content, Purpose, or Both*, 90 WASH. L. REV. 869, 891(2015) (“Transformativeness, despite its potential ambiguities, has the capacity to recognize the uses that we find valuable and that we believe copyright owners shouldn’t control.”).

are very likely to rule in favor of the copyright holders.<sup>160</sup> If they would not, courts are very likely to rule in favor of users.<sup>161</sup>

The significant market substitution standard can resolve the aforementioned problems through a new approach that directly allows courts to exclude a public interest use of a work that is permissible under the first fair use factor from the ambit of the work's market under the fourth factor. Stemming from the public interest principle, the significant market substitution standard guides courts to more effectively weigh the extent of market harm. To that end, it requires courts to utilize public interest considerations in evaluating the harm to a work's current and potential market value. If courts can identify a public interest use under the first fair use factor, they should then apply the significant market substitution standard, which sets a higher threshold for establishing market harm.

The Second Circuit ruling in the Google Library case sheds light on how this new standard can be applied. Although the fourth fair use factor is intended to protect the market value of a work, the Second Circuit examined it in light of public interest considerations and then applied the significant market substitution standard, which allows the public to benefit from limited uses of copyrighted works to the extent that such uses do not exert a significant substitutive effect on those works' market value. The Second Circuit stated:

We recognize that the snippet function can cause *some* loss of sales. There are surely instances in which a searcher's need for access to a text will be satisfied by the snippet view, resulting in either the loss of a sale to that searcher, or reduction of demand on libraries for that title, which might have resulted in libraries purchasing additional copies. But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or

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<sup>160</sup> See *Campbell*, 510 U.S. at 593 (“Evidence of substantial harm to [a derivative market] would weigh against a finding of fair use.”); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566–67 (1985) (“Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.”); *Cambridge University Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014) (“The central question under the fourth factor is not whether Defendants' use of Plaintiffs' works caused Plaintiffs to lose some potential revenue. Rather, it 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.”).

<sup>161</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (ruling that fair use “requires the copyright holder to demonstrate some likelihood of harm”); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 224 (2d Cir. 2015) (deciding that a violation of the fourth fair use factor could be found if the defendant caused “a meaningful or significant effect” on the market value of the plaintiff work).

significant effect “upon the potential market for or value of the copyrighted work.”<sup>162</sup>

Here, the Second Circuit filled the vacuum left by the Supreme Court’s *Campbell* ruling, casting new light on how to ascertain the probability of market substitution in light of the public interest principle. The Second Circuit was fully aware of instances in which the provision of snippet views by Google Library would cause some loss of sales to the affected works. However, it ruled that such market harm is nonetheless permitted under the fair use doctrine as long as it does not lead to “meaningful or significant”<sup>163</sup> market substitution of the works. In other words, the fair use doctrine tolerates a moderate degree of market harm caused by a transformative use that is socially beneficial. The doctrine protects such a socially beneficial use as long as it does not cause market harm sufficient to significantly replace the copyright holder’s work in the marketplace. With regard to a non-transformative use that protects the public interest, the Second Circuit decided that copyright holders should not be vested with market control over their works to the extent that those works are used by digital libraries providing the print disabled with access to them.<sup>164</sup>

To follow the public interest principle, courts should first determine whether the use of a work is socially beneficial, and then ensure that such use would not cause significant market substitution.<sup>165</sup> Again, the Second Circuit showed how courts should handle these two steps in weighing the fourth factor. For the first step, the Second Circuit concluded that snippet views promote the public interest in locating information, such as a historical fact that is not protected by copyright law. It offered the plausible case of a student writing a research paper who would benefit from the snippet view of *The Making of Franklin D. Roosevelt* generated by the entry of search words to discover the historical fact that Roosevelt had been stricken with polio.<sup>166</sup> With regard to the second step, the Second Circuit found that snippet views of copyrighted books did not cause significant market substitution to the

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<sup>162</sup> *Authors Guild*, 804 F.3d at 224.

<sup>163</sup> *Id.*

<sup>164</sup> See *Authors Guild v. HathiTrust*, 755 F.3d 87, 103 (2d Cir. 2014) (“The fourth factor also weighs in favor of a finding of fair use. It is undisputed that the present-day market for books accessible to the handicapped is so insignificant that ‘it is common practice in the publishing industry for authors to forgo royalties that are generated through the sale of books manufactured in specialized formats for the blind . . . .’” (quoting Final Form Br. and Special App. for Pls.-Appellants at \*34)).

<sup>165</sup> See Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 633 (2015) (“[T]here may be societal benefits from a use without concomitant market benefits to the copyright owner, but when there are market benefits to the copyright owner, there tends also to be societal benefit. All in all, policies weighing in favor of fair use suggest that market benefits to the copyright holder offer a signal that there is a societal benefit favoring fair use, which might also benefit the copyright holder.”).

<sup>166</sup> *Authors Guild*, 804 F.3d at 224.

books because Google had endeavored to make those views short, disjointed, and incomplete.<sup>167</sup>

## 2. *Evaluating Market Harm but Not Benefits*

In weighing the fourth fair use factor, some U.S. courts have considered the benefits that the authorized use of a work can confer upon its market value. For example, the District Court approvingly weighed the market benefits accrued from Google Library in its assessment of the fourth factor.<sup>168</sup> A number of leading commentators have contended that both the Supreme Court's fair use rulings and practical needs lend support to a consideration of market benefits.<sup>169</sup> As shown in the preceding subsection, however, the significant market substitution standard does not necessitate judicial inquiry into whether the unauthorized use of a work may benefit its market value. Instead, it requires courts only to evaluate the harm to the work's market value caused by the unauthorized use.<sup>170</sup>

Contrary to these commentators' inference from leading precedents, the U.S. Supreme Court's fair use rulings should not be read as providing judicial support for a consideration of market benefits under the fourth factor. In *Sony*, the Court did turn its attention to how the reproduction of works for the time-shifting purpose conferred market benefits upon the copyright holder concerned and public benefits in the form of wider access to television

<sup>167</sup> *Id.* at 224–25.

<sup>168</sup> See *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013); see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (discussing defendant's use of the plaintiff's images in thumbnail version in the defendant's search engine brought benefits to the plaintiff); *Nat'l Ctr. for Jewish Film v. Riverside Films, LLC*, No. 5:12-cv-00044-ODW (DTBx), 2012 U.S. Dist. LEXIS 131831, at \*13-14 (C.D. Cal. Sept. 14, 2012) (ruling in favor of the defendants because their films would cause "a newfound interest in Plaintiff's copyrighted films").

<sup>169</sup> See, e.g., Fromer, *supra* note 165, at 641 ("In sum, *Campbell*'s fair use analysis ought to be read to require consideration of both market harms and benefits—so long as these harms and benefits surpass a certain degree of speculativeness—to determine the market effects bearing on fair use. The statute, copyright policy, and business realities justify this understanding of the fourth fair use factor."); Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 823 (2015) ("After *Campbell*, it is acceptable for courts to take into account possible market benefits of a defendant's use of the plaintiff's work in weighing market effects, not just possible negative effects. *Campbell* has opened the door to considering possible benefits and harms together in a holistic way, as well as in relation to the other factors.").

<sup>170</sup> See, e.g., 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1305[A][4] (2018) ("The fourth factor looks to adverse impact only by reason of usurpation of the demand for plaintiff's work through defendant's copying of protectable expression from such work."); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (ruling that fair use defenses should "look to . . . the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."); Wendy J. Gordon, *The Concept of "Harm" in Copyright*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 30 n.81 (Shyamkrishna Balganeshe ed., 2015) ("The fourth fair use factor . . . has been interpreted both as referring to plaintiff's private harm, and as referring to impact on incentives.").

programs.<sup>171</sup> However, it then shifted its attention and emphasized that what the fourth factor really requires is for a copyright holder to “demonstrate some likelihood of harm” to refute the contention that a reproduction of his or her work constituted a fair use.<sup>172</sup> Without weighing up whether the said market benefits could mitigate the potential market harm, the Court then directly concluded that the copyright holders in question had failed to prove on the merit of the fourth factor that the reproduction at issue had “cause[d] any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works.”<sup>173</sup> Relying on *Sony*, the Supreme Court later asserted in *Harper & Row, Publishers, Inc. v. Nation Enterprises* that inquiry into the fourth factor is concerned merely with market harm.<sup>174</sup> It did not consider whether the unauthorized publication of excerpts from former President Nixon’s memoirs had produced market benefits by bringing the public’s attention to the memoirs prior to their publication. Instead, the Court implied that it was improper to consider market benefits.<sup>175</sup>

Similarly, the *Campbell* ruling should not be read as setting a precedent on judicial consideration of market benefits under the fourth factor. In a footnote to its ruling, the Court offered the following analysis:

Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer’s appropriation of a composer’s previously unknown song that turns the song into a commercial success; the boon to the song does not make the film’s simple copying fair. This factor, no less than the other three, may be addressed only through a “sensitive balancing of interests.” Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.<sup>176</sup>

To some commentators, this observation is the epitome of the Supreme Court’s endorsement for incorporating a consideration of market benefits into analysis of the fourth factor.<sup>177</sup> In my opinion, however, the observation is not intended to open the door to any such additional consideration for several reasons.

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<sup>171</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 456.

<sup>174</sup> 471 U.S. 539, 568 (1985) (“This inquiry must take account not only of harm to the original but also of harm to the market for derivative works.”).

<sup>175</sup> The Court ruled that “[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But Congress has not designed, and we see no warrant for judicially imposing, a ‘compulsory license’ permitting unfettered access to the unpublished copyrighted expression of public figures.” *Id.* at 569 (citations omitted).

<sup>176</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 n.21 (citations omitted).

<sup>177</sup> See, e.g., Fromer, *supra* note 165, at 629.

First, despite its mention of “the boon” to the copyright holder’s market, the Court did not examine the market benefits of parodies that accrued to copyright holders, as commentators have alleged.<sup>178</sup> Rather, it solely analyzed the various scenarios in which parodies might cause harm to copyright holders and then decided to insulate the fourth factor from consideration of those hypothetical harms.<sup>179</sup>

Second, by the “sensitive balancing of interests” quoted from *Sony*, the Court did not intend to weigh both the positive benefits and harmful effects that an unauthorized use could bring to a copyright holder’s market. Instead, it meant to show its concurrence with the part of the *Sony* ruling in which interests were weighed under the confluence of all four fair use factors,<sup>180</sup> the first factor in particular.<sup>181</sup>

Third, when the Court concluded that the degree of market harm must be balanced with “the other factors,” it was by no means referring to market benefits as factors. Again, it situated its analysis of market harm in the scrutiny of transformativeness under the first factor. Indeed, the Court made it crystal clear that transformativeness serves as a countervailing consideration against the market harm assessment under the fourth factor.<sup>182</sup>

On the other hand, the proposed consideration of market benefits is fraught with problems, making its incorporation into application of the fourth factor undesirable indeed. First, measuring market benefits is infeasible in practice. Virtually any unauthorized use of a work could hypothetically benefit the copyright holder to a certain extent. For example, as unauthorized uses can promote the visibility or popularity of a work to various degrees,<sup>183</sup> they might result in increased sales for the copyright holder.<sup>184</sup> However, it

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<sup>178</sup> *Id.* (arguing that “the Court hints that some parodies might even confer market benefits”).

<sup>179</sup> *Campbell*, 510 U.S. at 591–92 (“Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. . . . We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”).

<sup>180</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–55 (1984) (“When [fair use] factors are all weighed in the ‘equitable rule of reason’ balance, we must conclude that this record amply supports the District Court’s conclusion that home time-shifting is fair use.”).

<sup>181</sup> In footnote 40 of the *Sony* ruling that the Court cited, it was stated that courts should particularly weigh the first factor which triggers an inquiry of the character of use as being productive and nonproductive with the fourth factor. *Sony*, 464 U.S. at 455 n.40.

<sup>182</sup> *Campbell*, 510 U.S. at 591 (ruling that “when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

<sup>183</sup> See David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 379 (2014) (“Infringement can, however counterintuitively, serve as a source of publicity and drive up demand in a way that more than makes up for the lost sales of some copies.”).

<sup>184</sup> Judge Leval gives an example how “[q]uotation of the original may substantially augment its value and yet be a clear infringement.” He pointed out that “[t]his would occur, for example, if a famous

would be difficult indeed to put an exact figure on such benefits, and it would be nearly impossible to calculate exactly how many people purchased a given work because an authorized copy thereof had aroused their interest. Nor would it be an easy task to measure the reputational benefits accruing to a work through an unauthorized use.<sup>185</sup> More difficult still would be to calculate those benefits in dollars. Given these difficulties, it would be unrealistic to determine the market benefits to a work first and then weigh those benefits against the market harm.

Second, the proposed separation between market benefits and harm is likely to be circular in nature, which may result in unintended negative consequences for copyright holders. Market benefits, if ascertained exogenously without taking a closer look at copyright holders' legitimate intentions, are in turn very likely to be harmful to their interests protected under the fourth factor. In these circumstances, so-called market benefits would actually equate to market harm to copyright holders. *Monge v. Maya Magazines, Inc.*<sup>186</sup> epitomizes just this kind of adverse circumstance for copyright holders. The defendant, Maya Magazines, had published photos of the wedding of the Monges, a celebrity couple who wished to keep their marriage secret. Before the unauthorized publication, Maya Magazines had bought the photos in question from the Monges' chauffeur, who had tried but failed to extort money from the Monges for the photos' return. Maya Magazines' publication of the photos might have been considered to confer market benefits on the couple by increasing demand for their wedding photos and other photos and burnishing their reputation as celebrities. However, it is crystal clear that the Monges never wished to enjoy such questionable benefits, having vehemently objected to any publication of their wedding photos. Hence, the wider the circulation of the photos, the greater the harm—rather than benefits—inflicted upon them.

There were two kinds of harm to the Monges associated directly with the market benefits derived from the unauthorized initial publication of the photos and their subsequent circulation. First, there was significant market harm caused directly to their proprietary control over the market for their

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disc jockey, without authorization, regularly used an obscure song as the theme melody of her program. The value of the copyright for the song would be greatly enhanced.” Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1459 (1997); see also Patry, *supra* note 159, § 6:14 (pointing out that “a search engine’s retrieval and display of excerpts from a copyrighted book will likely lead to increased sales, as well as providing valuable information to the individual who initiated the query”).

<sup>185</sup> Similarly, a search engine’s reproduction and display of a work may increase the reputation of the work on the Internet.

<sup>186</sup> 688 F.3d 1164 (9th Cir. 2012).

wedding photos,<sup>187</sup> as their publication limited the couple's exercise of their exclusive right to publish,<sup>188</sup> further distribute,<sup>189</sup> and prepare derivative works.<sup>190</sup> Second, there was indirect harm to other of the Monges' personal interests relating to the market for their wedding photos. The forced opening up of that market by Maya Magazines not only impinged upon their privacy but also negatively affected their reputation as unmarried celebrities.<sup>191</sup> All in all, *Monge v. Maya Magazines, Inc.* demonstrates the infeasibility of considering market benefits under the fourth factor, given that such "benefits" can in reality impose harm on copyright holders if their works are being used in a manner contrary to their legitimate intentions.

Hence, I agree with commentators who state that courts should consider the larger social benefits accruing from unauthorized uses of a work,<sup>192</sup> but respectfully disagree with them that such benefits should be considered under the fourth fair use factor. Instead, social benefits should be considered under the first fair use factor with the public interest use standard I suggest above.

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<sup>187</sup> In my view, it would have been better for courts to rule that the unauthorized initial publication concerned caused harm to the right to control the market for the photos rather than to the photos' potential market value. Such an approach would have alleviated any doubt over whether the copyright holders in the case had any wish to publish their photos, meaning that the photos' potential market value was uncertain. The right to control the market for a work does not require consideration of the potential value of that market. For the court's ruling in this regard, see *id.* at 1182 ("Maya's un-authorized 'first and exclusive' publication of the images substantially harmed the potential market because the publication directly competed with, and completely usurped, the couple's potential market for first publication of the photos.").

<sup>188</sup> 17 U.S.C. § 106(3) (2018). The U.S. Supreme Court concluded that "Clause (3) of section 106, establishes the exclusive right of publications. . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work" *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (citing H.R.Rep. No. 94-1476, p. 62 (1976), U.S. Code Cong. & Admin. News 1976, p. 5675). It also ruled that "[t]he right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Id.* at 564.

<sup>189</sup> 17 U.S.C. § 106(3).

<sup>190</sup> *Id.* § 106(2).

<sup>191</sup> See Patrick R. Goold, *Unbundling the 'Tort' of Copyright Infringement*, 102 VA. L. REV. 1833, 1837 (2016) (finding that "[w]hile some courts conceptualize harm as lost revenue from the defendant, others require proof of consumer demand diversion, and occasionally courts also find a cognizable nonfinancial injury to privacy, reputation, or creative control"); David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. Copyright Soc'y U.S.A. 421, 422 (1983) (pointing out that "[t]he [mere] notion of economic 'harm' as a prerequisite for copyright protection is mischievous"); cf. Gordon, *supra* note 170, at 51 ("Subjective distress may be 'harm' in some contexts, such as the tort of intentional infliction of emotional distress, but should not count as such in copyright.").

<sup>192</sup> See Fromer, *supra* note 165, at 633 (concluding that "there may be societal benefits from a use without concomitant market benefits to the copyright owner, but when there are market benefits to the copyright owner, there tends also to be societal benefit").

#### IV. MODIFYING THE PROCEDURAL RULE BY REALLOCATING THE BURDEN OF PROOF

The assignment of burden of proof is of critical importance.<sup>193</sup> In some circumstances, it can determine the outcome of a fair use case, thereby profoundly affecting protection of the public interest. For example, as discussed in Part II, the Chinese courts placed the burden of proving fair use on the accused infringers in copyright disputes. Therefore, the Beijing High Court simply rejected Google's assertion of fair use on the grounds that the company had failed to submit evidence proving fair use.<sup>194</sup> By strictly following such a procedural rule, the Court failed to consider any public interests involved in the provision of Google Library. At the same time, although the U.S. courts properly protected the public interest in the Google Library case, there are still problems with the fair use doctrine they invoked, specifically with their procedural treatment of fair use as an affirmative defense.

In this part of the paper, I first identify the major inadequacies of assigning the burden of proof in the way required by the affirmative defense approach to fair use. I then explore how the public interest principle can lead to the redefinition of fair use as a collective user right, thereby triggering a major modification of the procedural rule for burden of proof allocation. I argue that users should be required to bear only the burden of proving whether their use meets the first fair use factor, the public interest use standard thereunder in particular. When it comes to the three other fair use factors, copyright holders should shoulder the burden of proof.

##### A. Major Problem with the Affirmative Defense Approach

Under the fair use doctrine, the burden of proving fair use is placed on the alleged infringers who have used copyrighted works.<sup>195</sup> In *Harper & Row*, for example, the U.S. Supreme Court treated fair use as "an affirmative defense requiring a case-by-case analysis,"<sup>196</sup> thereby refuting the existence of presumptive categories of fair use.<sup>197</sup> In *Campbell*, the Court further clarified that "[s]ince fair use is an affirmative defense, its proponent[s]

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<sup>193</sup> Shyamkrishna Balganesh, *Copyright as Market Prospect*, 166 U. PA. L. REV. 443, 497 (2018) ("A major unresolved controversy of some significance in copyright jurisprudence is whether fair use should be a part of the plaintiff's prima facie case, or instead an affirmative defense.").

<sup>194</sup> See MERGES & SONG, *supra* note 42, at 456.

<sup>195</sup> See Sun, *supra* note 1, at 146 ("By treating fair use as an affirmative defense, courts place the burden of proving fair use on the allegedly infringing users in copyright disputes.").

<sup>196</sup> 471 U.S. 539, 561 (1985).

<sup>197</sup> *Id.* ("The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.").

would have . . . the burden of demonstrating fair use.”<sup>198</sup> Following this judicial characterization of fair use as an affirmative defense,<sup>199</sup> users are procedurally required to bear the burden of producing the requisite evidence and persuading courts that said evidence is sufficiently probative to demonstrate that their use of the copyrighted work in question satisfies all fair use factors.<sup>200</sup> In *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>201</sup> the U.S. Court of Appeals for the Ninth Circuit further explicated the way in which the burden of proving fair use should be handled as a matter of procedure in the different stages of judicial proceedings:

At trial, the defendant in an infringement action bears the burden of proving fair use. Because “the burdens at the preliminary injunction stage track the burdens at trial,” once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed.<sup>202</sup>

Placing the burden of proving fair use on users as an affirmative defense, however, has given rise to a number of unintended negative consequences. First, users are not by any means in a better position to prove the fourth fair use factor, which in many cases is the key determining factor in the case outcome. The U.S. Supreme Court has exhibited sympathy for the difficulty defendants experience in obtaining sufficient evidence to prove fair use under the fourth factor.<sup>203</sup> However, it has not reversed the burden of proof by requiring plaintiffs to demonstrate market harm. Instead, it has

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<sup>198</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

<sup>199</sup> *See, e.g.*, *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1307 n.21 (11th Cir. 2008) (“The affirmative defense of fair use is a mixed question of law and fact as to which the proponent carries the burden of proof.”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1994) (“Fair use serves as an affirmative defense to a claim of copyright infringement, and thus the party claiming that its secondary use of the original copyrighted work constitutes a fair use typically carries the burden of proof as to all issues in the dispute.”); *Columbia Pictures Indus. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1187 (C.D. Cal. 1998) (holding that “because fair use is an affirmative defense, Defendants bear the burden of proof on all of its factors”).

<sup>200</sup> *See* Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1784 (2010) (pointing out that to prove the existence of fair use, a user is required to “produce the necessary evidence (even where the inquiry is speculative) and to persuade the court that her interpretation of the evidence reflects fact (even where the inquiry is subjective)”).

<sup>201</sup> 508 F.3d 1146 (9th Cir. 2007).

<sup>202</sup> *Id.* at 1158 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006)).

<sup>203</sup> *Campbell*, 510 U.S. at 590 (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”) (citation omitted).

merely defied practice to presume market harm if a commercial use is found.<sup>204</sup>

Second, the affirmative defense approach places an onerous procedural burden on users, which may deter members of the public from asserting their fair use privilege. A fair use inquiry is a complex combination of law and fact without bright line rules.<sup>205</sup> As a highly sophisticated body of copyright law, the fair use doctrine is known for its ambiguity, with all four fair use factors still ill-defined.<sup>206</sup> Therefore, defendants must rely on legal professionals to assist them with collecting and then utilizing evidence to demonstrate that a fair use claim prevails on the basis of all four factors. Because of these onerous procedural and evidentiary requirements, the process of proving fair use is very likely to incur a six-figure attorney fee.<sup>207</sup> Faced with the high cost of defending the fair use privilege, users, particularly the less well-off and not-for-profit entities, may prove unwilling to assert the legality of their uses before courts.<sup>208</sup> Consequently, commentators have lamented that fair use has been unduly reduced to “the right to hire a lawyer to defend [one’s] right to create.”<sup>209</sup>

Third, the affirmative defense approach has impaired such public interests as free speech and education, which are crucial to a free and equal society. Free speech activities, to a greater or lesser extent, involve the copying of copyrighted works.<sup>210</sup> In the various stages of copyright litigation proceedings—from the preliminary injunction to courtroom hearing to voluntary settlement—the difficulty of collecting evidence to prove market harm and the high litigation costs involved impose an undue burden on users

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<sup>204</sup> *Id.* at 591 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)) (distinguishing *Sony*’s ruling that “[i]f the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated”).

<sup>205</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“Fair use is a mixed question of law and fact.”).

<sup>206</sup> *See, e.g., Sun, supra* note 3, at 291 (“Judging from section 107’s legislative purpose and structure and the discrepancies in courts’ approaches to apply the four factors, the fair use doctrine is indeed vague, flexible and open-ended.”).

<sup>207</sup> *See, e.g., Kevin M. Lemley, I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 311 (2004) (“Intellectual property litigation typically spans several years with total costs commonly exceeding hundreds of thousands or even millions of dollars. A 2001 survey . . . calculated the average cost through trial of typical patent disputes . . . at \$1,499,000; \$699,000 for similar trade secret disputes; \$502,000 for trademark disputes; and \$400,000 for copyright disputes.”) (footnotes omitted).

<sup>208</sup> *See, e.g., Sun, supra* note 1, at 192; James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 890 (2007).

<sup>209</sup> LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 187 (2004).

<sup>210</sup> *See Tushnet, supra* note 106, at 567.

who wish to defend their free speech right.<sup>211</sup> Worse still, the fear of failing to tackle such difficulties successfully might deter people from asserting their free speech right even prior to the commencement of judicial proceedings. The affirmative defense approach can therefore exert a chilling effect on free speech in everyday life.<sup>212</sup> Such a chilling effect can also be seen in educational settings, raising serious concerns over whether fair use can deliver on its promise to promote education.<sup>213</sup>

### B. *Transforming Fair Use into a Collective User Right*

In response to the problems with reducing fair use to an affirmative defense, several commentators have contended that the nature of fair use should be redefined in line with the legislative intent of Section 107 of the U.S. Copyright Act, which governs fair use analysis.<sup>214</sup> At the same time, the redefinition should also alleviate the burden on users of proving fair use.<sup>215</sup> Although such an approach has merit, I believe that a better approach would be to follow the public interest principle by redefining fair use as a collective user right and subsequently reallocating the burden of proof between the user and copyright holder.

#### 1. *Fair Use as a Statutory Right*

By characterizing fair use as an affirmative defense, the U.S. courts have turned a blind eye to the statutory definition of fair use. The U.S. Copyright Act explicitly embraces fair use as a statutory right. Section 108 states that “[n]othing in this section . . . in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.”<sup>216</sup> As this statutory language is crystal clear, fair use should be regarded as a right.

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<sup>211</sup> Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 691, 709–10 (2015) (“Treating fair use as an affirmative defense places an unnecessary and inappropriate burden on free speech. Placing the burden of proving or disproving fair use may play a significant role in the outcome of a litigated case at a variety of stages, from the issuance of a preliminary injunction to the ultimate determination of infringement liability. And, of course, who bears the burden of proving a use was (or was not) a fair use affects the settlement posture of the parties, as well as the behavior of potential fair users even prior to the filing or threat of litigation.”) (citation omitted).

<sup>212</sup> *Id.* at 710; Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 719–22 (2003) (arguing that placing the burden of proof on the defendant violates due process First Amendment due process rights).

<sup>213</sup> See, e.g., Sun, *supra* note 3, at 321–22.

<sup>214</sup> Loren, *supra* note 211, at 695 (“The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable.”) (internal quotation marks omitted).

<sup>215</sup> *Id.* at 702.

<sup>216</sup> 17 U.S.C. § 108(f)(4) (2012).

However, what remains unclear is whether it is a substantive, procedural right, or both. As a substantive right, fair use is more akin to a positive right.<sup>217</sup> It is supposed to entitle members of the public to make fair use of copyrighted works on their own decisions. As a procedural right, however, fair use serves as a negative right entitling a user to sufficient judicial protection in various stages of legal proceedings that prevent copyright holders from unduly interfering with fair use.<sup>218</sup> According to a report by the U.S. Copyright Office, Sections 107 and 108 define fair use as a substantive right. The report further reads Section 108 as a “fair use savings clause,” entitling “libraries and archives to make fair use of works to the same extent as any other user of a copyrighted work” under Section 107.<sup>219</sup> Therefore, fair use is a substantive right that entitles the public to take the positive action of using a work without permission from the copyright holder.<sup>220</sup>

## 2. *Fair Use as a Judicially Recognized Right*

Because fair use has been judicially defined as an affirmative defense, courts have increasingly deviated from the practice of considering fair use as a substantive, positive right. The U.S. Court of Appeals for the Eleventh Circuit actually ventured to redefine fair use as an “affirmative right” in its *Suntrust Bank v. Houghton Mifflin Co.* ruling.<sup>221</sup> In that case, the Eleventh Circuit grounded the fair use right in the constitutional right to free speech under the First Amendment:

[F]air use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. However, fair use is commonly referred to as an affirmative defense, and, as we are bound by Supreme Court precedent, we will apply it as such. Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its

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<sup>217</sup> Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY* 178 (2002) (“The ‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind.”).

<sup>218</sup> *Id.* at 174 (“The defence of liberty consists in the ‘negative’ goal of warding off interference.”).

<sup>219</sup> U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17, at 9 (2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf> [<https://perma.cc/3NU3-R32U>].

<sup>220</sup> Loren, *supra* note 211, at 698 (“The language of Section 108, identifying the ‘right of fair use,’ furthers the textual argument that the statute does not treat fair use as an affirmative defense in the style of ‘confession and avoidance.’ A defense is any reason that the plaintiff should not prevail. On the other hand, an affirmative defense is relevant only once the plaintiff’s prima facie case has been proven. If fair use is ‘not an infringement,’ then the plaintiff has not met its burden to demonstrate a prima facie case of infringement without overcoming the argument that the use is a fair use.”) (citations omitted).

<sup>221</sup> 268 F.3d 1257 (11th Cir. 2001).

constitutional significance as a guarantor to access and use for First Amendment purposes.<sup>222</sup>

Similarly, the U.S. Court of Appeals for the Second Circuit also attempted to redefine fair use as a right in *NXIVM Corp. v. Ross Institute*, undergirding that right with the Copyright Clause of the U.S. Constitution:

Fair use is not a doctrine that exists by sufferance, or that is earned by good works and clean morals; it is a right—codified in § 107 and recognized since shortly after the Statute of Anne—that is “necessary to fulfill copyright’s very purpose, [t]o promote the Progress of science and the useful arts . . . .”<sup>223</sup>

The foregoing quote from the Copyright Clause is largely understood to justify copyright protection as a means to the end of promoting the public interest. For example, the U.S. Supreme Court and lower federal courts alike have repeatedly stressed that protection of the public interest is the primary objective of U.S. copyright law.<sup>224</sup> Therefore, as long as fair use is invoked in the public interest, copyright law should also protect it as a positive right.<sup>225</sup>

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<sup>222</sup> *Id.* at 1260 n.3 (citations omitted). In this footnote, the judge cited *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996), which also defined fair use as a right:

Although the traditional approach is to view “fair use” as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.

*Id.* at 1542 n.22.

<sup>223</sup> 364 F.3d 471, 485 (2d Cir. 2004) (Jacobs, J., concurring) (alteration in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)).

<sup>224</sup> *See, e.g., Campbell*, 510 U.S. at 575 (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts . . . .’”) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8); *Feist Publ’n, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–50 (1991) (holding that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”) (citations omitted). For similar judicial opinions, see *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Computer Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 711 (2d Cir. 1992).

<sup>225</sup> Patry, *supra* note 159, § 10:1.50 (2018) (“‘Limitations and exceptions to copyright,’ a phrase much in current use, posits the issue backwards; that phrase assumes a grant of rights that is checked only on occasion, and in derogation of a presumed default of unfettered rights. Limitations and exceptions will be allowed, it is argued, if there is a public interest that justifies overriding the private rights of authors in their works in particular circumstances.”).

In attempting to redefine fair use as a right, courts did not further propose altering the procedural rules for fair use cases by shifting the burden of proving fair use to the plaintiff.<sup>226</sup> Nevertheless, in *Lenz v. Universal Music Corp.*,<sup>227</sup> the U.S. Court of Appeals for the Ninth Circuit decided to deviate from the affirmative defense approach:

[Characterizing fair use as an affirmative defense] conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that fair use does not fall into the latter camp: “[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use.” Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer. . . .<sup>228</sup>

This treatment of fair use fundamentally departs from the conventional reading of fair use as an affirmative defense that “excuses impermissible conduct.” The Ninth Circuit grounded its opinion in fair use as a concept legally permitting the public to use copyrighted works, a concept deeply ingrained in copyright law. Given that the public is entitled to make legally permitted uses, copyright holders cannot unduly interfere unless uses go beyond the bounds set in Section 107. Therefore, the Ninth Circuit’s opinion implicitly proffers a legal basis for treating fair use as a substantive positive right under Sections 107 and 108 of the U.S. Copyright Act.

Furthermore, the Ninth Circuit moved to explicitly accept fair use as a right.<sup>229</sup> The court considered and agreed with the opinion of Judge Birch that fair use should be treated as a right rather than an affirmative defense, and subsequently altered the burden of proving fair use in notice-and-takedown proceedings.<sup>230</sup> The Ninth Circuit required the copyright holder in question to evaluate whether a fair use of his work existed before he sent a takedown notice to an Internet service provider. A normal takedown notice requires proof of the non-existence of fair use from the copyright holder not the user.<sup>231</sup>

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<sup>226</sup> See, e.g., *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 (11th Cir. 1996).

<sup>227</sup> 815 F.3d 1145 (9th Cir. 2015).

<sup>228</sup> *Id.* at 1152–53 (citations omitted). The Ninth Circuit also concluded that “[f]air use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright and laches.” *Id.* at 1153.

<sup>229</sup> *Id.* at 1153.

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

<sup>231</sup> *Id.* (holding “that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is ‘authorized by the law’ and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).”).

At the same time, the treatment of fair use as a user right also gains strong support from several Canadian court rulings defining the Canadian fair dealing doctrine as equivalent to the fair use doctrine. In *CCH Canadian Ltd. v. Law Society of Upper Canada*,<sup>232</sup> for example, the Supreme Court of Canada delivered a groundbreaking opinion on the nature of fair dealing. It decided that the fair dealing doctrine under the Canadian Copyright Act should be regarded as “a user’s right.”<sup>233</sup> For that purpose, the doctrine “must not be interpreted restrictively”<sup>234</sup> so as to achieve balanced protection of the rights of both copyright holder and user. In a subsequent case, the Supreme Court further justified its definition of fair dealing as a user right on the grounds of public interest protection, stating that “users’ rights are an essential part of furthering the public interest objectives of the [Canadian] Copyright Act.”<sup>235</sup>

### 3. *Fair Use as a Collective User Right*

As discussed above, I believe it is legally sound to treat fair use as a user right according to the plain language of the U.S. Copyright Act and the growing tendency among circuit courts to depart from the affirmative defense approach. There has also been a surge in commentators adamantly arguing the case for redefining fair use as a user right.<sup>236</sup>

In my view, the public interest principle requires fair use to be treated as a *collective* user right. As discussed in Section A of Part III, according to that principle, only public interest uses that comport with group or societal interests are protected by the fair use right.<sup>237</sup> Therefore, such public interests are by nature collectively shared by users as members of a group or society. Given the collective nature of users’ interests, fair use should be

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<sup>232</sup> [2004] 1 S.C.R. 399, ¶¶ 48, 51 & 63 (Can.), available at <https://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html?autocompleteStr=%5B2004%5D%201%20S.C.R.%2039&autocompletePos=1>.

<sup>233</sup> *Id.* ¶ 48.

<sup>234</sup> *Id.*

<sup>235</sup> See *Soc’y of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, ¶ 27 (Can.).

<sup>236</sup> For theoretical discussion about how to treat fair use and fair dealing as a user right, see Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462, 463 (Michael Geist ed., 2005); Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User Rights Approach*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 132 (Ruth Okediji, ed.) (2017); Niva Elkin-Koren, *The New Frontiers of User Rights*, 32 *AM. UNIV. INT’L L. REV.* 1 (2016); Wendy J. Gordon & Daniel Bahls, *The Public’s Rights to Fair Use: Amending Section 107 to Avoid the “Fared Use” Fallacy*, 2007 *UTAH L. REV.* 619, 626 (2007) (“[F]air use is a ‘right’ in all these senses: it is an existing liberty, to which the public has an enduring entitlement, and which deserves significant weight.”); Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 *B.C. L. REV.* 397, 426 (2003) (“Instead, the law sets entitlements to give recognition to these interests, to provide breathing space for others to interact with copyrighted works.”).

<sup>237</sup> See *supra* text accompanying notes 138–48.

characterized as a collective user right. Concomitantly, copyright holders have a collective duty to make their works freely available to serve fair users' right to achieve their collective interests.<sup>238</sup> The substantive dimension of the fair use doctrine comprises both a collective right conferred on users and a collective duty imposed on copyright holders.

Accordingly, the public interest principle reshapes the procedural dimension of the fair use doctrine. While serving as a substantive right, fair use also protects users' interests as a procedural right, which requires them to prove that they have exercised their right within the doctrine's ambit. In response to users' assertion of their right, copyright holders have a procedural duty to prove that they are *not* legally required to fulfill users' interests. The integration of users' procedural right and copyright holders' procedural duty thus plays a determining role in reallocating the burden of proof in fair use cases.

As a matter of procedure, a user, as a holder of the right to fair use, only needs to prove in judicial proceedings that he or she has exercised that right in the public interest. In terms of the four fair use factors, therefore, the user bears the burden of proof only under the first factor, which requires him or her to provide evidence demonstrating that he or she used the copyrighted work in question in the public interest. If he or she fails to meet that burden of proof, then the use of the work will be deemed to have been made for his or her own private interests.

At the same time, a copyright holder has a procedural duty to demonstrate that he or she does not bear a substantive duty to fulfill the fair use interest alleged by the user. In discharging that duty, he or she bears the burden of proving that the use made of his or her work in the public or private interest has exceeded the ambit of the fair use doctrine. Accordingly, the burden of proof for the three other fair use factors, particularly the fourth factor concerning market harm, is placed on the copyright holder.

Based on the public interest principle, the user right approach can produce positive effects in protecting the public interest in fair use cases. First, it provides a rights-based mode for protecting the public interest procedurally, correcting the inequality in legal status caused by the affirmative defense mode. In essence, the user right approach comports with the procedural premise of the operation of judicial proceedings in copyright cases.

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<sup>238</sup> According to the interest theory of rights, a person having a right to something means that the right serves his or her interest, and meanwhile someone else has a duty to provide it. *See, e.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 180 (1986) ("The specific role of rights in practical thinking is . . . the grounding of duties in the interests of the other beings. . . . Rights ground requirements for action in the interest of other beings.").

Normally, when a copyright holder lodges a legal complaint with a court, he is procedurally required to prove that he or she has a right to the work he or she created because the work is copyrightable. Similarly, when a user claims that he or she has a fair use right, he or she needs to prove that he or she has such a right in the sense that the use of the work is made in the public interest. The public interest principle thus offers a procedurally equal status to the user and the copyright holder. Each bears a substantive right in judicial proceedings, namely, a copyright for the plaintiff and a fair use right for the defendant. Therefore, the user right approach rectifies the inequality in legal status under the affirmative defense mode, which regards the plaintiff as a copyright holder but potentially discriminates against the defendant as an alleged infringer or defense invoker who has no legal right that is expressly recognizable under copyright law.

Second, the user right approach necessitates a corresponding procedural duty for copyright holders, that is, a duty to prove, among other factors, that their economic interests have been significantly harmed. Their discharge of that duty alleviates users' burden of proof without requiring them to prove the non-existence of significant market harm. As noted earlier in this part,<sup>239</sup> it is often very difficult indeed for users to prove that their uses of works do not cause market harm. The proposed approach responds to that difficulty by shifting the burden of proving the existence of significant market harm to copyright holders.<sup>240</sup> This modification of the procedural rule would in turn protect users' interests in two primary ways.

First, by removing the burden of proving the non-existence of market harm from users, the user right approach procedurally implements the requirement that copyright holders must fulfill their collective duty to serve the public interest in using their works. To that end, they should tolerate public interest uses to the extent required by the fair use doctrine. As discussed in Part III, the significant market harm standard excludes public interest uses from the scope of the market for a copyright holder's works.<sup>241</sup> Second, the user right approach reduces litigation costs for users because it requires copyright holders to bear the cost of proving all fair use factors other than the first, particularly the fourth, which requires market research and the collection of evidence and can thus be costly. The legal fees incurred in

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<sup>239</sup> See *supra* text accompanying notes 203–04.

<sup>240</sup> See, e.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1279 (11th Cir. 2014) (“Fair use is an affirmative defense, and the evidentiary burden on all four of its factors rests on the alleged infringer. However, Plaintiffs—as publishers—can reasonably be expected to have the evidence as to availability of licenses for their own works. It is therefore reasonable to place on Plaintiffs the burden of going forward with the evidence on this question.”) (citation omitted).

<sup>241</sup> See *supra* text accompanying note 149.

defending one's fair use right are thus greatly reduced, meaning a user is less likely to shy away from asserting that right for financial reasons.

In a nutshell, treating fair use as a collective user right procedurally addresses the major problems with the affirmative defense approach.<sup>242</sup> By modifying the procedural rules for allocating the burden of proof, this user right approach in turn promotes the protection of fair use as a substantive legal right under copyright law.

### C. Can Courts Protect the Public Interest Proactively?

As shown in Section C of Part II, the Beijing High Court ruled against Google on the grounds that it had failed to fulfill its burden of proving fair dealing. Against the backdrop of that ruling, the proposed procedural treatment of fair use as a collective user right gives rise to concerns over whether courts should have the power to protect the public interest proactively, a power that has the potential to result in judicial activism and courts abandoning their impartial role in adjudicating fair use cases. These concerns can be encapsulated in two questions. First, can courts proactively identify the public interests involved in the use of a work that a user has not proved with evidence? Second, can they do so even if the user provides no evidence of the existence of a public interest use?

These issues are of pivotal importance. Under the public interest principle, identifying public interests in the use of copyrighted works determines the outcome of first factor analysis. It also has direct bearing on assessment of the fourth factor, as the scope of a copyright holder's market hinges upon the scope of public interest use thereunder.

A recent copyright case decided by the Beijing First Intermediate Court casts light on how courts can deal with the two issues. In *Beijing Sogou Information Service Co., Ltd. v. Wenhui Cong*,<sup>243</sup> the copyright holder, Mr. Cong, lodged a complaint with the Beijing Haidian District Court alleging that Sogou had infringed his copyright by circulating the web cache of the webpage that originally published his article.<sup>244</sup> The intermediate court held that the use of the copyrighted article for web caching constituted fair use under Chinese copyright law because Sogou's web caching service satisfied substantive fair use requirements and promoted the public interest.<sup>245</sup> This

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<sup>242</sup> Loren, *supra* note 211, at 701 (arguing that the assignment of the burden of proof "could work a radical change in the meaning and effect of the doctrine of fair use").

<sup>243</sup> Beijing First Intermediate Court, 2013 Yi Zhong Min Zhong Zi No. 12533 (Dec. 10, 2013).

<sup>244</sup> See Haochen Sun & Johnny Xuyang Han, *The Scope of the Fair Use Doctrine and its Public Interest Mandate under Chinese Copyright Law*, in ANNOTATED LEADING COPYRIGHT CASES IN MAJOR ASIAN JURISDICTIONS (Kung-Chung Liu ed.) (City University of Hong Kong Press, forthcoming 2019).

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

fair use ruling was rendered without any consideration of whether the defendant, Sogou, bore the burden of proving fair use. Sogou did not raise a fair use defense because it claimed that it had not committed any act tantamount to an infringement of Mr. Cong's right to make his article available to the public via the Internet.

Despite the defendant failing to provide any evidence proving public interest use, the Beijing First Intermediate Court buttressed its fair use ruling by elaborating upon such use, noting that the defendant's web caches contributed three indispensable public benefits. First, web caches ensure consistency in helping users to locate information on the Internet. When original websites cannot be loaded owing to technical or connection difficulties, Internet users can still acquire information through the web caches stored on servers belonging to search engine service providers. Second, because web caches are not updated in a timely manner, Internet users can have a quick view of them even after the relevant information has been deleted from the original websites. Third, the defendant's web caches highlight the keywords that Internet users search for to enhance search efficiency. Consequently, the Beijing First Intermediate Court proactively examined the various public interests afforded by the defendant's web caching services even though the defendant had furnished no evidence proving that those services promoted the public interest.

In my view, the Beijing First Intermediate Court acted rightly in this case. First, when courts proactively examine the existence of a public interest use with regard to the purpose and character of that use, they will still have to further consider the extent to which the use harms the copyright holder's economic interests. Therefore, courts' exercise of judicial power in making additional public interest considerations is still checked by the fourth fair use factor or Article 21 of the Copyright Implementation Regulation, which protects the market value of copyrighted works.<sup>246</sup>

Second, the proactive examination of public interest by courts comports with social justice, a value that serves as the bedrock of any judicial system.<sup>247</sup> Fair use, by its very nature, is designed to promote social justice.<sup>248</sup> It prevents the knowledge and information embodied in works from being

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<sup>246</sup> See *supra* text accompanying note 61 (providing an unauthorized use of a work "shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner").

<sup>247</sup> As John Rawls points out, "the principles of social justice . . . provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation." JOHN RAWLS, *A THEORY OF JUSTICE* 4 (rev. ed. 1999).

<sup>248</sup> See, e.g., SUNDER, *supra* note 137, at 105–19 (considering examples about how fair use can promote social justice); Haochen Sun, *Copyright and Responsibility*, 4 HARV. J. SPORTS & ENT. L. 263, 299 (2013) (discussing how copyright law can promote social justice).

monopolized by copyright holders at the expense of the public interest. If courts do not examine whether a work was used in the public interest simply because a user fails to submit any or sufficient evidence, they will legally permit a copyright holder to override public interests beneficial to a particular group of users or to society at large. Against this backdrop, social justice demands that courts call the copyright holder's claim of infringement into question. Doing so further allows them to make proactive inquiries into the extent to which the public interest would be impaired should they uphold the claim.

In deciding the web caching case, the Beijing First Intermediate Court undertook such a proactive inquiry in considering whether a total ban on the provision of web caching services would severely jeopardize the public interest. According to the Court, without the shield of fair use, web caching would be deemed an infringement of copyright. To avoid potential legal liabilities, search engine service providers would have to shoulder the unnecessarily troublesome burden of carrying out numerous preliminary and time-consuming checks to remove web caches that infringe copyright. The Beijing First Intermediate Court reasoned that, given the current level of technological development, it would be infeasible to delete web caches simultaneously with website changes. Nor would it be feasible for search engine service providers to obtain permission proactively from all copyright owners to offer a web caching service. All such providers would cease providing web caches if they were held liable for copyright infringement, which would seriously harm the public interest. Accordingly, for the sake of certain copyright owners' interests, the public would be deprived of the benefits brought about by web caches, and search engine service providers would have to bear an unnecessary burden.

## V. INVIGORATING THE PUBLIC INTEREST PRINCIPLE DOMESTICALLY AND GLOBALLY

Like many legal principles and standards, the proposed public interest principle and its substantive and procedural standards are by no means perfect. In this part of the article, I respond to the major concerns over both the public interest principle and its subsidiary standards. Furthermore, I consider how and why the principle could play a uniquely important role in bridging the gaps between the fair use and fair dealing doctrines.

### *A. Preventing the Public Interest Principle from Becoming a Leviathan*

#### *1. Against an Over-Capacious Principle*

The first criticism that might be leveled against the public interest principle is that the principle is so capacious that it might easily infringe upon

private interests in the name of protecting the public interest. Were that to occur, copyright holders would end up sacrificing too much financially. As the U.S. Supreme Court has aptly cautioned, “[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But . . . we see no warrant for judicially imposing, a ‘compulsory license’ permitting unfettered access.”<sup>249</sup> The single-minded prioritization of the public interest would render copyright as a private right meaningless. It would deprive copyright holders of their economic interests in circulating their works in the marketplace, ultimately deterring them from creating or disseminating new works,<sup>250</sup> which would in turn impair the public interest.

In response to these valid concerns, I argue that the public interest principle actually requires courts to take copyright holders’ economic interests seriously. To that end, it places the first factor, which carries the public interest use standard, under the scrutiny of the other fair use factors. Although the public interest principle situates the overall fair use analysis within the context of the public interest at large, it does not deviate from the traditional judicial practice of applying fair use factors in a holistic and balanced manner.<sup>251</sup> The principle by no means empowers the first factor to override the other fair use factors, the fourth factor in particular. Instead, it guards against the harmful disruption of copyright holders’ market by maintaining the fourth factor on an equal footing with the first. It also rules out consideration of the market benefits to copyright holders to ensure an appropriate assessment of the potential market harm to them.<sup>252</sup> With these built-in limits on its application, the public interest principle thereby serves as a vehicle for courts to achieve the balanced application of all four fair use factors by permitting them to serve as a check on one another.

The U.S. courts’ fair use rulings in digital library cases demonstrate that the public interest principle, if properly applied with meticulous weighing up between the first and fourth factors, poses no major threats to copyright holders. After all, despite Google Library and the HathiTrust Digital Library now having existed for more than a decade, the publishing industry is still

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<sup>249</sup> Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 569 (1985).

<sup>250</sup> See Authors Guild v. HathiTrust, 755 F.3d 87, 95 (2d Cir. 2014) (“A fair use must not excessively damage the market for the original by providing the public with a substitute for that original work.”).

<sup>251</sup> Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1308 (11th Cir. 2008) (quoting Stewart v. Abend, 495 U.S. 207, 236–37 (1990)) (“The fair use doctrine is an ‘equitable rule of reason’; neither the examples of possible fair uses nor the four statutory factors are to be considered exclusive.”); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1283 (2014) (ruling that Section 107 requires “a holistic analysis which carefully balanced the four factors”).

<sup>252</sup> See *supra* text accompanying notes 170–82.

enjoying healthy growth.<sup>253</sup> Even the university presses, whose imminent demise was widely predicted in the social media age, are prospering.<sup>254</sup> What really matters today is whether copyright holders can adapt to take full advantage of digital technologies as an important means of marketing their works.<sup>255</sup>

At the same time, the public interest principle also forbids misuse of the fourth factor. As market harm is always a matter of degree,<sup>256</sup> it prevents courts from interpreting the scope of the protectable market of a work in an overly broad fashion. Instead, it forces courts to draw a line between the scope of unauthorized uses of the work in the public interest and the scope of the work's protectable market for issuing valid licenses for its use or the creation of its derivatives. On the one hand, courts must consider the scope of public interest uses in terms of the first factor, as they have long done in cases involving transformative uses.<sup>257</sup> On the other, they must consider whether the scope of the protectable market claimed by the copyright holder is reasonable under the fourth factor.<sup>258</sup> Meticulous examination of both matters is essential for courts to decide whether an unauthorized use has caused significant market harm to the copyright holder.<sup>259</sup> Should courts

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<sup>253</sup> See Julie Bosmanaug, *Publishing Gives Hints of Revival, Data Show*, N.Y. TIMES (Aug. 9, 2011), <https://www.nytimes.com/2011/08/09/books/survey-shows-publishing-expanded-since-2008.html> [<https://perma.cc/M2AG-DZH3>].

<sup>254</sup> See Chris Plattsmier, *University Presses are Thriving, Not Broken*, ACLS (Oct. 29, 2018), <https://www.humanitiesebook.org/university-presses-are-thriving-not-broken/> [<https://perma.cc/73G6-MUZZ>].

<sup>255</sup> See Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1132 (2010) (“In the digital era, authors are in a better position than in the past to grow their own audiences, cultivate reputations that attract readers, and provide their works to readers through alternative distribution channels. . . .”); Mike Shields, “*Growth has been significant*”: *Publishers are Falling in Love with Apple News*, BUS. INSIDER (May 9, 2018), <https://www.businessinsider.com/publishers-are-falling-in-love-with-apple-news-2018-5> [<https://perma.cc/3JF2-KXEV>].

<sup>256</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 n.21 (1994) (“Market harm is a matter of degree, and the importance of [the fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”).

<sup>257</sup> See, e.g., *Campbell*, 510 U.S. at 579 (ruling that parody “provide[s] social benefit, by shedding light on an earlier work . . .”).

<sup>258</sup> *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1277 (11th Cir. 2014) (“Put simply, absent evidence to the contrary, if a copyright holder has not made a license available to use a particular work in a particular manner, the inference is that the author or publisher did not think that there would be enough such use to bother making a license available. In such a case, there is little damage to the publisher’s market when someone makes use of the work in that way without obtaining a license, and hence the fourth factor should generally weigh in favor of fair use.”).

<sup>259</sup> *Id.* at 1276 (“The goal of copyright is to stimulate the creation of new works, not to furnish copyright holders with control over all markets. Accordingly, the ability to license does not demand a finding against fair use.”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 n.17 (2d Cir. 1994) (“[A] copyright holder can *always* assert some degree of adverse [effect] on its potential licensing

deviate from this pattern of reasoning, their application of the fourth factor will be detrimental to the public interest.<sup>260</sup>

The U.S. Supreme Court's *Harper & Row* ruling exemplifies the incorrect application of the first and fourth fair use factors without any consideration of the public interest. In *Harper & Row*, the Supreme Court held that *The Nation's* unauthorized publication of approximately three hundred words of a direct quotation from President Gerald Ford's then-unpublished memoirs did not constitute a fair use.<sup>261</sup> The Court's overly restrictive interpretation of the first and fourth fair use factors is quite problematic. Overly emphasizing the commercial nature of the use concerned, the Court failed to grasp the significance of the public interests involved in the use concerned. As Justice Brennan pointed out in his dissenting opinion, such use was vital to lending authenticity to the magazine's news reporting on a historical event, i.e., the resignation and pardon of President Richard Nixon. Keeping the public informed of the details of that event undoubtedly "furthered the public interest"<sup>262</sup> in "[the] broad dissemination of principles, ideas, and factual information [that] is crucial to . . . robust public debate and [an] informed citizenry."<sup>263</sup>

Moreover, if it had recognized *The Nation's* use as a public interest use, the Court would have had to modify its ruling on the fourth factor. It ruled in favor of the copyright holder on the fourth factor on the grounds that its interest had been harmed by the single cancellation of an offer to publish the memoirs as a magazine serial and subsequent refusal to pay it \$12,500.<sup>264</sup> However, the Court's finding that this single cancellation qualified as significant harm to the copyright holder's interests is dubious to say the least. In fact, the copyright holder failed to demonstrate that the use in question caused any harm to the work's potential market.<sup>265</sup> Although the defendant used the heart of that then-unpublished work, in weighing up all four factors, analysis of the first and fourth factors should still have led the Court to rule in its favor. Had the public interest principle guided the Court, it would have ruled the use concerned to constitute a fair use.

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revenues as a consequence of the secondary use at issue simply because the copyright holder has not been paid a fee to permit that particular use.") (citations omitted).

<sup>260</sup> See, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELLECTUAL PROP. L. 1, 30 (1997) (pointing out that the inappropriate application of the fourth factor "can inappropriately skew the fair use analysis to favor the rights of copyright owners").

<sup>261</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542–45 (1985).

<sup>262</sup> *Id.* at 591.

<sup>263</sup> *Id.* at 582 (Brennan, J., dissenting).

<sup>264</sup> *Id.* at 567.

<sup>265</sup> See Fromer, *supra* note 165, at 625.

## 2. *Against an Over-Ambiguous Principle*

One could further argue against the public interest principle by pointing out that public interest is a deeply troubling concept given the tremendous difficulty of defining its nature and scope. As the concept still remains ill-defined, the application of the public interest principle to fair use cases would lead to myriad unintended negative consequences, thereby further aggravating the extant uncertainties surrounding the fair use doctrine.<sup>266</sup>

However, the law itself has been replete with legal terms that are ambiguous in nature since its inception.<sup>267</sup> History is witness to the positive evolution of the law over time despite the ambiguity deeply embedded into its every verbal ingredient. For that matter, language itself is fraught with ambiguities. As long as the law relies on language to convey its prescriptions, the problem of ambiguity will persist.<sup>268</sup> For example, under the U.S. Constitution, it is legal for the government to exercise its eminent domain power to take private property for public use provided that fair compensation is paid to the owner.<sup>269</sup> This takings clause has been implemented for ages without any proper delineation of the public interest in the taking of private property.<sup>270</sup>

Hence, it makes no sense to argue against the public interest principle simply by faulting it for its ambiguity. Rather, the issue of ambiguity should be understood as a double-edged sword. While dealing with its negative effects, we can also take advantage of its positive effects in protecting the public interest. On the one hand, we can take measures to moderate the ambiguity of the public interest principle to the greatest extent possible. In Part III, I discuss how courts can ascertain public interests by identifying the group- or society-based interests in using a given work.<sup>271</sup> Therefore, it is quite feasible to inject a proper degree of certainty into the judicial application of the principle.

On the other hand, it could be argued that the public interest principle's ambiguity is actually necessary to ensure that the principle is sufficiently broad-based to accommodate a wide range of socially beneficial interests in using copyrighted works. At the policy level, the public interest principle's ambiguity may help create a relatively flexible environment that supports

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<sup>266</sup> See e.g., Sun, *supra* note 3, at 303–04 (discussing the indeterminacy of the fair use doctrine); Beebe, *supra* note 9, at 16 (asserting that “fair use is such an amorphous body of doctrine and its outcomes so unpredictable”).

<sup>267</sup> Sun, *supra* note 3, at 304.

<sup>268</sup> *Id.*

<sup>269</sup> The Fifth Amendment states that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

<sup>270</sup> Sun, *supra* note 3, at 319–20.

<sup>271</sup> See *supra* text accompanying notes 138–48.

technological innovation<sup>272</sup> and cultural development.<sup>273</sup> At the doctrinal level, the principle's ambiguity would help courts to protect public interests that are still underserved by the prevailing interpretation of the fair use doctrine. The U.S. Supreme Court has designated satire as far less worthy than parody of receiving fair use protection.<sup>274</sup> In so ruling, the Court has handed down a clear definition of the public interest in the parodic use of a work, stating that it is deserving of protection because it informs the public of a "new expression, meaning, or message"<sup>275</sup> that can be added to the work. However, a broader, albeit more ambiguous understanding of the public interest could produce the positive effect of requiring courts to consider the larger social benefits that satirical uses may confer. For example, the Second Circuit held in *Blanch v. Koons* that Jeff Koons's satirical use of a portion of a photograph in a collage should be deemed fair use.<sup>276</sup> The court pointed out that the photo concerned was "fodder for [the user's] commentary on [the] social and aesthetic consequences of mass media."<sup>277</sup> As satire carries society-based public interests, it is regarded as a fair dealing exemption under the copyright laws of a number of countries, including the UK<sup>278</sup> and Australia.<sup>279</sup>

### 3. *Against an Over-Monolithic Principle*

A further ground for criticism of the public interest principle is that its emphasis on the public interest would rule out private uses of works that serve users' individual interests but have long been deemed legal under

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<sup>272</sup> See, e.g., Chander, *supra* note 8, at 664 ("The American concept of 'fair use' . . . proved conducive to various innovations in the digital realm."); Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 862 (2008) (arguing that "fair use as a component of innovation policy suggests that courts and policy-makers must strive to make fair use something on which innovators may more easily rely"); Robin A. Moore, *Fair Use and Innovation Policy*, 82 N.Y.U. L. REV. 944, 946–47 (2007).

<sup>273</sup> See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 50 (2004) ("To make intellectual property consistent with the idea of free speech as democratic culture, there must be a robust and ever expanding public domain with generous fair use rights."); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (arguing that copyright law functions to support "a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy").

<sup>274</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994) ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."); see also SUNDER, *supra* note 137, at 120 (explaining why courts and scholars have treated satire and parody differently).

<sup>275</sup> *Campbell*, 510 U.S. at 579.

<sup>276</sup> *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

<sup>277</sup> *Id.* at 253.

<sup>278</sup> Copyright, Designs and Patents Act 1988, c.48, s 30A (U.K.).

<sup>279</sup> Australian Copyright Act 1968, § 41A (Austl.).

copyright law. Examples of such private uses include recording television programs for the time-shifting purpose of viewing them at a later time<sup>280</sup> and downloading music from a computer for the space-shifting purpose of listening to it at another location of the user's choosing.<sup>281</sup> Private uses preserve users' anonymity, which "permits these activities to go forward, and allows fair users to decide later whether to reveal their identities when releasing their work."<sup>282</sup> Therefore, private uses legally protect the right to privacy, an individual interest that is actually dear to the public.<sup>283</sup>

To be sure, private uses can hardly satisfy the public interest use standard under the fair use factor, as they primarily serve users' individual interests in a private setting. However, it does not necessarily follow that if courts were guided by the public interest principle, the fair use doctrine would disallow all private uses. Instead, it would protect non-commercial private uses that do not cause significant market harm to the copyright holders. For instance, the private use of a work for the aforementioned time-shifting purpose would still be deemed legal. As the U.S. Supreme Court's ruling in *Sony* shows, such use does not cause "any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works."<sup>284</sup>

### B. Bridging the Gaps between Fair Use and Fair Dealing

By nature, the fair dealing doctrine plays the same role as the fair use doctrine by allowing the public to use copyrighted works without authorization from the copyright holders and without paying them royalties. The striking discrepancies between the two doctrines lie chiefly in the structure of their legislative format and responsiveness to the role of courts. Fair dealing has entrenched an exhaustive list of exemptions and the rigid application of legal factors. Fair use, in contrast, is known for its flexibility owing to its non-exhaustive itemization of exemptions and open-ended application of legal factors.<sup>285</sup> Consequently, the fair use doctrine affords courts greater latitude in deciding the outcomes of disputes on a case-by-case

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<sup>280</sup> *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 454–56 (1984) (ruling that "time-shifting" of copyrighted television shows with videotape recorders (VTR) constituted fair use primarily because it did not have negative effects on the current as well as the potential market for the copyrighted works).

<sup>281</sup> Relying upon *Sony*, the court in *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.* held that copying for space-shifting purposes is "paradigmatic noncommercial personal use entirely consistent with the purposes of the [Copyright] Act." 180 F.3d 1072, 1079 (9th Cir. 1999); *cf.* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (rejecting the ruling that space-shifting is fair use); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

<sup>282</sup> See Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 598 (2003).

<sup>283</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65–66 (1973).

<sup>284</sup> *Sony*, 464 U.S. at 456.

<sup>285</sup> See, e.g., BURRELL & COLEMAN, *supra* note 8, at 252.

basis and more power to come up with additional legal standards for judicial decision-making.<sup>286</sup>

Despite these differences, I argue that the public interest principle can guide courts toward applying the fair dealing doctrine, in addition to the fair use doctrine. In this way, the principle would serve as a meaningful alternative approach to bridging the gaps between fair use and fair dealing, an issue that has long troubled copyright scholars and practitioners.<sup>287</sup> The principle obviates the need to reform fair dealing by adopting open-ended fair use standards and the need to reform fair use by injecting the kinds of certainty that fair dealing affords. Application of the principle would thus steer the discourse away from whether the flexible fair use doctrine or the rigid fair dealing doctrine is more advantageous. I do not argue the case for the former to replace the latter on its own merits, or vice versa. Instead, I propose that the public interest principle can serve as a commonly shared principle for adjudicating fair use and fair dealing cases and developing further legislative reforms aimed at fixing the major problems with both doctrines.

### *1. Acting as a Guiding Principle*

First and foremost, what matters most for both the fair use and fair dealing doctrines, in my view, are the principles that can guide the courts in interpreting those doctrines. Despite the differences in their overall legislative structure, a commonality between fair use and fair dealing is the direct application of legal factors without the concomitant adoption of a guiding principle for such factor-based application. The fair use doctrine routinely entails judicial inquiries into the four fair use factors. Similarly, the fair dealing doctrine operates in a two-tier cluster of factors in common law jurisdictions. It first triggers a judicial inquiry into whether a given use of a work falls into any of the statutory factors enumerated in the various fair dealing exemptions. Then, following the *Hubbard v. Vosper* ruling in the UK, it further requires courts to consider whether the use is fair by applying a few additional factors.<sup>288</sup> In Canada, those factors include (1) the purpose

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<sup>286</sup> Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 45 (Ruth L. Okediji ed., 2017) (pointing out that one of the reasons why “civil law countries have generally been reluctant to adopt a flexible and open-ended [limitation and exception], such as fair use” is that “legislatures in those countries are expected to define the balance of rights between copyright owners and the public”).

<sup>287</sup> *See id.* (arguing that “a key advantage of a flexible [limitation and exception]” is that “it enables the law to adapt to new circumstances and evolve over time without the need for continual statutory amendments”).

<sup>288</sup> *Hubbard v. Vosper* [1972] 2 Q.B. 84, per Lord Denning at 1027. In this ruling, Lord Denning explicated factors for weighing on fairness as follows:

of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.<sup>289</sup>

Without a guiding principle, the factor-based application of the fair use and fair dealing doctrines has resulted in diametrically opposing rulings. Despite the open-ended, flexible nature of fair use and the public interest-oriented *Campbell* ruling, U.S. courts have still rendered copyright holder-centric rulings by interpreting the fair use factors restrictively. The U.S. Supreme Court's ruling in *Harper & Row* is a case in point.<sup>290</sup> Conversely, despite the widely held belief in the fixed, rigid nature of the fair dealing doctrine and judicial assertions that the doctrine has been interpreted strictly,<sup>291</sup> the Supreme Court of Canada's rulings in *CCH* and its progeny have rendered liberal interpretations of the doctrine by applying public interest considerations.<sup>292</sup> Similarly, the Court of Justice of the European Union has defined parody broadly on the basis of freedom of expression,

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It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be un-fair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

*Id.*

<sup>289</sup> See *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 399, ¶ 53 (Can.).

<sup>290</sup> Sun, *supra* note 3, at 321 (pointing out that the *Harper & Row*-type judicial practice of treating fair use as an affirmative defense "would give rise to the problem that [the public's] rights are automatically 'ranked' lower than copyrights" and that "courts actually water down the importance of protecting public interest"); NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 64–65 (2008) ("Since *Harper & Row*, the Blackstonian property-centered view of fair use has steadily gained ground.").

<sup>291</sup> See, e.g., Case C-201/13, *Deckmyn v. Vandersteen*, 2014 E.C.R. ¶ 43 (ruling that "the conditions set out in Article 5 [of the EU Copyright Directive that governs exceptions and limitations to copyright] must generally be interpreted strictly"); Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-0000 (ruling that fair dealing exceptions must be interpreted strictly).

<sup>292</sup> See Giuseppina D'Agnostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 309 (2008) (arguing that the concept of U.S. fair use, which theoretically allows any type of use to be "fair" and merely provides factors to assist courts in their decision-making, while suggesting that Canada seek to build on the distinctive features of its fair dealing regime, such as its policy preoccupations that avoid championing owners' rights, and factors for determining fair dealing that are more flexible than U.S. fair use); see also Peter K. Yu, *Customizing Fair Use Transplants*, 7 MDPI LAWS 9, 12 (2018), available at <http://www.mdpi.com/2075-471X/7/1/9> [<https://perma.cc/P85E-PF4F>] (arguing that "a jurisdiction that refuses to introduce fair use but is open to adopting a broad fair dealing exception for quotation could easily achieve many important benefits provided by the fair use provision, especially if judges are willing to liberally construe the quotation exception").

allowing the parodic use of a work to function as a satire with social and political criticism.<sup>293</sup>

Given that the issue of interpretation is central to both doctrines, the public interest principle would play a pivotal role in guiding courts to not only interpret the legal factors thereunder but also to determine the outcomes of hard cases after weighing those factors. To be sure, courts can rely on the fair use or fair dealing factors to settle easy cases adequately. However, they encounter severe difficulties in attempting to settle hard cases by relying solely on those factors.

In hard cases, courts are confronted with the thorny issue of how to apply the fair use or fair dealing doctrine to address the conflict between the public interest in sharing the information contained in a copyrighted work and the private interest in controlling the exclusive ownership of that work.<sup>294</sup> They have to deal with such bewilderingly complex tasks as drawing a line between the transformative use of a work and preparing a derivative of that work<sup>295</sup> and defining the scope of the market for the work.<sup>296</sup> In these circumstances, the public interest principle would serve to guide courts in dealing with hard cases by shedding light on how best to address the conflict between public and private interests. Its subsidiary public interest use standard would require courts to consider whether a work was used in the public interest or for the user's own private interest. If they find the former to be the case, then they can simultaneously identify the extent to which the use serves group- or society-based public interests. Moreover, the principle's

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<sup>293</sup> In *Deckmyn*, the Court offered a broad definition of parody as follows:

[T]he concept of parody in the Directive ought not to be confined to the case of a parody having no meaning beyond the original, work parodied. It could perhaps be argued that, from the point of view of literary theory, the most deeply-rooted type of parody is that which, whatever the intention, is essentially designed to refer to the original work. Irrespective of that, it cannot be denied that criticism of customs, social criticism and political criticism have also, from time immemorial and clearly for the purpose of conveying a message effectively, made use of the privileged medium entailing the alteration of a pre-existing work, which is sufficiently recognisable to the public at which that criticism is directed.

*Deckmyn*, C-201/13, ¶ 64; see also Graeme W. Austin, *EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire*, 39 UNSW L.J. 684, 688 (2016) (noting that the Court “interpreted the concept ‘parody’ quite broadly”).

<sup>294</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1977) (arguing that in a hard case, “the judge has, accordingly to that theory, a discretion to decide the case either way”).

<sup>295</sup> See, e.g., Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 442 (2008); Jane C. Ginsburg, *Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms – Part II (Fair Use)* 4–19 (Columbia Law and Economics, Working Paper No. 503, Jan. 2015), <http://ssrn.com/abstract=2539178> [<https://perma.cc/U9EL-V7E7>].

<sup>296</sup> Regarding the circularity problem in defining the scope of market, see, e.g., Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1387 (6th Cir. 1996); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 (2d Cir. 1994).

significant market harm principle would dictate that courts protect a public interest use only if such protection would not cause significant harm to the market value of the work.

## 2. *Paving the Way for Adoption of the Public Interest Principle*

There are very good prospects that the public interest principle can be adopted in both fair use and fair dealing jurisdictions because courts there are increasingly embracing the practice of deciding cases in light of the public interest. By spelling out the concept of transformative use, the U.S. Supreme Court's *Campbell* ruling paved the way for applying the fair use factors with public interest considerations. Since *Campbell*, the U.S. courts have decided a large number of fair use cases in the public interest.<sup>297</sup> Their rulings in the Google Library and HathiTrust Digital Library cases not only epitomize this steadily growing judicial practice but have also developed new dimensions of fair use adjudication that are compatible with the legal standards embodied in the public interest principle I propose herein.

Meanwhile, courts in jurisdictions following the fair dealing doctrine are also increasingly applying that doctrine in the public interest. The 1988 U.K. Copyright, Designs and Patents Act contains a general provision mandating the application of the fair dealing doctrine with public interest considerations. It states that “[n]othing in this Part affects any rule of law preventing or *restricting* the enforcement of copyright, on grounds of public interest or otherwise.”<sup>298</sup> With regard to the “reporting current events” defense, the U.K. courts have decided that it should be interpreted liberally<sup>299</sup> “to reflect the public interest in freedom of expression and, in particular, the freedom of the press.”<sup>300</sup> Similarly, there have been very positive developments in court decisions on fair dealing cases in China in light of the public interest. Despite the rulings against Google Library, as shown in Section C of Part IV of this article, the Beijing First Intermediate Court boldly examined the nature and scope of Chinese fair dealing provisions in light of the public interest in those rulings.<sup>301</sup> Most importantly, the Supreme Court of Canada, as noted in Section B of Part IV, has adopted a more liberal approach to defining fair dealing as a user right.<sup>302</sup>

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<sup>297</sup> See *supra* text accompanying notes 101–14.

<sup>298</sup> Copyright, Designs and Patents Act 1988, § 171(3) (U.K.) (emphasis added).

<sup>299</sup> *Pro Sieben A.G. v. Carlton Television Ltd* [1999] 1 WLR 605 at 614G.

<sup>300</sup> *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142, ¶ 66 (July 18, 2001). The Court also pointed out that this defense “is clearly intended to protect the role of the media in informing the public about matters of current concern to the public.” *Id.* ¶ 64.

<sup>301</sup> See *supra* text accompanying notes 243–48.

<sup>302</sup> See, e.g., Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, in *THE COPYRIGHT PENTAGON: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 157, 169 (Michael Geist ed., 2013).

### 3. *Making the Principle Compatible with Fair Dealing*

Third, the public interest principle is not necessarily incompatible with the exhaustive enumeration of fair dealing exemptions. Rather, it can play a positive role in helping courts to interpret specific fair dealing exemptions and the criteria for evaluating fairness. Take the fair dealing doctrine in UK as an example. Fair dealing exemptions therein such as “research” and “study,”<sup>303</sup> “criticism or review,”<sup>304</sup> “reporting current events,”<sup>305</sup> and “caricature, parody, or pastiche”<sup>306</sup> are crudely enumerated without having their contours properly defined, which calls into question exactly how the UK courts should interpret the nature and scope of those exemptions.

In this context, the public interest principle can help courts to shed light on each enumerated exemption. Take the research exemption for instance. Without taking the public interest into account, the UK courts have ruled that this exemption permits only non-commercial research.<sup>307</sup> By contrast, the Supreme Court of Canada has decided to interpret it in light of the public interest. By defining the scope of research in “a large and liberal”<sup>308</sup> manner, the Canadian Court held that the research exemption allows commercial research performed in the public interest.<sup>309</sup> Similarly, as discussed in the earlier part of this section, the public interest principle can guide courts’ evaluations of fair dealing.<sup>310</sup>

### 4. *Setting Common Goals and Agendas for Further Reforms*

Last but not least, the public interest principle sets common goals and agendas for initiating more constructive reforms of both doctrines in the public interest.<sup>311</sup> Compatible with the relevant international copyright treaties,<sup>312</sup> the principle affords courts sufficient latitude to capitalize on public interest considerations in fair use or fair dealing cases.

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<sup>303</sup> Copyright, Designs and Patents Act 1988, ch. 48; § 29 (U.K.).

<sup>304</sup> *Id.* § 30.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* § 30A.

<sup>307</sup> *See, e.g.,* *Controller of HM Stationery Office & Anor v Green Amps Ltd* [2007] EWHC 2755 ¶ 21 (Ch).

<sup>308</sup> *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 399 ¶ 51 (Can.).

<sup>309</sup> *Id.* (holding that “[l]awyers carrying on the business of law for profit are conducting research”).

<sup>310</sup> *See supra* text accompanying notes 288–96.

<sup>311</sup> Professor Rochelle Dreyfuss has argued for the need to set common goals and agendas for reforming both fair use and fair dealing doctrines around the world. *See* Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 34 (2004) (“[I]t is worth comparing the traditional intellectual property regimes of developed countries to find commonalities (such as fair use and fair dealing) that are not currently phrased as affirmative rights, and that may not reflect identical guarantees, but that nonetheless assure that users have access to innovations.”).

<sup>312</sup> Samuelson, *supra* note 286, at 53 (“Although some scholars have questioned whether open-ended [limitations and exceptions], such as fair use, are consistent with international treaty obligations, many

Akin to the fair use doctrine, the burden of proving fair dealing is placed on the defendant in judicial proceedings.<sup>313</sup> Therefore, it would be desirable to apply the public interest principle to usher in a legislative or judicial reform that would reallocate the burden of proof between the plaintiff and defendant in the manner I suggest in Part IV.

It would also be desirable to reconsider whether fair dealing should maintain its exhaustive enumeration of exemptions, although such reconsideration may not be needed to inquire into whether the open-ended merits of fair use should be transplanted into fair dealing. What really matters in effectuating the public interest principle is to determine whether the legislature should give the judiciary more power to apply the principle to adjudicate fair dealing cases competently.<sup>314</sup> One possible pathway to such reform would be the inclusion of a provision providing that fair dealing permits public interest uses in the statutory enumeration of fair dealing exemptions.<sup>315</sup> The Chinese government is already considering this type of reform to fair dealing in China. The latest draft amendment proposes that the exhaustive list of fair dealing exemptions under Article 22 of the Chinese Copyright Law should be broadened by incorporating a provision expressly allowing the Chinese courts to recognize new fair dealing exemptions not listed under that article.<sup>316</sup>

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European as well as U.S. scholars make compelling arguments that fair use and other flexible [limitations and exceptions] are compatible with treaty obligations.”)

<sup>313</sup> See LIONEL BENTLY ET AL., *INTELLECTUAL PROPERTY LAW* 226 (2018) (pointing out that the fair dealing defense “only comes into play once a claimant has established that copyright has been infringed. Where this occurs, the onus of proof [then] falls on the defendant to prove that one of the exceptions applies”).

<sup>314</sup> Robert Burrell, *The Changing Judicial Politics of Copyright Exceptions in the UK*, in *THE CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS IN COMPARATIVE PERSPECTIVE* (Shyamkrishna Balganes, Wee Loon Ng-Loy & Haochen Sun eds., forthcoming 2019) (“Judges in copyright cases may not be merely weighing the interests of copyright owners and users. They may also be involved in the ultimately more important tasks of holding the executive to account, setting the limits of executive rulemaking and establishing the relationship between national law and supranational legal obligations.”). For arguments about conferring more power on the judiciary in fair dealing jurisdictions, see Martin Senftleben, *The Perfect Match – Civil Law Judges and Open-Ended Fair Use Provisions*, 33 *AM. U. INT’L L. REV.* 231, 233 (2017) (arguing that “civil law judges are capable of applying open-ended fair use norms adequately and consistently”).

<sup>315</sup> See, e.g., Michael Handler & Emily Hudson, *Fair Use as an Advance on Fair Dealing? Depolarising the Debate*, in *THE CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS IN COMPARATIVE PERSPECTIVE* (Shyamkrishna Balganes, Wee Loon Ng-Loy & Haochen Sun eds., forthcoming 2019) (proposing to expand fair dealing with “the addition of new fair dealing purposes or the development of other closed provisions that utilize a less prescriptive drafting style”).

<sup>316</sup> Edward Chatterton & Horace Lam, *Amendments to the PRC Copyright Law. . . . The Practical Implications for Rights Owners* (Aug. 1, 2014), available at <https://www.lexology.com/library/detail.aspx?g=6d3a69f3-e558-4fba-ae7b-88140cd3b322> [<https://perma.cc/VU3D-XJNT>].

## VI. CONCLUSION

Google has scanned over twenty million books for its Library Project, accounting for approximately one-seventh of all books published since the invention of the printing press.<sup>317</sup> Despite being hailed as “the most significant humanities project of our time,”<sup>318</sup> Google Library is still illegal in a number of countries,<sup>319</sup> China among them. Relying on the fair dealing doctrine, the Chinese courts not only dealt a huge blow to Google Library, but also placed the public interest at serious risk.

Although the U.S. courts shielded Google Library through the application of the fair use doctrine, they did not remove all legal impediments to the potential creation of digital public libraries. They did, however, instill hope that such a library might be created in the digital age.<sup>320</sup> The U.S. courts not only saved Google Library by interpreting the fair use doctrine in light of the public interest, but also shed light on the importance of the public interest principle I propose in this article.

The public interest principle, as I have shown herein, is intended to reshape both the fair use and fair dealing doctrines to ensure that they can better serve the larger social needs of the globalized digital world. The consistent application of the principle by courts around the world would develop collective wisdom about maximizing usage of the merits of both doctrines while minimizing the effect of their demerits.

By embracing the proposed public interest principle, both the judiciary and the legislature would ensure that copyright law gains a more pertinent role in shaping the new age of big data and artificial intelligence in which the use of knowledge and information is more important than ever before.<sup>321</sup>

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<sup>317</sup> Jon Orwant, *Ngram Viewer 2.0*, GOOGLE AI BLOG (Oct. 18, 2012), <https://research.googleblog.com/2012/10/ngram-viewer-20.html> [https://perma.cc/LVR4-E8CM].

<sup>318</sup> James Somers, *Torching the Modern-Day Library of Alexandria*, ATLANTIC (Apr. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320> [https://perma.cc/7PPX-YNX6]; Tim Wu, *What Ever Happened to Google Books?*, NEW YORKER (Sep. 11, 2015), <https://www.newyorker.com/business/currency/what-ever-happened-to-google-books?mbid=rss> [https://perma.cc/B8HZ-3S6P] (“It was the most ambitious library project of our time—a plan to scan all of the world’s books and make them available to the public online.”).

<sup>319</sup> Gaelle Faure, *French Court Shuts Down Google Books Project*, L.A. TIMES (Dec. 19, 2009), [articles.latimes.com/2009/dec/19/world/la-fg-france-google19-2009dec19](https://www.latimes.com/2009/dec/19/world/la-fg-france-google19-2009dec19) [https://perma.cc/E5B5-FQNN].

<sup>320</sup> See Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WISC. L. REV. 479, 562 (2011) (emphasizing that “the accumulated knowledge of humankind contained in millions of books from major research library collections can be made widely available to future generations through digitally networked environments”).

<sup>321</sup> See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 114 (2001) (predicating the necessity to reform the fair use doctrine so that it “will be a superior mechanism for safeguarding the public interest in a way that facilitates dispersion of the new benefits that the Internet offers to society as a whole”); Benjamin L. W. Sobel, *Artificial*

Hence, the public interest principle, if properly applied, could serve as a powerhouse dedicated to revolutionizing copyright law as a legal engine of public interest protection.

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*Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 97 (2017) (concluding that although “[t]he fair use dilemma is a genuine dilemma [in the age of artificial intelligence], . . . it offers an opportunity to promote social equity by reasserting the purpose of copyright law”).

