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**ESSAY — FAIR USE FACTOR FOUR REVISITED:  
VALUING THE “VALUE OF THE COPYRIGHTED WORK”**

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**ABSTRACT**

*Recent caselaw has restored the prominence of the fourth statutory factor — “the effect of the use upon the market for or value of the copyrighted work”— in the fair use analysis. The revitalization of the inquiry should also occasion renewed reflection on its meaning. As digital media bring to the fore new or previously under-examined kinds of harm, courts not only need to continue refining their appreciation of a work’s markets. They must also expand their analyses beyond the traditional inquiry into whether the challenged use substitutes for an actual or potential market for the work. Courts should acknowledge that the statute’s designation of “the value of the copyrighted work” identifies independent kinds of harm and entails considerations distinct from market substitution. Those harms include the undermining of business models in which the “value of” the copied work may be its utility as a “draw” for goods or services other than the copied work. Similarly, in some public licensing models, the “value of” a work may inhere in its role in an ecosystem of innovations: payment-free “ShareAlike” licenses may lack monetary worth, but their terms ensure that follow-on creators make available to subsequent authors the new matter contributed to the content whose copying each successive license permitted. Relevant considerations also concern creators’ economic and moral interests in being recognized as the authors of the copied works. This Essay explores the basis for and consequences of according autonomous value to the inquiry into the impact of the use upon the “value of the copyrighted work.”*

**INTRODUCTION**

In the decades after the U.S. Supreme Court’s adoption of “transformative use” as a criterion for evaluating the first statutory fair use factor (“nature and purpose of the use”),<sup>1</sup> a spate of lower court decisions

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<sup>1</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

enlarged the ambit of “transformative use” analysis to engulf all of fair use. A finding of “transformativeness” often foreordained the ultimate outcome, as the remaining factors withered into restatements of the first.<sup>2</sup> Lately, however, appellate courts and some district courts have expressed greater skepticism concerning what uses actually “transform” content copied into new works or repurposed into copyright-voracious systems.<sup>3</sup> As a result, courts are bestowing greater attention on the other statutory factors, particularly the factor four inquiry into “the impact of the use on the potential markets for or value of the copied work.”<sup>4</sup> The restored prominence of the fourth factor should also occasion renewed reflection on its meaning. As digital media bring to the fore new or previously under-examined kinds of harm, courts not only need to continue refining their appreciation of a work’s markets. They must also expand their analyses beyond the traditional inquiry into whether the challenged use substitutes for an actual or potential market for the work. Courts should acknowledge that the statute’s designation of “the value of the copyrighted work” identifies independent kinds of harm and entails considerations distinct from market substitution. Those harms include the undermining of business models in which the “value of” the copied work may be its utility as a “draw” for goods or services other than the copied work. Similarly, in some public licensing models, the “value of” a work may inhere in its role in an ecosystem of innovations. That is, payment-free “ShareAlike” licenses may lack monetary worth, but their terms ensure that follow-on creators make the new matter that they contribute to licensed content available to subsequent authors. Each successive license permits the copying of this content. Relevant considerations also concern creators’ economic and moral interests in being recognized as the authors of the copied works. This Essay explores the basis for and consequences of according autonomous value to the inquiry into the impact of the use upon the “value of the copyrighted work.”

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<sup>2</sup> See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008). For a more recent empirical study, see Jairui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

<sup>3</sup> See, e.g., *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018); *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723 (9th Cir. 2019). For an analysis of this caselaw, see, e.g., Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, [2020] SING. J. LEGAL STUD. 265; David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267 (2018); Marshall Leaffer, *Le fair use comme << utilisation transformatrice >>: son évolution et son avenir aux Etats-Unis*, 73 PROP. INTELL. 17 (2019).

<sup>4</sup> 17 U.S.C. § 107(4) (2018).

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I. THE DIFFERENCE BETWEEN “POTENTIAL MARKET” AND “VALUE OF”

The fourth fair use factor instructs courts to “consider” “the effect of the use upon the potential market for *or* value of the copyrighted work.”<sup>5</sup> The text invites distinct evaluation of the two effects.<sup>6</sup> As Michael Madison has queried, “What should we make of the disjunctive ‘potential market for *or* value’ of the work? ‘Market’ and ‘value’ might be the same thing, but the linguistic distinction appears purposive.”<sup>7</sup> Yet very little caselaw or secondary authority specifically confront the contention that the “value of the copyrighted work” should mean something not synonymous with markets for the copyrighted work.<sup>8</sup> Perhaps this doctrinal gap results from a paucity of cases in which courts perceived (or plaintiffs alleged) that a harm to a work’s “value” entailed assessment either of non-market concerns or of impact on the economic prospects of plaintiff’s works in general (as opposed to the particular copied work). But such cases exist and are likely to proliferate in the digital environment.

*Philpot v. WOS, Inc.*,<sup>9</sup> offers an object lesson. There, a district court in the Fifth Circuit weighed the fourth factor against a photographer who made his images of musical concert performers available for free, subject to Creative Commons attribution licenses. Plaintiff earned almost no money from his photographs, but often was paid in kind, with concert tickets, drinks and food. Defendant’s online celebrity news site incorporated two of plaintiff’s photos, which it had downloaded from third party sites, unchanged and without attribution. Defendant sought summary judgment, urging fair use. The court stated that the issue of transformativeness could not be determined on summary judgment, but concluded on the record before it that the fourth factor favored Defendant because Plaintiff made his photographs available for free, losing money annually. Plaintiff contested the characterization of the market for his work, to no avail:

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<sup>5</sup> *Id.* § 107(4) (emphasis added).

<sup>6</sup> As discussed in Part II, the argument for recognizing independent meaning in “value of” is not purely textualist; it also advances the overall goals of the fair use exception.

<sup>7</sup> See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1562 (2004); see also Andrew Gilden, *Copyright’s Market Gibberish*, 94 WASH. L. REV. 1019, 1073 (2019) (“Even though the fourth fair use factor is often shorthanded as the ‘market harm’ factor, ‘market’ and ‘value’ are stated in the disjunctive, meaning that a use can be assessed in terms of its impact within the marketplace or upon some other set of ‘values.’”).

<sup>8</sup> Madison, *supra* note 7, notes the “purposive” “linguistic disjunction” between “market” and “value,” but does not explore what independent meaning “value of the copyrighted work” might have.

<sup>9</sup> No. 18-CV-339-RP, 2019 WL 1767208 (W.D. Tex. Apr. 22, 2019).

Philpot responds that his photographs are not offered for free; they are offered for the price of attribution, which has economic value as advertising for his work. . . . [T]his factor looks at the market for the original work and derivatives from that work, not at the market for the plaintiff's work in general. Although the Court accepts that attribution might lead someone to purchase one of Philpot's works, he fails to explain how any amount of advertisement might lead to being paid for two works that he makes available for free.<sup>10</sup>

The court's perception of the plaintiff as a copyright troll<sup>11</sup> may have obscured an important issue regarding the kind of harm cognizable under the fourth factor. Suppose an author, subject to attribution, makes some of her work available for free as a "draw" for other works, or indeed for services not necessarily involving the creation of works of authorship. Copying the "free" work may not diminish its market because the author has effectively relinquished any claim to compensation for *that* work. But in asserting that the fourth "factor looks at the market for the original work and derivatives from *that work*, not at the market for the plaintiff's work in general" (emphasis supplied), the court may be undermining "loss leader" business models of this kind.

The *Philpot* court was correct insofar as the statutory language, "effect on the potential market for the copyrighted work," directs inquiry into the markets for *that* work. The statute, however, does not require a court to circumscribe its conception of cognizable "effect" to harm to the market for the copied work. Factor four also requires courts to assess "the effect of the use upon the . . . value of the copyrighted work."<sup>12</sup> "Value of" ranges more broadly than "market for" (indeed, reading the two synonymously would violate the principle that words in a statute are to be given independent meaning<sup>13</sup>). The effect of the copying on the copied work's "value" is not limited to direct harm to current or future sales or licensing of that work. Notably, as Philpot complained, unattributed copying of a work deprives it of its value as a "draw" for *other* works (or services).

A work's "value" may also be reputational,<sup>14</sup> but the author will not reap economic or moral benefits unless the public identifies the work with

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<sup>10</sup> *Id.* at \*7.

<sup>11</sup> *Id.* ("[T]he principal way that Philpot appears to make money from his photography is settlement agreements in copyright lawsuits.").

<sup>12</sup> 17 U.S.C. § 107(4) (2018) (emphasis added).

<sup>13</sup> *See, e.g.,* *Quality King Distribs. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 145-48 (1998) (Supreme Court considering whether one potential interpretation of the Copyright Act of 1976 would render one of its provisions superfluous). *See also* sources cited *supra* note 7.

<sup>14</sup> *See, e.g.,* *Penguin Grp. (USA), Inc. v. Am.Buddha*, No. CV-13-02075-TUC-JGZ, 2015 WL 11170727, at \*6 (D. Ariz. May 8, 2015) (holding that, regarding the fourth factor, "the compensation that [plaintiff] Penguin derives from its publica-

its author. Authorship attribution has not typically featured in the fair use inquiry,<sup>15</sup> perhaps because in most cases, the copied work's author either is generally known (as is usually the case in parodies), or has been credited (as in scholarly commentary and other educational uses). But increasingly, digital uses, such as that at issue in *Philpot*, sever the work from its author's name. When the currency in which the author trades is reputational rather than directly monetary, unattributed copying, even — or especially — from copies made available for free, will have a deleterious impact upon the value of the copyrighted work as a vehicle for author recognition.<sup>16</sup>

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tion of the Works includes the *preservation of its reputation for excellence* and the *strength of its relationships with distributors and customers*. American Buddha's use of the Works jeopardizes Penguin's business because it robs Penguin of the *ability to control the quality distribution of its works* and harms Penguin's reputation as a publisher." (emphasis added). One must nonetheless take care not to push the reputational aspect of a work's "value" too far, lest it justify a rejection of a fair use defense to parodies and other critical commentary. See discussion *infra* text at notes 45-55.

<sup>15</sup> Proposals to codify aspects of fair use in U.S. copyright reform bills prior to the 1976 Copyright Act generally required acknowledgement of the source of the copied content. See ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS (1958), reprinted as Study No. 14, in Copyright Revision Studies Nos. 14-16, prepared for the S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION 18-24 (Comm. Print 1960). Latman's Study observes, at 18, that "it is clear that acknowledgment, in itself, is not sufficient to insure fair use and preclude infringement." He does not state that failure to credit the author should preclude a finding of fair use; see also Letter from Ralph S. Brown to the Subcommittee, *id.* at 41 ("It does not seem to be a helpful approach to make the fairness of use conditional on acknowledgment of the source. Though acknowledgment of credit may be an important element in determining whether a given use is fair, it should not immunize excessive takings. Conversely, the absence of acknowledgment should not stigmatize insubstantial ones."); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007) (recommending the addition of a fifth fair use factor focusing on attribution); Jane C. Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L. COM. L. 44, 72-73 (2016) (arguing that authorship attribution should be an element of the inquiry under the first fair use factor).

<sup>16</sup> See, e.g., *Williamson v. Pearson Educ.*, No. 00-CIV-8240(AGS), 2001 WL 1262964, at \*7 (S.D.N.Y. Oct 19, 2001) (assessing works' "peculiar value"); *Weissmann v. Freeman*, 868 F.2d 1313, 1326 (2d Cir. 1989) ("The rewards that Congress planned for copyright holders of scientific works to reap *arguably include promotion and advancement in academia* . . . . In scholarly circles[,] recognition of one's scientific achievements is a vital part of one's professional life.") (emphasis supplied); *Greaver v. Nat'l Ass'n of Corp. Dirs.*, No. C.A. 94-2127(WBB), 1997 WL 34605245 (D.D.C. Nov. 19, 1997) ("In the 'consulting world,' as in other fields such as academia where 'profit is ill-measured in dollars,' . . . *recognition as an authoritative voice is the measure of the value of one's work*" (quoting *Weissmann*, 868

As Christopher Buccafusco and David Fagundes have contended, coining the term “incentive-based harms,” “many authors are driven to create in order to receive public recognition for their efforts. They may value recognition entirely apart from any financial benefit that it conveys. Accordingly, if others repeatedly use their works without attributing them to their authors (a practice that copyright law generally allows), those authors may be less willing to create in the future.”<sup>17</sup> Non-attribution thus can “sensibly diminish”<sup>18</sup> the “value” of the work to its author; equally significantly, the ensuing devaluation of authorship may undermine copyright’s role in fostering creativity.

Treating the impact of the use upon the value of the work as an inquiry distinct from assessment of harm to the potential market for the copied work allows the fair use doctrine to take account of additional interests relevant to authorship incentives and consumer information. Were factor four confined to the economic prospects for the *copied* work, then copyright doctrine might discourage the development of means of making works available that are not based on selling copies of or access to the copied work. Loss leader business models, such as the one popularized by the rock band The Grateful Dead, allow copying or accessing a copyrighted work without direct charge. But they anticipate that the consumer attracted by the free content will purchase or subscribe to other works or goods or services, or simply will remain on the copyright owner’s site long enough to be exposed to advertisements.<sup>19</sup> Many digital service providers

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F.2d at 1324) (emphasis added). See also Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2579 (2009).

<sup>17</sup> Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 *MINN. L. REV.* 2433, 2485 (2016) (arguing for a broader conception of harm under the fourth fair use factor by recognizing non-financial incentives behind creation). See also Alina Ng, *The Concept of Our Legal Imagination: Legal Fictions and the Conceit of Deemed Authorship*, 17 *N.Y.U. J. Legis. & Pub. Pol’y* 707, 741, 744 (2014) (suggesting that the waning in creative attachment that creators might have to their works as a result of being denied authorship status could result in less creation); Thomas M. Byron, *Past Hits Remixed: Fair Use as Based on Misappropriation of Creative Value*, 82 *MISS. L.J.* 525, 588-89 (2013) (“So market harm occurs when the user puts the original work to a use that appropriates the creativity of the original work by using the work in a way that would have been beneficial to the original author. This is particularly true when the use, if permitted, would undermine future incentives to create such work.”).

<sup>18</sup> *Folsom v. Marsh*, 9 *F. Cas.* 342 (C.C.D. Mass. 1841) (No. 4901).

<sup>19</sup> DAVID M. SCOTT & BRIAN HALLIGAN, *MARKETING LESSONS FROM THE GRATEFUL DEAD: WHAT EVERY BUSINESS CAN LEARN FROM THE MOST ICONIC BAND IN HISTORY*, at xx-xxi (2010) (“[T]he Grateful Dead created a huge network of people who traded tapes in pre-Internet days. The broad exposure led to millions of new fans and sold tickets to the live shows. Today, as many companies experiment with offering valuable content on the Web, the Grateful Dead teaches us that when we free our content, more people hear about our company and even-

today, such as Hulu, Dropbox, and LinkedIn, employ versions of this “freemium” business model.<sup>20</sup> The “value of” the copyrighted work inheres in the viability of these business models, but inquiry only into harm to the potential market for the copied work overlooks the broader economic calculus.

Just as the “value of” analysis may best capture the harm to new business models, it may also aptly account for a related development: non-traditional, free and open-source software licenses, and Creative Commons and similar licensing models. Under these licenses, the author or copyright owner may authorize unpaid copying, but the terms of the license include other requirements, such as authorship attribution and, perhaps most pertinently, an obligation to “share alike.”<sup>21</sup> As described by Creative Commons, under an Attribution-ShareAlike license, “[if] you remix, transform, or build upon the material, you must distribute your

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tually do business with us.”). See also Jared Lindzon, *The Grateful Dead as Business Pioneers*, FORTUNE (Mar. 23, 2016), <https://fortune.com/2016/03/23/grateful-dead-business-lessons/> (“In many ways, scholars consider the Grateful Dead the band that turned the recording industry on its head. Instead of using its concerts as a vehicle to boost record sales, the group encouraged fans to bring recording instruments to their concerts and share those recordings for free as a way to build a loyal fan base and boost concert attendance.”).

*Fox Broadcasting Co., Inc. v. Dish Network, L.L.C.*, 723 F.3d 1067 (9th Cir. 2013) offers another example of the relationship of advertising to the value of the copyrighted work. In that case, Fox alleged that Dish’s Hopper device enabled copyright infringement because it skipped over the commercials when playing back user-recorded programs. The Ninth Circuit rejoined that commercial-skipping was irrelevant because Fox did not own the copyrights in the commercials; the ease of skipping the commercials therefore did not cause any cognizable harm. Had the court appreciated that the “value of the copyrighted work” (the television programming) was as a “draw” to hold an audience for the commercials that underpin the broadcasters’ business model, perhaps it would not have been so quick to find fair use. Thanks to Jeremy King, Columbia Law School class of 2021, for pointing out the pertinence of *Fox v. Dish* to “value of” analysis.

<sup>20</sup> See Vineet Kumar, *Making “Freemium” Work*, HARV. BUS. REV. (May 2014), <https://hbr.org/2014/05/making-freemium-work>.

<sup>21</sup> Creative Commons, Attribution-ShareAlike 4.0 International Public License § 3(b), <https://creativecommons.org/licenses/by-sa/4.0> (last visited Mar. 22, 2020) (free content license). See also Free Software Foundation, GNU General Public License, Version 3, § 5(c) <https://www.gnu.org/licenses/gpl-3.0.html> (last visited Mar. 22, 2020) (“You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it.”) (free software license).

contributions under the same license as the original.”<sup>22</sup> Thus, the licensee must make her new matter available for subsequent authors to “remix, transform or build upon.” Copying a prior work in order to create a derivative work, but then asserting exclusive rights in the additions and changes to the preexisting work, would violate the license and infringe the copyright in the underlying work.<sup>23</sup> ShareAlike licenses underpin free and open-source software; their innovation ecosystem relies on successive public availability of each incremental contribution to the underlying code.<sup>24</sup>

Copying that privatizes an adaptation of content licensed for free may not harm the “market” for the licensed work, but disrespecting the ShareAlike condition harms the “value of” the underlying work. The resultant harm is the underlying work’s impaired ability to encourage innovation in software (and other) creation by compelling the licensee to make each new contribution freely available so that others may build on it. In their inquiry into market harm, courts often consider the harm “if [the use] should become widespread.”<sup>25</sup> Applying this consideration to the “value of” the copied work, one could argue that widespread violation of ShareAlike licenses wrecks a similarly deleterious effect on the value of the underlying work, for if everyone could copy without giving back to the license-driven commons, the copied work could not serve its purpose of promoting further, unencumbered, innovation.

In addition, the “value of” the copied work may lie in its ability to signal the quality of the intellectual products identified with their authors. In other words, the “value of” also can encompass consumers’ interests.

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<sup>22</sup> Creative Commons, Attribution-ShareAlike 4.0 International (CC BY-SA 4.0), <https://creativecommons.org/licenses/by-sa/4.0> (last visited Mar. 22, 2020). See also Creative Commons, Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0), <https://creativecommons.org/licenses/by-nc-sa/4.0>.

<sup>23</sup> *Jacobsen v. Katzer*, 535 F.3d 1373, 1380-81 (Fed. Cir. 2008) (“Generally, a “copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement” and can sue only for breach of contract. . . . *If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement. . . .*”) (emphasis added).

<sup>24</sup> *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses> (last visited Mar. 23, 2020) (“We call this idea ‘ShareAlike’ and it is one of the mechanisms that (if chosen) helps the digital commons grow over time.”); *ShareAlike compatibility*, CREATIVE COMMONS WIKI, [https://wiki.creativecommons.org/wiki/ShareAlike\\_compatibility](https://wiki.creativecommons.org/wiki/ShareAlike_compatibility) (last visited Mar. 23, 2020) (“The ShareAlike licenses are designed to ensure that the freedoms associated with a licensed work survive as the work is adapted by others and that those freedoms attach to adaptations of the work as well.”).

<sup>25</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 179 (2d Cir. 2018).



Unattributed copying deletes the identifying information that may assist consumers to determine whether to purchase other works by the same author, or subscribe to her fan club or otherwise invest financially and emotionally in a given creator's output. (Or, for that matter, to spurn other works by a given author, because the consumer did not like the prior work.) Finally, a reading of factor four that bypasses the "value of" the copied work ignores moral and reputational interests which may not directly implicate the economic returns from the copied work, but which can underpin the author's incentives to create.

## II. DOCTRINAL BASIS FOR RECOGNIZING "VALUE OF" AS AN AUTONOMOUS CONSIDERATION

The textual argument that courts should interpret the fourth factor disjunctively to distinguish market harm from other detrimental, particularly reputational, impacts on the "value of the copyrighted work" innovates relative to the legislative history of § 107. The term "value of the copyrighted work" appears in the legislative history of the 1976 Copyright Act as early as January 16, 1963, in a preliminary draft that was circulated but not issued.<sup>26</sup> The 1963 draft articulated the fourth fair use factor as "the effect of the use upon the potential value of the copyrighted work."<sup>27</sup> In 1964, the 88th Congress revised this language as we know it today: "the effect of the use upon the potential *market for* or value of the copyrighted work."<sup>28</sup> The 1964 version of the fourth factor survived in all subsequent revisions of the fair use provision. In fact, the formulation of the fourth factor's text does not appear to have prompted dispute or debate. Congressional reports and transcripts of hearings from the 89th Congress onward refer occasionally to the fourth factor, but they address only

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<sup>26</sup> 1 KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 317 (Alan Latman & James F. Lightstone eds., 1981).

<sup>27</sup> *Id.* The precise formulation of the draft circulated in 1963 was as follows:

"§ 6: Limitations on Exclusive Rights: Fair Use: All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) *the effect of the use upon the potential value of the copyrighted work.*"

*Id.* (emphasis added).

<sup>28</sup> *Id.* at 323 (citing S. 3008 (18) (as introduced (also, H.R. 11947 (7/20/64) (20); H.R. 12354 (8/12/64) (24), identical bills)), 88th Cong., 1st Sess. (1964)).

economic loss and/or market harm.<sup>29</sup> Congress does not appear to have considered the relationship of harms such as loss of attribution<sup>30</sup> or artistic integrity to the fair use inquiry.

The “value of” language likely derives from *Folsom v. Marsh*,<sup>31</sup> where Justice Story in 1841 suggested, “if so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.”<sup>32</sup> Justice Story’s analysis focuses on the unfair competitive effects of the unlicensed copying; the concept of injurious appropriation of an author’s labors can encompass unattributed copying. Admittedly, the context in which Justice Story voiced these criteria did not concern misattribution or non-attribution,<sup>33</sup> but the broad concept of competitive injury that Story evoked could well encompass harms that do not translate directly to lost sales. As we have seen, moreover, attribution interests, as a kind of reputational interest, can be both personal and economic.<sup>34</sup>

In addition to its textual basis, recognizing the “value of” the copyrighted work comports with Congress’ general intent to articulate broad criteria capable of encompassing new conditions, as evident in the House Report:

[T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judi-

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<sup>29</sup> For example, in 1967 the House Judiciary Committee report interpreted the fourth factor as follows: “Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection.” H.R. REP. NO. 90-83, at 35 (1967). In response, the State University of New York submitted a Statement to the Senate Judiciary Committee criticizing the House Judiciary Committee’s interpretation of the fourth factor as a “restrictive and limiting interpretation of the [fair use] doctrine . . . to the use of copyrighted material by educators.” *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 1334 (1967) (statement prepared by State University of New York).

<sup>30</sup> While the legislative history discloses some attention to authorship attribution, see *supra* note 15, it does not appear that any connection was drawn between attribution and the “value” of the work.

<sup>31</sup> 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). See Latman, *supra* note 15, at 15-16.

<sup>32</sup> *Folsom*, 9 F. Cas. at 348.

<sup>33</sup> See Anthony R. Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES* 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

<sup>34</sup> *But see* Gilden, *supra* note 7, at 36-37 (criticizing the conversion of noneconomic concerns into market-based arguments in order to enhance the likelihood of a copyright remedy).

cial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . [C]ourts must be free to adapt the doctrine to particular situations on a case-by-case basis.<sup>35</sup>

While this passage of the House Report is most frequently cited to justify the expansion of existing exceptions or the introduction of new ones,<sup>36</sup> the fair use doctrine's capacity to evolve with changing conditions is not a one-way ratchet. Fair use dynamism applies equally well to the assessment of whether the development of new technologies or business models might render unfair a use previously considered "fair," particularly in relation to "potential markets for" the work.<sup>37</sup> But the "value of" criterion is also well-suited to respond to the impact of new modes of exploitation. The term "value of" is an expansive, and expandable, criterion; it can adapt to new kinds of creation of value. Thus, courts should not limit their inquiry to the effect of the use upon the value authors could derive at the time of the work's creation; given Congress' endeavor to guard against obsolescence, a work's "value," whether actual or potential, at the time of infringement supplies the relevant focal point.

The most pertinent caselaw authority recognizing the distinct economic considerations in "value of" may be *Video Pipeline, Inc. v. Buena*

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<sup>35</sup> H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5680.

<sup>36</sup> *See, e.g.*, *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980).

<sup>37</sup> The best-known example may be *American Geophysical Union v. Texaco*, 60 F.3d 913, 931 (2d Cir. 1994) in which the court ruled, *inter alia*, that the development of a market to license photocopied extracts from scientific journals made their unlicensed reproduction unfair. The court contrasted another court's decision twenty years earlier, *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1357-59 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), in which the absence of a licensing market influenced the court's determining that the NIH's copying of articles from medical journals was fair use. ("[I]t is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use. . . . Whatever the situation may have been previously, before the development of a market for institutional users to obtain licenses to photocopy articles, see *Williams & Wilkins*, 487 F.2d at 1357-59, it is now appropriate to consider the loss of licensing revenues in evaluating 'the effect of the use upon the potential market for or value of' journal articles.")

*Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), similarly suggests that fair use is not static. The court acknowledged that potential security failures could wreak great economic harm were unprotected digitized copies to supplant authorized exploitations, but found Google's security measures "impressive." *Id.* at 228. The court thus left open a contrary determination in the event of subsequent inadequacy of security measures.

*Vista Home Entertainment, Inc.*,<sup>38</sup> which ruled that a defendant who copied and compiled film trailers was not likely to succeed on the merits of its fair use defense when the copyright owner introduced evidence of its movie trailers' advertising value, including for other works:

Video Pipeline takes too narrow a view of the harm contemplated by this fourth factor. The statute directs us to consider "the effect of the use upon the . . . value of the copyrighted work," not only the effect upon the "market," however narrowly that term is defined. And the value "need not be limited to monetary rewards; compensation may take a variety of forms." . . . Disney introduced evidence that it has entered an agreement to cross-link its trailers with the Apple Computer home page and that it uses on its own websites "*the draw of the availability of authentic trailers to advertise, cross-market and cross-sell other products, and to obtain valuable marketing information from visitors who chose [sic] to register at the site or make a purchase there.*" . . . In light of Video Pipeline's commercial use of the clip previews and Disney's use of its trailers as described by the record evidence, we easily conclude that there is a sufficient market for, or *other value in*, movie previews such that the use of an infringing work could have a harmful effect cognizable under the fourth factor.<sup>39</sup>

Thus, unlike the district court in *Philpot*, the Third Circuit accepts that the relevant "value" need not lie solely in the sales of the copied work; when the copying undermines the ability of that work to serve as a "draw" for other works or economic benefits, it has deleteriously impacted the "value of the copyrighted work."

Moreover, as we have seen, the "value" of the work need not be monetary.<sup>40</sup> Indeed, the "linguistic disjunction"<sup>41</sup> between "potential market for" and "value of" the copyrighted work permits an inference that the relevant value may encompass not only reputational, but also other kinds of authorial concerns. For example, in *Chicago School Reform Board of Trustees v. Substance, Inc.*,<sup>42</sup> the Seventh Circuit held the disclosure of secure test questions was not a fair use. The district court had emphasized

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<sup>38</sup> 342 F.3d 191 (3d Cir. 2003), *abrogated on other grounds*, TD Bank N.A. v. Hill, 928 F.3d 259 (3d Cir. 2019).

<sup>39</sup> *Id.* at 202 (citing *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000)) (emphasis added). The court also referenced *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 447 n.28 (1984), which it characterized as "stating in a different context that the 'copyright law does not require a copyright owner to charge a fee for the use of his works, and . . . the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier.'"

<sup>40</sup> *See, e.g.*, *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 64 (1st Cir. 2012) ("[T]he fourth factor of the fair use inquiry cannot be reduced to strictly monetary terms").

<sup>41</sup> Madison, *supra* note 7.

<sup>42</sup> 79 F. Supp. 2d 919 (N.D. Ill. 2000), *aff'd*, 354 F.3d 624 (7th Cir. 2003)

the unauthorized publication's harm to the tests' educational value<sup>43</sup> and Judge Posner agreed: "[defendant] is destroying the *value of the tests and the fact that it's not a market value has no significance* once the right to copyright unpublished works is conceded, as it must be."<sup>44</sup>

Arguably, giving distinct consideration to the impact on the "value of" a copyrighted work, independently of harm to the work's actual or potential markets, risks inserting undesirable author preferences into the fair use balance. If "value of" means subjective value to oversensitive authors, would we not be confronting courts with unmeasurable, unadministrable criteria? For example, an author might object that a negative book review that quotes from her work harms the value of the work by diminishing sales and by tarnishing her reputation. But the Supreme Court, in addressing the fourth factor, declined to recognize an author-controllable market for parody or criticism.<sup>45</sup> Would recognition of a "value of" sub-factor nonetheless introduce considerations the Court has excluded? Would we therefore need to articulate limiting factors to the inquiry into "value"?

Two responses: first, "value" need not be purely subjective; the business model and reputation concerns that we have advanced lend themselves to objective assessment. We might therefore understand the term to imply external verifiability. This connotation does not banish infringement claims motivated at least in part by the author's sense of personal grievance (indeed, the author's conviction that she was wronged may propel many if not most infringement claims, including those for which there is no plausible fair use defense). But requiring objective appreciation of the "effect" of the use upon the "value" of the work cabins the kinds of challenges an author may bring. One might analogize to the moral right of integrity of the work. Some authors might believe that copyright law should empower them to prevent *any* alteration to their work; the international standard expressed in the Berne Convention, however, reaches only

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<sup>43</sup> *Id.* at 933-34 ("Defendants' publication of the tests significantly decreased that value, and the court need not determine at this time the monetary damage Defendants caused. The court finds no difference between a copyright holder losing future profits because of a copyright infringement and the Board losing its future educational value of its copyrighted work.").

<sup>44</sup> 354 F.3d at 627 (emphasis supplied).

<sup>45</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) ("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.")

changes that are “prejudicial to [the author’s] honor or reputation.”<sup>46</sup> The Berne standard of assessment of prejudice is objective, akin to the evaluation of defamation. This is an important safeguard against overreaching by overly-proprietary creators, particularly in the context of licensed, or lawfully permitted, adaptations. It is not enough that the author does not like what was done to her work; the action taken must also reflect badly on her in the public eye.<sup>47</sup> Assessing harm to a work’s reputational value under the fourth fair use factor similarly incorporates an outward-facing inquiry.

By the same token, the effect of the use upon the value of the work to promote the author’s *oeuvre* or other endeavors cannot be infinitely attenuated. Just as courts have clarified that the inquiry into market substitution would not be satisfied by a showing only of purely hypothetical licensing markets,<sup>48</sup> so must there be some ascertainable connection between the unattributed copying and deprivation of revenue opportunities. For example, if the copying, albeit more than *de minimis*, appropriates unrecognizable portions of the work, it becomes difficult to contend that these would have served to advertise the author’s offerings.

Second, beyond the constraints just analyzed, it is not necessary to articulate specific limiting factors on the “value of” subfactor; these already are present in the other fair use factors. Fair use requires balancing all the factors;<sup>49</sup> as a result, even if the “value of” subfactor leaned toward the author or copyright holder, other considerations, such as the nature of the use, its amount and substantiality, and the assessment of market harm, can outweigh the author’s objections to the use, whether these are non economic, or based in other commercial goals. For example, even if negative criticism inflicted cognizable harm on the reputational value of the work, the role of the first fair use factor in ensuring robust discussion *about* works of authorship,<sup>50</sup> as well as the Supreme Court’s normative

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<sup>46</sup> See Berne Convention for the Protection of Literary and Artistic Works art. 61115(1), Sept. 9, 1886, as revised at Paris on July 24, 1971, 828 U.N.T.S. 221, 235 [hereinafter Berne Convention].

<sup>47</sup> See SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND*, para. 10.29 (2d ed. 2006).

<sup>48</sup> See, e.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1278 (11th Cir. 2014) (noting that “licensing poses a particular threat that the fair use analysis will become circular, and Plaintiffs may not head off a defense of fair use by complaining that every potential licensing opportunity represents a potential market for purposes of the fourth fair use factor”).

<sup>49</sup> See, e.g., *Cambridge Univ. Press*, 769 F.3d 1232 (2014) (remanding for failure to weigh all the fair use factors together); *Cambridge Univ. Press v. Albert*, 906 F.3d 1290 (11th Cir 2018) (same).

<sup>50</sup> See, e.g., *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008) (regarding the *Harry Potter Lexicon*, distinguishing between copy-

excision of markets for criticism,<sup>51</sup> would likely prevail over the author's complaint that the unfavorable review threatened the value of her work to promote sales of her other works.<sup>52</sup>

Finally, while according independent consideration to the "value of" the copyrighted work should advance authors' interests in receiving attribution for their works, and perhaps also in protecting their integrity, emphasizing that subfactor will not convert the fourth fair use factor into a subterranean moral rights law. The reason is simple: the author must have standing to sue for copyright infringement; and unless she is a copyright owner, she has no claim.<sup>53</sup> Thus, for example, an author who has granted adaptation rights cannot complain that the adaptation's supposed violation of the work's integrity harms the value of a work in which she no longer holds the relevant rights. Similarly, unattributed copying may, as we have seen, deprive the author of the publicity value of the copied work, but if she has transferred the reproduction rights, third party copying may infringe the grantee's copyright, but the author no longer holds enforceable rights of her own.<sup>54</sup> By contrast, in moral rights systems, an author maintains attribution and integrity rights "independently of the author's economic rights, and even after the transfer of the said rights."<sup>55</sup>

### III. BROADER IMPLICATIONS OF VALUING THE "VALUE OF" COMPONENT

Recognizing independent meaning in the "value of" component of the fourth fair use factor serves purposes more broad-ranging than bolstering nontraditional business models and public licensing models, or finding a home (or at least a lean-to) in the copyright act for attribution interests. Fair use, as a "traditional contour of copyright,"<sup>56</sup> enables copyright to internalize objectives, such as the promotion of free speech and provision

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ing for the purpose of writing *about* the source work, and copying that substitutes for it).

<sup>51</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>52</sup> Indeed, in this instance, it would seem the author's complaint focuses on the critic's *opinion*, rather than on any copying the critic may have engaged in to support his opinion.

<sup>53</sup> See 17 U.S.C. § 501(b) (2018) (legal or beneficial owner is entitled to institute an action for infringement).

<sup>54</sup> Unless she is a "beneficial copyright owner," § 501(b), that is, unless she is receiving royalties from the grantee. See *Fantasy v. Fogerty*, 654 F. Supp. 1129, 1131 (N.D. Cal. 1987) (defining "beneficial owner" as "an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.").

<sup>55</sup> Berne Convention art. 6*bis*(1).

<sup>56</sup> *Golan v. Holder*, 565 U.S. 302, 328-329 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

of “breathing room” for technological progress,<sup>57</sup> for which external checks on the scope of protection might otherwise be required. Sometimes these goals may appear in tension with a plaintiff author’s demands, but often they prove authorship-enhancing for other authors, whether opposing parties, or at large.<sup>58</sup>

In other words, fair use affords more than a defense to copyright infringement; it encapsulates the aspirations of the copyright system.<sup>59</sup> When one recalls the origins of the U.S. fair use doctrine in Justice Story’s opinion in *Folsom v. Marsh*, this observation becomes less paradoxical than might first appear. *Folsom v. Marsh* was not a case about limiting the scope of copyright protection; on the contrary, Justice Story articulated the criteria that became the basis for § 107 in order to *expand* the scope of copyright to reach certain kinds of derivative works.<sup>60</sup> Hence his focus on the competitive effects of the defendant’s appropriation on the “value” of

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<sup>57</sup> See, e.g., Samuelson, *supra*, note 16, at 2602 (noting that fair use played “a significant role in regulating the development of new technologies and services designed to facilitate personal uses of copyrighted works”); 4 WILLIAM PATRY, PATRY ON COPYRIGHT § 10:1.50 (2020) (noting that courts created the doctrine of fair use to ensure that the constitutional objectives of copyright “were not stifled by copyright owners bent on shutting down all unauthorized uses or extracting license fees for conduct that should be uncompensated.”). See also Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (explaining that to constitute fair use, “the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”).

<sup>58</sup> See, e.g., Jane C. Ginsburg, *Exceptional Authorship: the Role of Copyright Exceptions in Promoting Creativity*, in *EVOLUTION AND EQUILIBRIUM: COPYRIGHT THIS CENTURY* 15, 16-20 (Susy Frankel & Daniel Gervais eds. 2014) (discussing “authorship-oriented exceptions”); Leval, *supra*, note 57, at 1109 (“[n]otwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance the objective.”). See also Joseph P. Fishman, *The Copy Process*, 91 N.Y.U. L. REV. 855 (2016) (advocating taking into account as part of the fair use inquiry the means by which the defendant copied the work, contending that certain kinds of copying enable future authors to “learn by doing”).

<sup>59</sup> See Leval, *supra*, note 57 (“[f]air use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright’s objectives leads to a coherent and useful set of principles.”).

<sup>60</sup> See Reese, *supra* note 33; see also L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431 (1998) (“The first myth is that *Folsom* created fair use, when in fact it merely redefined infringement. The second myth is that *Folsom* diminished, and therefore fair use diminishes, the rights of the copyright owner. In fact, the case enlarged those rights beyond what arguably Congress could do in light of the limitations on its copyright power and, indeed, fair use today continues to be an engine for expanding the copyright monopoly.”).



the plaintiff's work. Story's factors bolstered the reach of an author's exclusive rights before later authorities transformed them into a roadmap for limiting the scope of those rights. But those factors, now codified in section 107, still have a rights-reinforcing role,<sup>61</sup> particularly with respect to the now-reinvigorated fourth factor. Recent appellate caselaw shows renewed sensitivity to market substitution, including for licensing and derivative works markets.<sup>62</sup> Section 107 thus reminds us that copyright law sets with the copyright owner the default for control over markets—including new technology-driven markets — for the work. The burden remains on the user to shift the default by advancing a persuasive expression-based or social benefit justification for a use whose economic consequences defendant must also show are non substitutional.

By the same token, understanding the “value” of the work to encompass the author's attribution interests as well as indirect economic impacts, makes the fourth factor a source of protection for those interests.<sup>63</sup> As we have seen with the evolution of *Folsom v. Marsh*, mirroring limitations and rights is not anomalous. Moreover, international copyright law (with which U.S. copyright law purports to be consistent<sup>64</sup>) provides a specific example of the symbiotic relationship between third-party expressive uses and recognition of source work authorship. The Berne Convention article 10 quotation right pairs the copyright exception with an affirmative duty to attribute source, including the name of the author if it appears on the quoted work.<sup>65</sup> A broad conceptualization of the “value” of the copyrighted work to include attribution as well as other non economic (or only

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<sup>61</sup> See Patterson, *supra* note 60, at 447 (criticizing the role of fair use in creating as well as limiting rights: “modern courts continue to use the concept of fair use taken from *Folsom* to expand the copyright monopoly”).

<sup>62</sup> See, e.g., *TCA Corp. v. McCollum*, 839 F.3d 168, 181 (2016); *Fox News v. TVEyes*, 883 F.3d 169 (2d Cir. 2018); *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723 (9th Cir. 2019); *Brammer v. Violent Hues Prods.*, 922 F.3d 255 (4th Cir. 2019). Even *Google Books*, albeit attaining a high-water mark for transformative use, took care to explain why Google's use did not conflict with the authors' exclusive right over derivative works. See *Author's Guild v. Google*, 804 F.3d 202, 225-27.

<sup>63</sup> So long as the author still is the relevant copyright owner, see discussion, *supra* text at note 54.

<sup>64</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>65</sup> Berne Convention art. 10(3). For a detailed exploration of the article 10 quotation right, see, e.g., Tanya Aplin & Lionel Bently, *Global, Mandatory, Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, University of Cambridge Legal Research Paper No. 33/2018 (Mar. 2019).

indirectly economic) interests reinforces authorship incentives, for the benefit of all.<sup>66</sup>

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<sup>66</sup> See Buccafusco & Fagundes, *supra*, note 17. According independent meaning to “value of” can also further the interests of consumers of works of authorship, see discussion *supra*.