Fair Use: An Overview

By Genan Zilkha

Introduction

There are some legal concepts that even non-lawyers have strong opinions about – like Rent Stabilization, the Rockefeller Drug Laws, and the "Stand Your Ground" law that was the subject of the Trayvon Martin case. As a civil attorney, non-attorneys will ask me questions about these topics, especially those pertaining to criminal law. My answer – that I haven't studied criminal law since the bar, and that my knowledge of criminal law is basically limited to what I see on *Law and Order: SVU* – rarely, if ever, suffices.

The legal concept of fair use has that same broad appeal to the general public. Whether we know it or not, copyright law permeates many aspects of our lives. For most creative works, the authors are entitled to payment, which permits us to enjoy these works. We must purchase the right to download the MP3s we download and the eBooks we download or borrow. Even services that offer "free" streaming of music must compensate the owners of the music they are streaming.

This article will provide a basic overview of fair use and discuss fair use as it pertains to the *Authors Guild Inc. v. Google, Inc.* lawsuit.

"The U.S. Copyright Act grants certain exclusive rights to the owner of a copyright in a work."[1] These rights are exclusive and are thus limited to the holder of the copyright. These rights include the right to: (1) reproduce the copyrighted work; (2) prepare derivative work; (3) sell, lend or lease copies of the copyrighted work; (4) perform the work publicly; (5) display the work publicly; and (6) perform the work publicly "by means of digital transmission."[2] The copyright arises when the work is created, not when it is registered with the copyright office.[3] Copyright registration places the public on notice that the copyright holder did indeed create the copyrighted work.[4]

Although the rights of the copyright holder are exclusive, they are not absolute. Sections 107 through 122 of Title 17 of the United States Code govern the limits on these exclusive rights. These limits include but are not limited to: fair use,[5] reproduction by libraries and archives, noncommercial broadcasts, certain transmissions, and the so-called first sale doctrine. The first sale doctrine permits "the owner of a particular copy or phonorecord lawfully made under this title"[6] to sell the copy without the permission of the copyright holder.[7]

Fair use is an affirmative defense to an allegation of infringement.[8] It is "a privilege in other than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[9] If a use is deemed "fair" then the use of this "copyrighted work does not infringe the copyright in that work."[10] If a copyright holder brings a suit against a purported infringer and is able to make a prima facie showing of copyright infringement, then, if the fair use defense is raised the court must evaluate the four fair use factors as they apply to the action and evaluate whether, in fact, fair use applies. "Fair use is a doctrine the application of which always depends on consideration of the precise facts at hand."[11] There is no bright line rule as to whether a use can be qualified as fair use.[12]

The four factors that the courts must evaluate are as follows:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[13]

These factors are non-exclusive. These factors are preceded by a preamble which states that

> the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any

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> other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[14]

Notwithstanding this statement, these enumerated uses are not necessarily "fair," as they too must also be evaluated using the four factors.[15]

There are many misconceptions about fair use. These include a belief that using a specific number of words of a copyrighted text (for example) is not infringement but rather fair use, or that if one is using a copyrighted text but as a non-profit, or without the intent of profiting, this is fair use.[16] These beliefs are erroneous, and can instead expose a user to liability.[17] The only way to evaluate whether or not something is fair use is to evaluate it using the four factors.

The Purpose and Character of the Use

The first factor of the fair use analysis can itself be divided into two smaller factors. These factors make up the "heart of the fair use inquiry";[18] these are also the most difficult to analyze. The first "subfactor" focuses on the purpose of the use, that is, whether the use is for commercial or a non-profit educational purpose. The courts will provide more leniency in evaluating fair use if the use is in fact for a non-profit educational purpose. Notwithstanding, whether the organization using the intellectual property is a non-profit or for-profit corporation is not determinative in establishing this.

Courts have stated that "the proper focus of the commercial/non-commercial inquiry is 'on the use of the copyrighted material,' not on the profit or not-for-profit status of the user."[19] Courts have also stated that "non-profit organizations enjoy no special immunity from determinations of copyright violation."[20] The "crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of copyrighted material without paying the customary price."[21] Therefore, even if a non-profit is using another's work, this use will not be fair use if it can be considered commercial.

The second "subfactor" focuses on the character of the use, "whether the allegedly infringing work 'merely supersedes' the original work 'or instead adds something new, with a further purpose or different character, altering the first with new . . . meaning [] or message.'"[22] In other words, the court must evaluate whether the new, purportedly infringing work is "transformative."[23] "Although 'transformativeness' is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis."[24] Although the "tranformativeness" of a use cannot be easily defined, a use can be said to be "transformative if it 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'"[25] If a work is deemed substantially transformative, even if it is a strictly commercial work, then the use may be considered fair.[26]

Campbell v. Acuff-Rose Music[27] is a notable case which demonstrates how a strictly commercial use can be considered fair use if the use is transformative. In *Campbell*, 2 Live Crew was sued for copyright infringement by Acuff-Rose Music, Inc., which held the copyright for Roy Orbison's song "Oh, Pretty Woman." 2 Live Crew had quoted a portion of the song in "Pretty Woman," a parody of the Roy Orbison song. Despite the fact that 2 Live Crew's use was commercial, the Supreme Court held that this use was fair because it was a parody and thus transformative.[28] In *Cariou v. Prince*,[29] a recent Second Circuit case, the court held that 25 of 30 images, in which the alleged infringer modified photographs created by a photographer, were transformative. In finding the uses transformative the court said that these images "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."[30] At the same time, not all modifications are transformative.[31] In *Cariou*, the court held that only the modifications in 25 of the photographs were transformative – the remaining were not definitively considered to be transformative. Although these "instances moved the work in a different direction from Cariou's classical portraiture and landscape photos, we cannot say with certainty at this point whether those artworks present a 'new expression, meaning, or message.'"[32]

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In contrast to these cases, in *Salinger v. Colting*,[33] the Second Circuit held that a "sequel" to J.D. Salinger's *The Catcher in the Rye* was not transformative in part because the purpose of writing this sequel was "not to comment on Salinger but to write a *Catcher* sequel."[34] In *Castle Rock Entertainment v. Carol Publishing Group*,[35] the Second Circuit found that *The Seinfeld Aptitude Test* – a book containing *Seinfeld* trivia – was not transformative, in no small part because its "purpose, as evidenced definitively by the statements of the book's creators and by the book itself, is to repackage *Seinfeld* to entertain *Seinfeld* viewers."[36] As the purported infringers had done nothing more than "transform[ed] Seinfeld's expression into trivia quiz book form with little, if any, transformative purpose, the first fair use factor weighs against defendants."[37] Instead of creating something that was transformative, the alleged infringers simply created something that would "satiate *Seinfeld* fans' passion for

the 'nothingness' that *Seinfeld* has elevated into the realm of protectable creative expression."[38]

Due to the importance of the "transformative" factor, the "transformativeness" of the allegedly infringing work is generally the point on which the decisions of the courts focus.

The Nature of the Copyrighted Work

The second factor of the fair use test looks at the "nature of the copyrighted work." In evaluating the nature of the copyrighted work, the courts examine

> (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to claim for fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope of fair use involving unpublished works being considerably narrower.[39]

This factor "is rarely found to be determinative."[40]

In copyrighted works that are "non-factual or creative" it is less likely that the courts will find fair use, while works that are more "informational in nature are more susceptible to fair use."[41] For example, in *New Era Publications International v. Carol Publishing Group*,[42] the Second Circuit determined that quotations from published works, which were used in a biography of the author, could be labeled as "factual."[43] In contrast, in *Sandoval v. New Line Cinema Corp.*,[44] the court found that this factor weighed in favor of the copyright holder, whose unpublished photographs were briefly displayed in a film.[45]

Courts are less likely to find in favor of an infringer when the work at issue is unpublished.[46] For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[47] *The Nation* published excerpts of *A Time to Heal: The Autobiography of Gerald R. Ford*, which had not yet been published. The Court gave great weight to the fact that the excerpts were unpublished and found that the use was not fair. In contrast, in *Rotbart v. J.R. O'Dwyer Co.*,[48] where a publisher quoted and paraphrased a lecture, the use was found to be fair in part because the lecturer, having given a lecture to the public, had de facto published his lecture.[49]

The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The third factor of the fair use test examines the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." This requires a quantitative and qualitative evaluation of the use.[50] The quantitative and qualitative evaluations are intermingled and, as a result, there "are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use."[51]

The quantitative evaluation assesses the actual amount of the original work the infringing work uses in relation to the whole. For example, if an alleged infringer copies an entire work, this use is less likely to be considered fair use.[52] On the other hand, if an alleged infringer uses either a minimal part of the original work,[53] the work is obscured,[54] or the work is only briefly in the new work,[55] then this factor will weigh in favor of the alleged infringer.

The quantitative evaluation assesses the substance of the portions used by the alleged infringer as compared to the original. If an infringer uses a small portion of the work, but these portions make up the heart of the original work, the court is less likely to find fair use.[56] For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, although the excerpt included only 300 words taken from the original, the "portions actually quoted were selected by [the editor] as among the most powerful passages in those chapters."[57] As a comparison, in *Wright v. Warner Books, Inc.*,[58] the court found that this factor weighed in favor of the alleged infringer because the amount taken was minimal, and did not "make the book worth reading."[59] "The test of substantiality is not how much of the allegedly infringing work was taken from the copyrighted material, but rather how much of the copyrighted material was taken by the infringing work."[60]

> The rise of digital media has led to an increased utilization of the fair use defense.

The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth factor evaluates the effect of "market harm caused by the alleged infringement."[61] This factor "requires proof that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[62] Such inquiry must be cognizant not "only of harm to the original but also of harm to the market for derivative works."[63] In analyzing this factor the court must balance "the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."[64] This factor also examines whether this allegedly infringing use will replace or substitute for the original in the marketplace.[65] The courts will find that this factor weighs in favor of the alleged infringer if this alleged infringer is occupying a market niche that the copyright holder was not interested in filling.[66] An exam-

ple of such a niche is parody or criticism.[67] For example, in *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*,[68] the court found that three lines of "What a Wonderful World" performed by a rap artist with slight off-color modifications would not impact the sales of the actual song as well as any non-parodic rap versions of the song.

In *Twin Peaks Productions, Inc. v. Publications International, Ltd.*,[69] a publisher released a book consisting of plot abridgements and trivia for the television show *Twin Peaks*. In evaluating the fourth factor, the court found that the infringing book "compete[d] in markets in which [Twin Peaks Productions] has a legitimate interest."[70] In *American Geophysical Union v. Texaco Inc.*,[71] the Second Circuit found that photocopies Texaco made of academic journals would lead to "lost licensing revenue, and to a minor extent . . . lost subscription revenue."[72] As a result of this, the use was not deemed fair.

In contrast, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,[73] the Second Circuit found that seven artistic images, originally used on Grateful Dead concert posters and tickets that were reproduced without the permission of the copyright holder in a book about the Grateful Dead would not negatively affect the market for derivative uses of the images because they were sufficiently transformative. They were transformative because the images were not used in their original format, but rather as a means of illustrating a history.[74]

Authors Guild Inc. v. Google, Inc.

The rise of digital media has led to an increased utilization of the fair use defense. Fair use has been used, unsuccessfully, as a defense in file sharing cases.[75] Recently the question of fair use has arisen in the *Authors Guild Inc. v. Google, Inc.* lawsuit. This case arises from an agreement Google, Inc. (Google) entered into in 2004 with a number of major research libraries to digitize books and other writings in these libraries' collections.[76] Although many of these books were still under copyright, Google did not obtain permission of the copyright holders.[77] Since entering into this agreement Google has scanned and digitized more than 12 million books.[78] The participating research libraries received digital copies of the books, and Google made the books available to the general public for searching in an online database.[79] Search results of this database would provide the users with "snippets" or excerpts of a book.[80] In 2005, the Authors Guild Inc. (the AG) filed a class action suit against Google in the Southern District of New York alleging copyright infringement.[81] This allegation was based on two aspects of the 2004 agreement: (1) reproducing books currently protected by copyright and distributing them to libraries and (2) offering to the public "snippets" of these books.[82] Although Google and the AG attempted to settle the suit, for numerous reasons the settlement was not approved.[83]

In 2012, Google brought a motion to dismiss, and the AG brought a motion for class certification.[84] The AG's motion for class certification was granted.[85] Google appealed the grant of class certification, and the appeal was granted.[86] Google argued that AG could not be certified as a class because not all members of the AG wanted to be included in the class.[87] Google also stated that it intended to utilize a fair use defense, which may deem the litigation moot.[88] The court remanded the case to the district court so that it could evaluate the fair use issues.[89]

On November 14, 2013, Judge Denny Chin of the United States Court of Appeals for the Second Circuit decided this case in favor of Google.[90] In the decision, he conducted an analysis of Google's use of the material, using the four fair use factors, and determined that Google's use was in fact fair.

The first factor weighed in favor of Google. Although Google is a for-profit company, the court determined that Google's use was not itself for profit. Google "does not sell the scans it has made of books for Google; it does not sell the snippets that it displays; and it does not run ads on the About the Book pages that contain snippets. It does not engage in the direct commercialization of copyrighted works."[91] Even though Google might increase traffic to its sites that do in fact have ads, the court still determined that Google Books served an important educational purpose.

The court also looked at the ways that the "snippets" are utilized, stating that "Google Books has become an important tool for libraries and librarians and cite-checkers as it helps to identify and find books. The use of book text to facilitate search through the display of snippets is transformative."[92] The court also discussed how researchers have used Google Books to evaluate "word frequencies, syntactic patterns, and thematic markers to consider how literary style has changed over time."[93] This use of books was transformative, said the court, because "it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research."[94]

When evaluating the second fair use factor – the nature of the copyrighted work – the court noted that the majority of the books available on Google Books were non-fiction. Of those books that were fiction, none were currently unpublished or not available to the public. The court also weighed this factor in favor of fair use.

However, the court found the third factor weighed against fair use. This finding was based on the fact that Google scanned entire books and made them available to the public, even though Google limited the amount of text that was displayed in response to a search.

The court found the fourth factor weighed in favor of fair use. The AG raised the argument that Google Books would hurt the market by serving as a market replacement for books, and further because "users could put in multiple searches, varying slightly the search terms, to access an entire book."[95] The court dismissed both of

these arguments, stating that "[n]either suggestion makes sense"[96] and pointed to the countless hours of wasted energy that a user would be forced to exert to piece together the entire book and that this person would have to already own a copy of the book in order to determine the correct search terms. To the contrary, the court stated that Google Books would enhance the sale of books by exposing them to the public.

This decision is the result of eight years of litigation. It is an important case for copyright holders whose works are being displayed, often without their consent, in the digital world.

1. "Rights Granted Under Copyright Law," *Bitlaw, at* http://www.bitlaw.com/copyright/scope.html (Last visited, Jan. 10, 2014).

2. 17 U.S.C. § 106.

3. "Copyright in General," United States Copyright Office, http://www.copyright.gov/help/faq/faq-general.html (last visited Jan. 10, 2014).

4. "Copyright Basics," United States Copyright Office, at 7, http://www.copyright.gov/circs/circ1.pdf (last visited Jan. 10, 2014).

5. Codified in 17 U.S.C. § 107.

6. 17 U.S.C. § 109.

7. In *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013), a company attempted to use the "first sale" doctrine, in regards to digital media. "The statute plainly applies to the lawful owner's "particular" phonorecord, a phonorecord that by definition cannot be uploaded and sold on ReDigi's website." *Id.* at 33–34.

8. *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 998 (E.D. Wis. 2011) (citing *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 561 (1985)).

9. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting H. Ball, Law of Copyright and Literary Property 260 (1944)).

10. *Hofheinz v. A&E TV Networks*, 146 F. Supp. 2d 442, 445 (S.D.N.Y. 2001).

11. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 916 (2d Cir. 1994).

12. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

13. 17 U.S.C. § 107.

14. While teachers can make copies for classroom use, professional copy shops are not protected by fair use, and cannot do so without licensing the intellectual property first. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991).

15. *See Harper & Row, Publishers*, 471 U.S. at 562 (evaluating whether a use was "fair" using the four factors, despite its purported use in news reporting).

16. *See* "Fair Use Doctrine - Top 10 Misconceptions", *Legalflip, at* http://www.legalflip.com/Article.aspx?id=27&pageid=136 (last visited Jan. 10, 2014).

17. *See* "Fair Use," United States Copyright Office, http://www.copyright.gov/fls/fl102.html ("There is no specific number of words, lines, or notes that may safely be taken without permission.").

18. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

19. *L.A.Times v. Free Republic*, 2000 WL 565200 (C.D. Cal.Apr. 4, 2000) (quoting *Am. Geophysical Union*, 60 F.3d at 921–22).

20. *Byrne v. BBC*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001).

21. *Psihoyos v. Nat'l Examiner*, 1998 WL 336655 (S.D.N.Y. June 22, 1998) (quoting *Harper & Row, Publishers*, 471 U.S. at 562).

22. *Byrne v. BBC*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001) (quoting *Castle Rock Entm't v. Carol Publ'g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998) (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994)).

23. *See Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) ("in other words, whether and to what extent the new work is 'transformative.'").

24. *Hofheinz v. Discovery Commc'ns, Inc.*, 2001 WL 1111970 (S.D.N.Y. 2001).

25. *Wade Williams Distrib., Inc. v. ABC*, 2005 WL 774275 (S.D.N.Y. 2005) (citing *Campbell*, 510 U.S. 569).

26. *Id.* "[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." *Campbell*, 510 U.S. 569.

27. *Id.*

28. "We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107." *Id.* at 579. The entirety of the 2 Live Crew song and the Roy Orbison song were reproduced in Appendix B to the decision, making this the only Supreme Court decision to employ the phrase "Bald headed woman here, let me get this hunk of biz for ya."

29. 714 F.3d 694, 706 (2d Cir. 2013).

30. *Id.* at 708.

31. "A secondary work may modify the original without being transformative. For instance, a derivative work that merely presents the same material but in a new form, such as a book of synopses of television shows, is not transformative." *Id. See also Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

32. *Cariou v. Prince*, 714 F.3d 694, 711 (2d Cir.), *cert. denied*, 134 S. Ct. 618 (2013).

33. *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

34. *Id.* at 73.

35. 150 F.3d 132 (2d Cir. 1998)

36. *Id.* at 142.

37. *Id.*

38. *Id.* at 143.

39. *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 861 F. Supp. 2d 336, 341 (S.D.N.Y. 2012) (citing *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006)).

40. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001).

41. *Mathieson v. Associated Press*, 1992 WL 164447 (S.D.N.Y. 1992).

42. 904 F.2d 152, 158 (2d Cir. 1990).

43. We have some hesitation in trying to characterize Hubbard's diverse body of writings as solely "factual" or "non-factual," but on balance, we believe that the quoted works – which deal with Hubbard's life, his views on religion, human relations, the Church, etc. – are more properly viewed as factual or informational. *Id.* at 157. *See also Wright v. Warner Books, Inc.*, 748 F. Supp. 105, 109 (S.D.N.Y. 1990) (where the court came to a similar conclusion regarding the quoting of published works in a biography).

44. 973 F. Supp. 409 (S.D.N.Y. 1997).

45. *Id.* Although the courts found that this factor favored the copyright holder, the court still held that the use was protected as fair use. *Id.* at 414.

46. "Unpublished works are the "favorite sons" of the second fair use factor, and where a plaintiff proves unauthorized publication of an unpublished work, this factor weighs heavily against a finding of fair use." *Byrne v. BBC*, 132 F. Supp. 2d 229, 235 (S.D.N.Y. 2001).

47. 471 U.S. 539 (1985).

48. 1995 WL 46625 (S.D.N.Y. 1995).

49. *Id.*

50. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (2d Cir. 1991).

51. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

52. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

53. *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983).

54. *See Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 413 (S.D.N.Y. 1997), *aff'd*, 147 F.3d 2145 (2d Cir. 1998) ("Though defendant included in the scene's background plaintiff's ten copyrighted works in their entirety, at most a single one of the Photographs is recognizable as Sandoval's work, and that only after careful scrutiny and repeated viewings.").

55. *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044, 1046 (S.D.N.Y. 1994).

56. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 565 (1985).

57. *Id. See also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986) ("One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity." *Id.* (quoting *Bramwell v. Halcomb*, 3 My. & Cr. (Ch.) 736, 738 (1837)).

58. 953 F.2d 731, 739 (2d Cir. 1991).

59. *Id.* As a contrast, in *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987), the quotes were qualitative and also made "the book worth reading." *Id.*

60. *Mathieson v. Associated Press*, 1992 WL 164447 (S.D.N.Y. 1992).

61. *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1225 (S.D.N.Y. 1996).

62. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *see also Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (The owner of a copyright with respect to this market-factor need only demonstrate that if the unauthorized use becomes "widespread" it would prejudice his potential market for his work).

63. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 568 (U.S. 1985) *See also Robinson v. Random House, Inc.*, 877 F. Supp. 830, 843 (S.D.N.Y. 1995) ("Harm to both the original work and derivative works must be taken into account.") *Id.*

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

65. *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003).

66. *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

67. *Id.*

68. 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003).

69. 996 F.2d at 1366.

70. *Id.* at 1377. *See also Castle Rock Entm't v. Carol Publ'g Grp.*, 150 F.3d 132, 142 (2d Cir. 1998) (coming to a similar conclusion regarding *The Seinfeld Aptitude Test*).

71. 60 F.3d 913, 931 (2d Cir. 1994).

72. *Id.*

73. 448 F.3d 605, 607 (2d Cir. 2006).

74. *Id.* at 612.

75. *Arista Records LLC v. Doe*, 604 F.3d 110, 124 (2d Cir. 2010).

76. *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 386 (S.D.N.Y. 2012).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* The first proposed settlement in 2008 would permit Google to show 20% of works free of charge. Subscriptions to the service would be available for purchase, with the proceeds of subscription sales split between Google and the Authors Guild. Part of the settlement paid by Google would go to establishing a digital book registry to administer this new system. Part of the settlement paid by Google would also be used to compensate authors. Miguel Heft & Motoko Rich, *Google Settles Suit Over Book-Scanning*, N.Y. Times, Oct. 28, 2008, *at* http://www.nytimes.com/2008/10/29/technology/internet/29google.html (last visited Jan. 10, 2014). The settlement was amended in 2008. Kenneth Crews, *GBS 2.0: The New Google Books (Proposed) Settlement*, Columbia Univ. Libraries/Information Servs. Copyright Advisory Office, Nov. 17, 2008, *at* http://copyright.columbia.edu/copyright/2009/11/17/gbs-20-the-new-google-books-proposed-settlement/ (last visited Jan. 10, 2014). The Authors Guild published a website outlining the 2009 settlement. *Amended Settlement Filed in Authors Guild v. Google*, The Authors Guild, Nov. 13, 2009. *at* http://www.authorsguild.org/advocacy/111309-amended-settlement-filed-in-authors-guild-v-google (last visited Jan. 10, 2014). There were numerous critiques of the settlement. John Timmer, *The Sequel Stinks: Critics Trash New Google Books Settlement*, Ars Technica, Jan. 29, 2010. *Available at* http://arstechnica.com/tech-policy/2010/01/the-sequel-stinks-critics-trash-new-google-books-settlement (last visited Jan. 10, 2014).The settlement was rejected. *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

84. *Id.* Google brought a motion to dismiss the action commenced by Authors Guild of America, as well as a similar action commenced in 2010 on behalf of photographers and individuals who held the copyrights to some of the works featured in the snippets. *Id.*

85. *Id.*

86. *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Authors Guild, Inc. v. Google Inc.*, 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

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