

Reinvigorating U.S. Copyright with Attribution: How Courts Can Help Define the Fair Use Exception to Copyright by Considering the Economic Aspects of Attribution

Catherine J. Cameron¹

This article details the failure of Congress to adapt the Copyright Act to address the changes in publishing brought about by the widespread use of the internet as a source and disseminator of content. The article goes on to argue that a wholesale overhaul of the Copyright Act is not necessary to address the issues posed by online publishing. Instead, there is a mostly-abandoned strain of case law that can be used to reinvigorate Copyright law so that it better comports with the needs of a digital world. That strain involves a concept that courts have struggled to ignore – attribution as evidence that an alleged copyright infringer is using copyrighted material under the fair use exception. The abandonment of attribution as a consideration was based on an interpretation of attribution as a “moral right.” This article explains why that interpretation is faulty and demonstrates how considering the economic aspects of copyright comports with the dictates of copyright law as an economic rights consideration.

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1. Professor of Legal Skills, Stetson University College of Law. The author would like to thank the College of Law and the Poynter Institute for supporting the sabbatical that lead to the development of this article. Also, the author wishes to extend a special thanks to Ellyn Angelotti and E. Chantel Greene for their assistance with the research that went into this article.

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INTRODUCTION

Courts, legislators, public interest groups, and the legal academy have been calling for reform of copyright laws almost since the inception of those laws.² The death knell for the current version of the U.S. Copyright Act has grown louder as online publishing has increased.³ In an effort to avoid throwing the baby out with the bathwater, this article argues that a wholesale overhaul of the U.S. Copyright Act is not necessary to address the issues posed by online publishing.⁴ Instead, there is a mostly-abandoned strain of case law that can be used to reinvigorate U.S. Copyright law so that it better comports with the needs of a digital world. That strain involves a concept that courts have struggled to ignore – attribution as evidence that an alleged copyright infringer is using copyrighted material under the fair use exception to a copyright infringement action.

Congress and the courts have a tumultuous relationship with using attribution as evidence that an alleged copyright infringer is using the copyrighted material under the fair use exception. Congress includes no reference to attribution as a consideration under the fair use exception in the Copyright Act, yet other copyright laws embrace attribution as a consideration in determining whether someone used copyrighted material in a fair way.⁵ Additionally, there are a handful of cases in which courts have considered whether an alleged copyright infringer attributed the use of the work at issue to the original creator.⁶ Additionally, although there are a handful of cases in

2. Less than two years after the Copyright Act of 1976 was enacted, a law review article describing the changes the Act made to Copyright law noted that Congress was unable to “resolve all of the tough [copyright] questions, and it may have left too many unresolved.” Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 884 (1978). The author noted that one area of the statute that would cause problems was the fair use portion, which the author described as “elusive.” *Id.* at 879.

3. See generally William Patry, *HOW TO FIX COPYRIGHT*, (David McBride ed., 2011) “[T]he Internet and other digital technologies have undermined the central premise around which copyright markets have historically been built: artificial scarcity.” *Id.* at 3. See also James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 484 (2004).

4. Certainly, significant copyright reform could bring clarity to the uncertainty of how copyright should function in the digital world; however, as this article points out, there is a more palatable fix for the courts that would not require the legislative process.

5. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886; Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2006).

6. See e.g., *Rogers v. Koons*, 960 F.2d 301, 306-14 (2d Cir. 1992); *Karll v. Curtis Publishing Company* 39 F. Supp. 836 (E.D. Wis. 1941); *Henry Holt & Co. v. Leggett & Myers*

which courts have considered whether an alleged copyright infringer attributed the use of the work at issue to the original creator, there are many courts that do not. These courts, however, do not rely on precedent that supports the proposition that attribution should be ignored in a “fair use” analysis.⁷

As this paper will explain, this abandonment of attribution as a consideration in fair use constitutes a change in the interpretation of common law. If courts correct this error by incorporating attribution into a fair use analysis, many of the problems with the current state of U.S. copyright law could be fixed without the need for a major overhaul in the text or judicial analysis of the law.⁸ Additionally, considering attribution as part of a fair use analysis makes sense in light of the changing nature of content acquisition, content creation, content delivery, and the economics of information dissemination in the modern era. Accordingly, courts should consider incorporating this solution into the fair use analysis. In essence, a small step backwards in the progression of the law could be a tremendous step towards adapting copyright for the digital age.

THE MANY FACETS OF ATTRIBUTION

Attribution is commonplace in the educational setting.⁹ Because education and thought necessarily build on the work of others, students and professors routinely attribute ideas they take from other thinkers and writers in scholarly papers.¹⁰ Attribution allows the academic a way to explain the background behind the new ideas and thoughts the academic is seeking to add to the body of intellectual ideas.¹¹ However, building on the ideas of others to erect a new idea is not solely an academic concern. Many other professions routinely build on the work of others. To offer two such examples, satirists often parody the work of others and artists often mimic the styles of other artists.¹² Attribution is a simple act of explicitly recognizing the original

Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938).

7. See *infra* notes 85-89 and accompanying text.

8. At a panel discussion on copyright reform held at the beginning of the Obama administration that included copyright reform advocates from the record industry, the panel agreed that the policies behind copyright are so complex that legislative reform is not likely, and any reform will have to come from the courts. Stephanie Condon, *Copyright Reform Unlikely*, ADVOCATES SAY (July 29th, 2012, 2 p.m.), http://news.cnet.com/8301-13578_3-10162315-38.html.

9. See Ken Hyland, *Academic Attribution: Citation and the Construction of Disciplinary Knowledge*, 20 APPLIED LINGUISTICS, 341-67 (1999) (detailing the norms for citation frequency and form across various academic disciplines).

10. See *id.*

11. See *id.*

12. See *Campbell v. Acuff-Rose*, 510 U.S. 569, 580 (1994) (holding “for the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”); *Rogers v. Koons*, 960 F.2d 301, 309 (1992) (noting the “artistic tradition” of “incorporating [] images into works of art to comment critically both on the incorporated object and the political and economic system that created it”).

creator of an idea, but upon further scrutiny, the act of attribution represents a multitude of rights for the original content creator.

In the leading treatise on copyright, author Melville Nimmer dissects attribution into five distinct rights: (1) “the right to be known as the author of his work;” (2) “the right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written;” (3) “the right to prevent others from being named as the author of his work;” (4) “the right to publish a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name;” and (5) “the right to prevent others from using the work or the author’s name in such a way as to reflect adversely on his professional standing.”¹³ Each of these rights has a moral and an economic dimension to them.¹⁴ For example, “[t]he right to be known as the author of his work” may certainly affect the amount of money an artist can make off of a work of art.¹⁵ If someone else is selling the work as his or her own, this misrepresentation can dilute the market, thus hampering the original artist’s ability to make money off of the work.¹⁶ However, there is a moral dimension to attribution as well. Artists may feel they are somehow spiritually bereft if they are unable to claim what is rightfully theirs.¹⁷ Additionally, there is a moral component in the security artists feel in maintaining control over their work that can make artists more creative because they have a more personal stake in the outcome of that work.¹⁸ The work is that artist’s, and she can be confident that she can control whether her name is attached to the original work and future derivative works.¹⁹

The U.K., France, Australia, Germany, Italy and New Zealand have long recognized the “moral rights” dimension of attribution in their copyright laws.²⁰ France is generally cited as the place of origin of the concept that content creators should have rights of control over their work that go beyond economic considerations, and instead there are rights that are personal, almost spiritual, to

13. Melville Nimmer, *Nimmer on Copyright* §8D.02[6] (2012).

14. *Id.*

15. *See* *Richard Feiner & Co. v. H.R. Indus.*, 10 F. Supp. 2d 310, 315 (S.D.N.Y. 1998)(finding that the publishing of a still photograph from a motion picture without permission from the copyright owner would affect the revenue the copyright owner could reap from that still photograph in the future because the public might assume the still photograph was in the public domain due to the age of the film).

16. *See id.*

17. *See* *Rivera v. Mendez & Co.*, 824 F. Supp. 2d 265, 267 (D.C.P.R. 2011) (noting that “‘moral rights’ are rights of a spiritual, non-economic, and personal nature that . . . spring from a belief that an artist in the process of creation injects his spirit into the work”); *see also* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 365 (2006)(defining moral rights as “non-economic interests of authors . . . worthy of protection because of the presumed intimate bond between authors and their works”).

18. Lior Zemer, *Moral Rights, Limited Edition*, 91 B.U.L. REV. 1519, 1536-37 (2011) (quoting Roberta Rosenthal Kwall, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES XIII* (2010)).

19. *See* Rigamonti, *supra* note 17.

20. *See id.*

the author.²¹ These countries often espouse a view that creative works are an intrinsic part of the artist and that anything done with those works reflects directly on the author as a person.²² Requiring attribution for use of content created by another is one of the many ways these countries protect “moral rights.”²³ This moral right is the intrinsic right to control one’s reputation, which is a forward-looking right in that it exists at the moment the work is created.²⁴ The pecuniary aspect of copyright may be described similarly as the right to control one’s reputation. But the pecuniary aspect is backwards-looking. Once a work has been created, attribution for that work can be an economic benefit for the original artist. This is particularly true in the age of social media where notoriety can equal significant economic gain.²⁵

Because the moral and economic dimensions of attribution are intertwined, some of the attribution rights these “moral rights” countries seek to protect are the same rights that the U.S. protects under its copyright laws such as the right to control reproduction of the work. However, the attribution rights these “moral right” countries grant copyright holders go far beyond what the U.S. has been willing to grant content creators.²⁶ The U.S. has chosen to deal with this type of “moral rights” reputational concern under the tort of defamation and has parsed out copyright as a bastion of purely economic concerns inherent in the creation of artistic rights.²⁷ Although this dispassionate objectivity appears to be more aspirational than actual, attribution also has a quantifiable pecuniary component that fits within the concerns of U.S. courts to keep morality out of copyright litigation. Avoiding “moral rights” has been the justification in many instances for failing to protect or encourage attribution rights.²⁸ However, despite Congress’s failure to include attribution as a consideration under the “fair use” exception to copyright infringement, attribution is required under several other copyright-related statutes.²⁹ Additionally, despite statements from several courts that indicate

21. See Nimmer, *supra* note 13, at 8D.01.

22. See *id.*

23. See *id.*

24. See *id.*

25. Brian Stelter, *Tube Videos Pull in Real Money*, NEW YORK TIMES, <http://www.nytimes.com/2008/12/11/business/media/11youtube.html> (July 29, 2012, 12:15 PM) (detailing how some YouTube videos can pull in revenue for video creators of more than \$100,000 a year).

26. See Nimmer, *supra* note 13, at 8D.01.

27. See *id.* at 8D.02.

28. See *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 24 (2d Cir. 1976) (holding “American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors”).

29. See *id.* (noting that “the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependence,” causing courts to “grant[] relief for misrepresentation of an artist’s work by relying on theories outside the statutory law of copyright, such as contract law”).

U.S. courts should not consider attribution because it is a “moral right” that the U.S. chooses not to protect, attribution nonetheless appears as a consideration in a handful of copyright cases assessing the “fair use” exception to U.S. Copyright Act.³⁰ This disconnect may be due to the inability of U.S. lawmakers to recognize the economic dimension to attribution when rejecting attribution as only a “moral right.”³¹

THE U.S. COPYRIGHT ACT’S STRAINED RELATIONSHIP WITH ATTRIBUTION

The law can be slow to change and to adapt to the needs of society, and U.S. copyright law is no exception. In over 200 years, the U.S. Copyright Act has endured relatively few major revisions. However, publishing and content creation have experienced a major revolution, especially since the advent of the Internet.³² The ease of distribution supplied by the Internet allows anyone to widely distribute and readily access a seemingly endless amount of content.³³

The first federal Copyright Act was written in 1790 and only granted copyright to books, charts and maps.³⁴ Because books and newspapers were the chief form of communication that needed to be protected, copyright law required only book publishers and distributors to understand the underpinnings of copyright law.³⁵ The law at that time was actually much more content-user-friendly than it is today. Content creators that wanted to acquire a copyright were required to register their intent with a government office and to renew the copyright in 28 years.³⁶ Only 5% of content creators ever registered their work, and only 15% of those who registered bothered to file for a renewal at the 28 year renewal period.³⁷ This lack of registering and renewing copyrights by content creators meant that most content was within the public domain in a relatively short amount of time.³⁸ This trend continued over a 150 year period from 1790 until the Copyright Act Reforms of 1976—evidencing that change in production, copying and distribution technology did not substantially change

30. See e.g., *Rogers v. Koons*, 960 F.2d 301, 306-14 (2d Cir. 1992); *Karll v. Curtis Publ’g Co.* 39 F. Supp. 836 (E.D. Wis. 1941); *Henry Holt & Co. v. Leggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

31. The “moral rights” countries seem to be somewhat confused on the dividing line between the “moral right” aspect of attribution and the economic rights aspect of attribution as well. See Rigamonti, *supra* note 17, at 360. “[T]he right to object to the false attribution of authorship is not a moral right . . . because the false attribution of someone’s work to another person does not require the latter to be the author of any work. This does not prevent French courts from occasionally invoking the statutory basis of the moral right of attribution when adjudicating cases involving the false attribution of authorship.” (Should this quote be indented R. 5.1?) *Id.* at 361.

32. See Patry, *supra* note 3.

33. See *id.*

34. Copyright Act of May 31, 1790 § 1 (granting copyright to “any map, chart, book, or books already printed within these United States”).

35. See Patry, *supra* note 3 at 38.

36. See *id.* at 104.

37. See *id.*

38. See *id.* at 104-06.

content creators' interest in securing copyrights.³⁹ Despite this evident lack of interest, the Copyright Act of 1976 increased the copyright protection for copyright owners by creating an automatic copyright upon creation of any material, regardless of registration with the U.S. Copyright office.⁴⁰ Although there has been a tectonic shift in content usage since the 1976 Act, there has been little development of the Copyright Act in that time frame. Most of the development that has occurred in the Copyright Act has been in response to lobbying by special interests with a monetary incentive to have the law changed.⁴¹ For example, the Digital Millennium Copyright Act of 1996, a provision that defines the rights to sue website owners for copyright infringing material posted on those websites, was born out of the concerns of internet providers about copyright infringement claims based on content created by third-parties on their servers.⁴²

Although one of the purported goals of the law of copyright is to protect economic rather than moral rights, and U.S. courts routinely reference attribution as a moral right that should not be protected under copyright law, a few copyright laws do incorporate attribution. Two notable exceptions are the amendments to the U.S. law⁴³ made to comply with the Berne Convention⁴⁴ and the Visual Artists' Rights Act of 1990.⁴⁵ The Berne Convention is an international treaty that sets forth recognition of the rights of an author to claim authorship of the work in order to prevent any modifications to the work that would "be prejudicial to his honor or reputation."⁴⁶ The U.S. joined the Convention in 1989.⁴⁷ The Visual Artists' Rights Act of 1990⁴⁸ codifies language similar to the Berne Convention for creators of works of visual arts.⁴⁹ Additionally, the Digital Millennium Copyright Act of 1998 prevents the removal or alteration of "copyright management information" that is somehow

39. *See id.*

40. *See id.* at 202. Notably, this shift to a more content-creator-friendly law may have been influenced by the content-creator-friendly laws of the "moral rights" nations with which the U.S. joined in the Berne Convention. *See* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 315-18 (2010).

41. At least one author has deemed this phenomenon "technological" because most of the recent Copyright Act reforms have been directed at technologies that affect control of copyrighted works. James Gibson, 80 NOTRE DAME L. REV. 163, 167-68 (2004).

42. The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

43. *See* 17 U.S.C. §§ 101, 104(b)(4)(2006).

44. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886.

45. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2006).

46. Berne Convention, *supra* note 4 at Article 6.

47. In order to join the Berne Convention, the U.S. had to make some revisions to the Copyright Act. Those revisions went into place in 1989 and include the automatic copyright provision which allows content creators copyright protection without registering their work with the Copyright Office. *See* 7 Patry on Copyright § 23:45 (Westlaw 2012).

48. 17 U.S.C. § 106A (2006).

49. *See id.*; "VARA amended the Copyright Act, importing a limited version of the civil-law concept of the "moral rights of the artist" into our intellectual-property law." *Kelly v. Chicago Park Dist.*, 635 F. 3d 290, 291-92 (7th Cir. 2011).

“conveyed in connection” with the work itself, including the author’s name.⁵⁰ This removal or alteration must have been done by someone with the intention of infringing on the copyright of the work’s creator.⁵¹ Courts have disagreed on whether this provision applies only to digital material, exactly what it means for the copyright management information to be “conveyed in connection,” and the mental state required to violate the statute. This has resulted in the statute not being very effective for encouraging attribution on a wide-spread basis, and certainly not when the author has failed to emblazon their name on the item itself.⁵² Although these exceptions are admittedly small, Congress has acknowledged that attribution can and should be considered in some copyright infringement claims.⁵³

Despite Congressional recognition of the need for attribution as part of the analysis of copyright use, the fair use exception to a copyright infringement suit makes no mention of attribution as a consideration. However, the “fair use” exception may be the most logical place to reference a subsequent content user’s attribution to the original creator of content. The Copyright Act indicates that the “fair use of a copyrighted work” for certain enumerated purposes – “criticism, comment, news reporting, teaching . . . scholarship, or research” – will not be deemed copyright infringement.⁵⁴ The statute makes it clear that these purposes are not an exhaustive list of purposes that may be recognized as fair use, but are simply offered for illustrative purposes.⁵⁵ The statute then lists factors a court may consider when deciding if use of the copyrighted material is “fair use.”⁵⁶ These factors include: (1) “the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit, educational purposes;” (2) “the nature of the copyrighted work;” (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) “the effect of the use upon the potential market for or value of the copyrighted work.”⁵⁷ The purposes for fair use listed in the statute are non-exhaustive. Similarly, the factors that a court may consider in determining whether or not a use is “fair use” under the statute are also non-exhaustive.⁵⁸

50. 17 U.S.C. § 1202 (2006).

51. *See id.*

52. *See* Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 72-73 (2007).

53. *See id.*

54. 17 U.S.C. § 107 (2006).

55. *See id.*

56. *See id.*

57. *Id.*

58. This lack of definition to the “fair use” exception has caused much confusion over the years. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1525 (2004) “[T]here is no end to legislative, judicial, and academic efforts to rationalize the doctrine. Its codification in the 1976 Copyright Act appears to have contributed to its fragmentation, rather than its coherence.” *Id.*

THE LOWER FEDERAL COURTS' STRAINED RELATIONSHIP WITH ATTRIBUTION

In 2008, an empirical study explored the reasoning behind 306 cases that substantially discussed the “fair use” doctrine as a defense to copyright.⁵⁹ The statistics indicate that there may be some subconscious consideration of the good or bad faith of the defendants in these cases, even though the courts did not expressly base their opinions on the good or bad faith of the defendant.⁶⁰ Of the cases this study took into account, 16% of the opinions describe the good or bad faith conduct of the defendant in some detail.⁶¹ The majority of the cases considered the good or bad faith of the defendant when discussing the first factor of the four-factor test – “the purpose and character of the use.”⁶² And although the authors of this study could find no statistically relevant correlation to the good faith of the defendant being the decisive factor in finding fair use, the study did find that 12 of the 14 opinions that found the defendant acted in bad faith found no fair use. Further, 24 out of the 28 opinions that reference the good faith of the defendant found fair use.⁶³

Indeed, other commentators have noted the natural leaning of the judiciary to include a good faith consideration in the analysis.⁶⁴ Many cases espouse the pretext that copyright is an economic concept and should only be determined by balancing the economic purposes of promoting incentives for creativity for both the original creators of works and those seeking to use those works to create new material. However, these same opinions note that either the defendant acted in a manner akin to “stealing” the works of others because the defendant tried to pass those works off as his or her own, or that the defendant acted in a manner that reasonable people would see as a permissible use of the work to build a new work.⁶⁵ Attribution is primary evidence of this sort of permissible use and counter-evidence to any claim of underhanded, theft-like actions of the defendant.

Because the right of attribution and good-faith dealing are so inextricably intertwined with the use of copyrighted material, several lower courts have incorporated the fact that a defendant attributed the original work or failed to attribute the original work as part of their analysis in fair use cases. Although

59. Barton Beebe, *An Empirical Study of US Copyright Fair Use*, 156 U. PA. L. REV. 549 (2008).

60. *Id.*

61. *Id.* at 608.

62. Twenty-five of forty-nine cases analyzed the good or bad faith of the defendant under the first prong of the four-factors test. *Id.*

63. *Id.* at 608-09.

64. See C.T. Drechsler, *Extent of Doctrine of “Fair Use” under Federal Copyright Act*, 23 A.L.R. 3d 139 § 9[a] (2012).

65. See *id.* (“Although it is said that as a general rule the lack of intention to infringe ordinarily is no defense to a charge of copyright infringement, not being one of the essentials to establish liability, and consequently that an infringement which is shown to have occurred will not be excused by the infringer’s lack of intention to infringe, the cases have also sometimes said that evidence of innocent intention, or evidence of the lack of intention to infringe, may have a bearing upon the question of “fair use.”).

some of these court opinions have incorporated this attribution analysis under the first factor of the four-part test (“the purpose and character of the use”), a couple of the opinions have analyzed attribution under the fourth factor (“the effect of the use on the potential market for or value of the copyrighted work”).⁶⁶ By analyzing attribution under the fourth factor, courts are naturally considering attribution in a pecuniary manner which is within the dictates of copyright being solely an economic right.⁶⁷

The idea that attribution can evidence fair use began with case law from the 1930’s, predating the current Copyright Act by nearly 40 years. *Karll v. Curtis Publishing Company*⁶⁸ involved an article published in the Saturday Evening Post magazine, in which the author used eight lines from a song about the Green Bay Packers written by the plaintiff.⁶⁹ The Post article attributed the song to the plaintiff and the court noted that the article gave the plaintiff notoriety he would not have had without the article.⁷⁰ Attribution along with the fact that the article created no financial competition for the song was the court’s basis for finding that the use of the song was permitted under the fair use doctrine as it was conceived of at that time under common law.⁷¹

Courts have also cooled to a fair use exception when attribution is lacking.⁷² In the *Rogers v. Koons*⁷³ case, the defendant tore off a copyright notice from a note card he had purchased and used it as the basis for a piece of art.⁷⁴ He gave this note card to artisans working for him and asked them to copy much of what they saw in the picture to create a sculpture that looked remarkably similar to the picture.⁷⁵ The court noted this removal of the copyright mark indicated “bad faith” on the part of the defendant and “militate[d] against a finding of fair use.”⁷⁶

Although attribution generally aids a defendant’s claim of fair use,

66. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 306-14 (2d Cir. 1992); *Karll v. Curtis Publ’g Co.* 39 F. Supp. 836 (E.D. Wis. 1941); *Henry Holt & Co. v. Leggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

67. See Nimmer, *supra* note 13, has argued that “[a]s copyright practitioners warily view the coming multimedia explosion, perhaps a synthesis of the best elements from both American and Continental moral rights doctrine offers the surest guide to navigate those shoals.” *Id.* at 8D.02[4]. Along with several other recommendations, he argues that attribution indicating the original author’s name and contribution to a derivative work should be consider by policy makers in reworking copyright laws. *Id.* And although it is outside the bounds of the scope of this article, Nimmer indicates that the U.S. should consider incorporating an attribution right into its laws to create a copyright that is more in concert with the rights of European laws so as to minimize conflict with these countries during issues of international trade and treaty compliance. *Id.*

68. 39 F. Supp. 836.

69. *Id.* at 836-37.

70. *Id.*

71. *Id.* at 837-38.

72. See *Rogers v. Koons*, 960 F.2d 301, 306-14 (2d Cir. 1992).

73. *Id.*

74. *Id.* at 305.

75. *Id.*

76. *Id.* at 309.

evidence of attribution cut against a fair use finding in at least one case.⁷⁷ In *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, the district court found that the use of a quote from a book that explained the mechanics of the human voice for vocal instruction was an infringement on the author's copyright despite the fact that the subsequent user attributed the quote.⁷⁸ In *Holt*, the quote involved a claim that smoking was not harmful to "auditory passages," and was used in a mass produced pamphlet advertising cigarettes.⁷⁹ The quote was attributed to the author of the book, Dr. Leon Felderman, at least in part, because such attribution made the quote more valid.⁸⁰ The court noted that this attribution was, actually, harmful to Felderman's reputation because the inclusion of his quote in a pamphlet promoting a product brought his professional ethics into question.⁸¹ The court intimated that this attribution "retarded the sale of [Felderman's] book."⁸² Under these facts, the court found no fair use.⁸³

Interestingly, the *Holt* case is often cited for the proposition that attribution should not be considered as part of a fair use analysis.⁸⁴ However, attribution did have a bearing on the analysis of the *Holt* case.⁸⁵ It was considered along with a host of other factors (including the fact that the pamphlet was produced for a purely commercial purpose, and that the quoted part was a "substantial part" of the original work) in determining that there was no fair use at play.⁸⁶ Thus, a more accurate rule to take from the *Holt* case is that attribution can have bearing on a fair use analysis, but is not dispositive of the issue.⁸⁷ The *Holt* court simply acknowledged that any attribution granted to the original content creator must be taken into account with the other facts of the case in determining whether a fair use exception is appropriate.⁸⁸ Notably, the *Holt* court considered attribution when determining the affect the use had on the marketability of the original piece after the alleged infringing use, suggesting that the court was focusing on the economic component of attribution, instead of the "moral rights" aspects of attribution.

Other cases have focused on attribution as evidence of marketability. In *Maxtone-Graham v. Burtchaell*,⁸⁹ a book opposing a woman's right to an

77. See *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

78. *Id.* at 304.

79. *Id.* at 303.

80. *Id.* at 304.

81. *Id.*

82. *Id.*

83. *Id.*

84. See, e.g., *Update Art, Inc. v. Maariv Israel Newspaper, Inc.*, 635 F. Supp. 228 n.5 (1986); *Addison-Wesley Publ'g Co. v. Brown*, 223 F. Supp. 219 n.29 (1963); *Meredith McCardle, Fan Fiction, Fandom, and Fanfare: What's all the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433 n.131(2003); *Lastowka*, *supra* note 52, at note 251.

85. *Holt & Co.*, 23 F. Supp. at 304.

86. *Id.* at 303.

87. *Id.* at 304.

88. *Id.*

89. 803 F.2d 1253 (2d Cir. 1986).

abortion used excerpts of interviews published in a book supporting a woman's right to abortion a decade earlier.⁹⁰ The court indicated that attribution might actually increase interest in the original pro-choice book, thereby minimizing the harm under the "effect on the market" prong.⁹¹ In *Richard Feiner & Co. v. H.R. Industries*,⁹² the court also placed the attribution consideration within the marketability analysis.⁹³ In this case, a still picture of a popular 1930s comedy act Laurel and Hardy, was published in the Hollywood Reporter magazine without attributing the work to the original copyright owner.⁹⁴ The court noted that failure to attribute the work might have given the impression that the old photograph had lapsed into the public domain.⁹⁵ The judge noted that this misimpression would affect the future market for the photograph, especially since the publication was in a trade magazine for an industry that might be very likely to use this same still in the future – the motion picture industry.⁹⁶

The legislative history of the Copyright Act indicates that the codification of the fair use doctrine is "a restatement of this judicially developed doctrine – it neither enlarges nor changes it in any way."⁹⁷ Because none of these cases that considered attribution in a fair use analysis were explicitly overturned on the grounds that considering attribution was an error, then, arguably, the legislative history of the fair use exception supports the use of attribution in the fair use analysis.⁹⁸

THE SUPREME COURT'S STRAINED RELATIONSHIP WITH ATTRIBUTION

The Supreme Court has never explicitly found attribution to be an appropriate or inappropriate consideration in a fair use analysis, but it certainly has had the chance, which may imply that the Supreme Court is not in favor of including attribution in a fair use analysis. The Supreme Court had an opportunity to bring in attribution as a defense to copyright in *Campbell v. Acuff-Rose*,⁹⁹ a 1994 case that illustrates well the tension that would be relieved if the Court had considered an attribution defense.¹⁰⁰ The *Campbell* case involved a commercially successful parody of a song owned by Acuff-Rose

90. *Id.* at 1256-57.

91. *Id.* at 1265.

92. 10 F. Supp. 2d 310 (S.D.N.Y. 1998)

93. *Id.* at 315-16.

94. *Id.* at 311-13.

95. *Id.* at 314.

96. *Id.* at 315.

97. 122 Cong. Rec. 3144 (1976) (statement of Sen. Turney).

98. *See also* *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (finding that an educational booklet on cake decorating could not claim fair use for a portion taken from another booklet on cake decorating without attribution); *Weissman v. Freeman*, 868 F.2d 1313, 1323-24 (2d Cir. 1995) (determining that the fact that one author failed to attribute a work to a colleague, but instead passed the work off as his own had a bearing on the court finding that the use was not "fair use" under the statute).

99. 510 U.S. at 593.

100. *Id.*

Music.¹⁰¹ A popular rap group at the time, 2 Live Crew, approached Acuff to see if the company would allow the group the right to use a small sample of the song “Oh, Pretty Woman” made famous by Roy Orbison in 1960s.¹⁰² Acuff-Rose refused to give permission for 2 Live Crew’s intended use of the song, but the group chose to incorporate the sample anyway in a 1989 song called “Pretty Woman.”¹⁰³ When reciting the facts of the case, the Court emphasized that the liner notes accompanying the 2 Live Crew album made it clear that the sample of “Oh, Pretty Woman” used in their song was written by Roy Orbison and William Dean and published by Acuff-Rose music.¹⁰⁴ Perhaps the Court felt compelled to mention this because it signaled that the group was not attempting to pass the work off as completely its own. However, the Court failed to reference this fact anywhere in the fair use analysis in the opinion. Instead, the Court focused the bulk of its efforts on defining how a parody, which generally largely mimics the original in order to effectuate its purpose, can be considered under fair use.¹⁰⁵ Specifically, the Court noted that when applying the four-factor test laid out in the fair use provision of the Copyright Act, the nature of parody means that most of a court’s decision will be dictated by the very nature of a parody.¹⁰⁶ Often, a court will find that there was some need to use part of the original to create the connection necessary for parody, which informs a court’s decision on the first prong of the analysis – “the purpose and the character of the use.”¹⁰⁷ Additionally, the Court noted that prong two – “the nature of the copyrighted work” – may not be very helpful to the determination of a parody case as most parodies are made of some sort of culturally noteworthy work.¹⁰⁸ The Court also noted that the third factor – “the amount and substantiality of the portion used” – will likely be large when discussing parodies because without an obvious connection to the original material, the meaning of a parody will be largely lost. And finally, the Court noted in discussing the fourth factor—“[t]he effect of the use upon the potential market for or value of the copyrighted work”— that a true parody is by its nature transformative, so “it is more likely that the new work will not affect the market for the original in a way cognizable under this factor.”¹⁰⁹ Although the Court engaged in this detailed factual analysis, it missed the opportunity to recognize the importance of the attribution, especially when analyzing the fourth factor of the fair use analysis.¹¹⁰ The fact that 2 Live Crew attributed the

101. *Id.* at 572.

102. *Id.* at 572-73.

103. *Id.*

104. *Id.* at 573, where the albums and compact discs identify the authors of “Pretty Woman” as Roy Orbison and Dees and its publisher as Acuff-Rose.

105. *Id.* at 574-94.

106. *Id.* at 580-81.

107. *Id.*

108. *Id.* at 586.

109. *Id.* at 591.

110. *Id.* at 590.

original “Oh, Pretty Woman” song should have diminished the market competition the parody could have had with the original.¹¹¹ The attribution of the original evidenced that 2 Live Crew was not seeking to compete commercially with the original. By placing emphasis on the attribution aspect of 2 Live Crew’s actions, the Court would have been more transparent in its assessment that 2 Live Crew was acting in a way that paid fair homage to the original work creator while creating something new with that work.

The Supreme Court has indicated that the impact the use has on the market is “undoubtedly the single most important element of fair use”¹¹² and that the market impact “is the most important, and indeed, central fair use factor.”¹¹³ As the most important factor in a fair use analysis, it seems especially critical that attribution, which can affect the marketability of original works both positively and negatively, should be part of a comprehensive look at the fourth factor of the fair use analysis.

Despite its failure to recognize attribution in the *Campbell* case, the Supreme Court indicated some willingness to view attribution as part of a copyright analysis in the *Dastar Corp v. Twentieth Century Fox*¹¹⁴ case. The plaintiff in *Dastar* sued for violations of the § 43 of the Lanham Act, which prevents a party from making a “misleading description of fact” that would cause confusion about the origin of goods, when Twentieth Century Fox sold a video that used unattributed copyrighted documentary footage belonging to Dastar.¹¹⁵ In determining that the lack of attribution did not violate the Lanham Trade-Mark Act, the Supreme Court indicated that the Act was not intended to create a right of attribution, but noted that any such right belongs under copyright law.¹¹⁶ This schizophrenic attitude towards attribution in the fair use analysis is a hallmark of every U.S. lawmaking body. The Supreme Court, like the lower federal courts, has looked at attribution with much ambivalence, and by doing so, has missed an opportunity to encourage an act that would not only assist a court in making the legal analysis of fair use, but would also resolve many practical concerns that have developed with the increased use of the internet as a source and distribution avenue for content.¹¹⁷

THE STRANGE CASE OF NEW YORK’S “HOT NEWS DOCTRINE” – AN ATTEMPT
BY A STATE TO PUNISH SUBSEQUENT CONTENT USERS FOR APPROPRIATING
CONTENT WITHOUT ATTRIBUTION

The largest six book publishing houses are located in New York, resulting

111. *Id.* at 573.

112. Harper & Row, 105 S. Ct. 2218, 2234 (1985).

113. Steward v. Abend, 495 U.S. 207, 238 (1990).

114. 539 U.S. 23 (2003).

115. *Id.* at 23-24.

116. *Id.* at 23

117. *See id.*

in many publishing dispute cases being filed in New York state courts.¹¹⁸ Perhaps that is why the peculiar “hot news doctrine” developed in that state’s courts. This doctrine appears to be the New York courts’ attempt to make up for the inability of copyright law to take into account the good or bad motivations of a defendant who has used the rights holder’s content without permission. Not surprisingly, because the “hot news doctrine” focused on the motivations of a defendant, attribution played a key role in its analysis. The life and slow demise of this doctrine is yet another example of the need for an attribution analysis in a consideration of fair use.

The “hot news doctrine” tort first appeared in a 1918 Supreme Court case – *International News Service v. Associated Press*.¹¹⁹ The *INS* court found that *INS*’ practice of copying *AP* stories and passing those stories off as its own was misappropriation of the *AP*’s work product.¹²⁰ Notably, at the time, the *AP* stories were not copyrightable, so creating a common law tort was the only way the Supreme Court could punish the *INS*’ actions.¹²¹ In 1938, the Supreme Court abrogated the “hot news doctrine” in *Erie Railroad Co. v. Tompkins*,¹²² finding that the federal courts did not have the authority to create federal common law in cases involving state claims based on diversity jurisdiction.¹²³

Despite the Supreme Court’s abandonment of the doctrine through *Erie*, 30 years later the New York state courts cited to the *INS* “hot news doctrine” to support developing a common-law misappropriations tort of unfair competition.¹²⁴ New York courts first adopted the doctrine in *Metro. Opera Ass’n Inc. v. Wagner-Nichols Recorder Corp.*,¹²⁵ a case in which the defendant reproduced recordings of operas without permission from the operas’ production company.¹²⁶ The production company and the broadcasting company that had acquired the rights to record the operas in question sued the defendants for unfair competition.¹²⁷ The court noted that the “hot news doctrine” was actually an extension of the unfair competition doctrine to cases that did not involve “palming off,” defined as selling the goods of another as one’s own.¹²⁸

Metro Opera broadened the then-defunct Supreme Court “hot news doctrine,” which the Supreme Court found only applied to breaking news stories and to claims that a defendant was reproducing any work of another

118. See Valerie Peterson, *New York City and Book Publishing: NYC is the Center of Books and Book Publishing in America*, ABOUT.COM (July 30, 3:05 PM), <http://publishing.about.com/od/Books/a/New-York-City-And-Book-Publishing.htm>.

119. 248 U.S. 215 (1918).

120. *Id.* at 894.

121. *Id.*

122. 304 U.S. 64 (1938).

123. *Id.*

124. 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950).

125. *Id.* at 491.

126. *Id.* at 486-88.

127. *Id.* at 488.

128. *Id.* at 491-92.

without that person's permission – a factual situation closely resembling copyright infringement. Indeed, after a handful of opinions that used the *INS* case as a basis for analyzing rights that appeared like a copyright analysis,¹²⁹ the U.S. Court of Appeals for the Second Circuit found that this strain of New York law, under most factual circumstances, should be a federal copyright claim.

This clarification came from a case that involved facts very similar to the *INS* case. In *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*,¹³⁰ brokerage firms sued an online financial news aggregator service for posting recommendations from large brokerage services regarding the buying and selling of various stocks without permission from the firms.¹³¹ The court found that the firms' claims brought as "hot news" misappropriations were copyright infringement claims in sheep's clothing and were, therefore, preempted by federal copyright law.¹³² Additionally, the court questioned whether flyonthewall.com's actions would actually create any financial harm to the brokerage firms involved.¹³³

The *Barclays* opinion noted that the "hot news" doctrine was born out of a desire by the courts to punish "business immorality," specifically a company's effort to pass off the work of another company as their own without permission from the other company.¹³⁴ The court noted that, unlike the *INS* case, flyonthewall.com was not claiming the recommendations as its own, but that the news aggregator was instead including "specific attribution to the issuing [firm]."¹³⁵ The court noted that this was akin to the socially acceptable news practice of reporting on basketball game scores or acting award recipients "with proper attribution of the material to its creator."¹³⁶

The New York courts' flirtation with the "hot news doctrine" demonstrates a desire to acknowledge the proper and improper use of the work of another in situations where permission has not been granted by the owner of the work. These opinions also illustrate the courts' desire to analyze the effect

129. See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (1955) (finding that the defendant phonograph record company could not sell copies of the recordings of certain artists when the plaintiff company had the exclusive right to sell the recordings at issue in the United States); *New York World's Fair v. Colourpicture Publishers, Inc.*, 1964 WL 8151 (N.Y. Sup. 1964) (using the *Metro. Opera* holding as a basis for enjoining a defendant post card distributor from selling postcards with pictures of buildings and exhibits owned by the New York World's Fair without the Fair's permission); *Dior v. Milton*, 9 Misc.2d 425 (1956) (citing the *Metro. Opera* holding as support for a finding that a fashion designer could sustain an unfair competition action against a defendant who sold the fashion designer's sketches without permission).

130. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).

131. *Id.* at 877-888.

132. *Id.* at 902-906.

133. *Id.* at 904-905.

134. *Id.* at 895 (quoting *NBA v. Sports Team Analysis & Tracking Sys.*, 939 F.Supp. 1071 (S.D.N.Y. 1996)).

135. *Id.* at 903.

136. *Id.* at 904.

that this proper or improper behavior had on the rightful owner's marketability for their work. This desire was, apparently, so strong that the New York courts created a new tort in order to deal with behavior that copyright law—as it has been treated by a majority of U.S. courts—does not address, but could address simply by incorporating an analysis of attribution.

If the court analyzed the attribution that occurred in the *INS* case or the *Barclays* case under the fourth factor of the fair use exemption as it is written today, the court would have reached the same result these courts reached, while creating a cleaner legal doctrine. In the *INS* case, *INS* failed to attribute the AP story to the AP,¹³⁷ and was in direct competition with the AP.¹³⁸ Therefore, failure to attribute would have weakened the marketability of the AP story, leading to a conclusion that the use was not fair use, just as the actual *INS* court found that *INS* was liable for “unfair competition.” In the *Barclays* case, theflyonthewall.com attributed wildly to the brokerage firms whose recommendations it used in its stories.¹³⁹ This attribution, the court noted, made the use akin to the socially acceptable use of attribution in news stories, and the financial damage to the brokerage firms was dubious.¹⁴⁰ A court considering these facts in its analysis of the fourth factor would likely come to the same conclusion. Proper attribution in this case likely did not affect—or may have assisted—the marketability of the firms by bringing notoriety to their recommendations. This analysis would cause the fourth factor to weigh in favor of fair use supporting a determination of no liability on the part of flyonthewall.com, just like the *Barclays* court found no liability on the part of flyonthewall.com.

ATTRIBUTION AS A FIX FOR THE FAIR USE PROBLEMS OF THE DIGITAL ERA

Perhaps no singular group of content creators and content users exemplifies the issues with the current state of copyright law better than journalists. The conflicting purposes behind copyright laws converge into troublesome waters for journalists every day. Journalists are creators in the business of creating.¹⁴¹ They are writers, photographers and artists who seek to make a profit off of their work, whether that profit is a small wage from a daily newspaper or a huge payout as an independent journalist who manages to scoop traditional journalism outlets.¹⁴² At the same time, journalists often repurpose

137. *Int'l News Serv.*, 248 U.S. at 229-31.

138. *Id.* at 241-46.

139. *Id.*

140. *Id.*

141. See Patricia Aufderheide & Peter Jaszi, *Copyright, Free Speech, and the Public's Right to Know*, CTR. FOR SOC. MEDIA (July 29, 2012, 11:15 AM), <http://www.centerforsocialmedia.org/fair-use/best-practices/copyright-free-speech-and-publics-right-know-how-journalists-think-about-fair-use> (detailing interviews with journalists that indicate that they are largely confused about copyright law and often do not report stories because of the uncertainty of the legalities involved in using Internet sources to build the story).

142. See *id.*

existing information into a new creation, which often conflicts with the copyright of other creators.¹⁴³ This conflict grows more common as journalists turn increasingly to the Internet and social media as the most efficient sources for readily accessible information on breaking news stories.¹⁴⁴ But the Internet is a pit of copyright thorns for journalists in that the material found there is a bevy of original work in a tangentially fixed form—work that by its very nature is automatically copyrighted at the time of creation.¹⁴⁵

Most journalists at traditional news outlets have had one or maybe two courses in their educational careers that have given them a small overview of copyright, but very few journalists have studied copyright in the depth necessary to make an informed judgment regarding the legality of using pictures, text, and other media found on the Internet to build news stories.¹⁴⁶ This lack of knowledge means that journalists are faced with one of two choices based on how risk adverse the particular journalists may be: (1) use information from the Internet and hope that the material is not copyrighted or that a defense, such as fair use, applies, or (2) avoid using material from the internet all together.¹⁴⁷ The latter option is perhaps the most troubling from a First Amendment perspective. If avoiding using Internet material means a story cannot be reported, not using the material may mean that the public misses out on news that it needs.¹⁴⁸

Journalists' role in society makes them one of the groups most frequently affected by the uncertainty in the copyright laws, and if this uncertainty is truly diminishing the amount of news that reaches the public, then the uncertainty is something worth revisiting. Additionally, much of what journalists do, such as news reporting and commentary, will be as the kinds of activities that would fall under fair use, so the fact that journalists are uncertain about their rights under the fair use exception is especially troubling. The solution for journalists and others like them may at first blush seem difficult to reach. Copyright reform that protects the rights of authors is often counterproductive to content

143. *See id.* (“[Journalists] regularly quote from government documents, think-tank reports, books and papers, memos and interviewee’s words—most of them copyrighted. State and local government documents, for example, are not necessarily in the public domain. Even federal documents may include copyrighted material or, if written by contractors, be copyrighted. Non-governmental sources, even if not published (for instance, a note or a diary entry), are all protected under the default copyright that is now national policy. As journalists increasingly move to a web-based environment, they meld images, music and video into new forms of multimedia -- work that contains multifaceted layers of copyright ownership rights.”).

144. *See id.* (“Journal Register Company Editor-in-Chief, Jim Brady said, “Before the Web, this type of thing fell on the business side of things with lawyers. It’s something that we never really had to think of. But once the web happened, every average journalist has to deal with it.”).

145. *See id.*

146. *See id.*

147. *See Aufederheide & Jaszi, supra* note 141.

148. *See id.* (detailing how journalists had related stories in which “work did not reach the public because of lack of clarity around rights—sometimes because of a journalist’s actions but often of gatekeepers such as editors or counsel overriding a journalist”).

users, and copyright reform that benefits content users often diminishes the rights of content creators. Because journalists are both users and creators of content, any change in the copyright laws would seem to cause a derogation of rights in one realm or the other. However, if journalists were confident that a court would take into consideration their efforts to attribute the use of any copyrighted work referenced in a news story in determining whether the use was a fair one, the fear of copyright infringement that may curtail the reporting of some stories would be reduced. And if journalists were confident that there was an incentive that subsequent users of their content would attribute the content to that journalist, the journalist could be assured that he or she would receive credit for the content and may even receive a level of notoriety the journalist would not have achieved without the attribution. In this way, courts considering attribution as evidence of fair use would benefit both the original content creator and the subsequent content user.

Journalists are not the only content creators affected by the lack of clarity in the fair use law for the digital world.¹⁴⁹ The amount of material posted on the Internet has far outpaced the amount of material available in the Library of Congress,¹⁵⁰ and that material continues to grow exponentially due to the popularity and prevalence of social media sites that make it extremely easy for someone to post information.¹⁵¹ This content comes in many tangible, and therefore copyrightable, forms including text, pictures, and video.

Occasionally, the best and most informative source of material actually comes from a random individual who shares information on a social media website. One of the most notable instances of this phenomenon occurred when a passenger on an airplane passing by Cape Canaveral during the launch of the final Endeavor shuttle took a fascinating photo of the shuttle after it cut through the top of the cloud cover.¹⁵² This passenger posted that picture to Twitpic, a website that allows users of the social-networking website Twitter to upload pictures.¹⁵³ Many news organizations wanted to use this picture to show this

149. See Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (stating confusion has not been confined to judges. Writers, historians, publishers, and their legal advisors can only guess and pray as to how courts will resolve copyright disputes).

150. See Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 769 (2006) (noting that “the Web has amassed at least fifty times more material than the Library of Congress” and “the number of distinct Web pages exceeded eight billion in 2005).

151. See Patry, *supra* note 3, at 3 (“The new markets created by the Internet and digital tools are the greatest ever: Barriers to entry are low, costs of production and distribution are low, the reach is global, and large sums of money may be made off of a multitude of small transactions.”).

152. See Charles Apple, *How the St. Pete Times scored that “viral” shuttle picture for A1 today*, AM. COPY EDITORS SOC’Y, (July 27, 2012, 2:30 PM) <http://apple.copysdesk.org/2011/05/17/how-the-st-pete-times-scored-that-viral-shuttle-picture-for-a1-today/>.

153. See Lyra Solocheck, *Photo of space shuttle Endeavor from a plane not the first, but it’s one we’ll remember*, TAMPA BAY TIMES, (July 17, 2012, 11:45 AM), <http://www.tampabay.com/blogs/latest-gadgets/content/photo-space-shuttle-endeavor-plane-not->

very interesting perspective of the very last shuttle launch.¹⁵⁴ At the time, Twitpic's terms of service were not clear as to who owned the copyright to the photo.¹⁵⁵ Some of the larger news organizations paid the passenger a small fee for the photo,¹⁵⁶ while others did not pay her at all.¹⁵⁷ But most of the media organizations that used her photo did attribute the photo to her.¹⁵⁸ This attribution, ironically, may have been more valuable to the passenger than any fees may have been. The passenger later noted that she had over 200,000 views of the picture, had added thousands of new Twitter followers to her Twitter account, and that she hoped to parlay her brief notoriety into a job offer.¹⁵⁹

People posting content on self-created public websites must surely be seeking some sort of non-monetary recognition for their efforts since that is typically the only recognition they will receive. Attribution gives that poster this recognition yet allows others to use the post to create new material. And as the economy has changed to an information-based economy, attribution, or the recognition of being the creator of certain material, has value for the creator. Attribution builds or breaks down the reputation of a creator, which can affect employment and marketability of the creator's product, a consideration that factor four of the fair use analysis already directs courts to evaluate.

At least two notable social media outlets have developed their own solutions to copyright issues that seem to use attribution as the core fix. YouTube has developed a symbiotic process for users of its site.¹⁶⁰ If copyright owners are concerned about their creative content being put up on YouTube without their permission, they can register that content with YouTube.¹⁶¹ When someone uploads a video to YouTube, sophisticated software scans the video for any matches to the registered content of copyright owners.¹⁶² If the software finds a match, YouTube will not post the video until the original copyright holder agrees to the use.¹⁶³ YouTube encourages copyright owners to allow derivative uses by citing money-making opportunities that have

first-its-one-well-remember.

154. See Sarah Kessler, *Space Shuttle Twitpic Woman Gets Paid, Credited & Snubbed By Media*, MASHABLE SOC. MEDIA, (July 22, 2012, 10:15 AM), <http://mashable.com/2011/05/17/space-shuttle-twitpic/>.

155. See *id.*

156. *Id.* The St. Pete Times paid the photographer \$100 to use her photo, and the Associated Press paid her \$500.

157. *Id.*

158. *Id.* Notably, ABC News did not credit the photographer, which the photographer found to be "not cool."

159. *How #Endeavor made @Stefmara Famous*, CHIRPSTORY, (July 22, 2012, 10:30 AM), <http://chirpstory.com/li/1475>.

160. Margaret Gould Steward, *How YouTube Thinks About Copyright*, YOUTUBE, (July 5, 2012, 5:25 PM), http://www.ted.com/talks/margaret_stewart_how_youtube_thinks_about_copyright.html.

161. *Id.*

162. *Id.*

163. *Id.*

developed for original copyright owners when such uses have been allowed.¹⁶⁴ One case that YouTube representatives often highlight is a song that fell off the music charts months before a video was released in which members of a wedding party danced to the song.¹⁶⁵ Because the original copyright holders of the song allowed the video of the wedding party to be posted, the song made a resurgence in the charts.¹⁶⁶

While the YouTube solution acknowledges the original copyright owner's rights and certainly could require subsequent users to acknowledge the original creator of the material as part of a mediated agreement between the copyright owner and the subsequent user, another site has developed a more passive process.¹⁶⁷ Pinterest is a website that allows users to "pin" or upload images of just about anything on the Internet onto their own page, which aggregates all of their "pinned" images.¹⁶⁸ Flickr is a website that allows users to easily upload photographs, and is often used by amateur and professional photographers to showcase their work. It did not take long for Pinterest to discover that some of the "pins" to Flickr pictures were questionable uses of content without the permission of the original content creator.¹⁶⁹ The two websites developed a solution that allows Pinterest users to easily upload to Flickr by clicking a specialized button that includes a reference to the original content creator and the location of the original content.¹⁷⁰ Representatives for the two websites indicated they felt that this process allowed content creators to use existing content to create their own Pinterest page while giving more visibility to the Flickr photographs than just Flickr can provide.¹⁷¹

The Creative Commons movement is further evidence that authors of material on the web desire attribution. Creative Commons is an organization whose express goal is to facilitate use of an author's work on the web by automating the permission process.¹⁷² Authors who register works with Creative Commons choose from a menu of prepackaged options regarding the types of permission they will grant people who want permission to use their work.¹⁷³ These requirements can range from the purpose the person will be using the work for to fees charged for use of the work.¹⁷⁴ After several years of

164. *Id.*

165. *Id.*

166. Steward, *supra* note 161.

167. Hayley Tsukayama, *Pinterest Addresses Copyright Concerns*, THE WASHINGTON POST, (July 22, 2012, 11:00 AM), http://www.washingtonpost.com/business/technology/pinterest-addresses-copyright-concerns/2012/03/15/gIQAijAFES_story.html.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *About - Creative Commons*, CREATIVE COMMONS, (July 22, 2012, 11:10 AM), <http://creativecommons.org/about>.

173. *About the Licenses - Creative Commons*, CREATIVE COMMONS, (July 22, 2012, 11:15 AM), <http://creativecommons.org/licenses/>.

174. *Id.*

giving authors the option of requiring or not requiring attribution, Creative Commons chose to make attribution an automatic requirement of any Creative Commons license.¹⁷⁵ The reason for this automatic requirement, Creative Commons says, is that over 97% of authors requested attribution as a requirement for their license.¹⁷⁶

CONCLUSION

While Congress, the courts, and academics debate the appropriate fix for the state of United States copyright laws, it appears that the solutions the online world seems to be developing and content posters seem to be seeking all involve attribution – an acknowledgement of the original copyright owners’ rights. The Flickr/Pinterest solution certainly functions more like traditional attribution than the YouTube model, but both models are based on the idea that use of material with attribution promotes the needs of both parties. The original copyright holder gets exposure, and the derivative user can create new material based on the original copyright holder’s material.

Attribution is not by any means a bullet-proof shield that will allow rampant copyright infringement. As it is only one factor considered by courts in a multi-factor analysis, attribution will be considered in light of all the facts of a case. And as the *Holt* case indicates, attributing material to its original owner comes with a certain level of responsibility. If attribution misleads – such as using a quote promoting one idea as a way to promote another idea – that attribution can negatively affect the marketability of the original work and can cut against a claim of fair use.

The economic rights reasoning behind adding attribution into consideration to the fourth factor of the fair use analysis is supported by the economic rights inherent in attribution. But there is no denying that a robust recognition of attribution by the courts does create a policy benefit as well that is akin to the “moral rights” other countries have sought to protect with a fair use analysis. In an age where the building blocks of an economy, an informed citizenry, and social interaction are the written and spoken word broadcast to millions over a free and easily usable distribution system like the Internet, the good citizenship of users of those building blocks is important to quantify and reward. Allowing content users to build their own unique content on the back of the content of others is a good thing in the Internet realm, and it can work for both authors and users as long as the efforts of individual stakeholders are acknowledged. Although this policy treads on the ground of “moral rights”, it is also a societal benefit born out of the economic rights analysis of attribution.

If courts were to consider attribution in the analysis of fair use, they would also be protecting the societal actors that the fair use exception explicitly

175. Glenn Otis Brown, *Announcing (and explaining) our new 2.0 licenses*, CREATIVE COMMONS, (July 22, 2012, 9:30 AM), <http://creativecommons.org/weblog/entry/4216>.

176. *Id.*

references – academics and journalists. The Internet makes these actors difficult to recognize, but attribution can help identify them and provide evidence that a use of copyrighted content falls within the bounds of the fair use doctrine. Attribution has always been a part of copyright law, despite Congress' and the courts' evident efforts to ignore attribution. Surely the time has come to allow attribution a place in the analysis of a fair use exception in order to assist the courts and content users in navigating this uncertain terrain.