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ILLUMINATING PATTERNS: PREDICTING FAIR USE OUTCOMES IN COPYRIGHT LAW

TYLER TRAIN†

The ostensible uncertainty of the fair use doctrine in copyright law has led to well-documented frustration from industry professionals. A closer inspection of court opinions, however, can reveal patterns not evident through a basic reading of the four factors statutorily enacted for fair use under 17 U.S.C. § 107. Recently, Michael Donaldson, a well-respected copyright clearance attorney in Los Angeles, California, became the first professional to identify a concrete pattern for what he called a "Safe-Harbor" fair use for one "cluster" of works—non-fiction—in his article Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works. This article builds on Refuge and has three major objectives: (1) grouping potentially infringing works by their characteristics as either creative, informational, or functional works; (2) suggesting a slight shift in Mr. Donaldson's breakthrough analysis, applying it to creative works instead of non-fiction; and (3) identifying a completely novel pattern and analysis for functional works.

I. INTRODUCTION

"Fair use is one of the most unsettled areas of the law. The doctrine has been said to be 'so flexible as virtually to defy definition.'"[1]

This quote from one federal circuit judge speaks for the large contingent of lawyers and creators alike who face frustration in the ostensible uncertainty of courts’ determinations of the fair use doctrine in copyright law.2 The fear alone

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2. Id. See also Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (stating the fair use doctrine is "the most troublesome in the whole law of copyright"); Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. Pa. L. Rev. 549, 622 (2008) ("[C]ourts tend to apply the factors mechanically and they sometimes make opportunistic uses of the conflicting precedent available to them. These are systematic failures that require intervention.").
within such uncertainty has the power to freeze the very expression that copyright law was constitutionally enacted to protect.\(^3\) Several scholars who have recognized this fact have attempted to resolve the uncertainty by considering the existence of patterns within specific "clusters" of works.\(^4\) However, most have failed to set forth concrete patterns for any of these clusters until recently, when entertainment attorney, Michael Donaldson, wrote the article *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works* ("Refuge").

In *Refuge*, Mr. Donaldson laid out a simple three-question test ("the Three-Question Test").\(^5\) Mr. Donaldson originally intended for the Three-Question Test to analyze the cluster of "non-fiction works."\(^6\) As part of his analysis, Mr. Donaldson instructed practitioners to look beyond the language of the case law and instead shift the focus to the subjects of the litigation.\(^7\) He encouraged a comprehensive, analytical comparison of the new work to the underlying work to foster a better understanding of what the courts were presented with before writing their opinions.\(^8\) Approaching the issue from this angle, Mr. Donaldson contended, could go a long way toward providing clarity to outcomes widely considered unpredictable.\(^9\)

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3. See Laure Hermand-Schebat, *John of Salisbury and Classical Antiquity*, in *A COMPANION TO JOHN OF SALISBURY* 180, 211 (Christophe Grellard & Frédérique Lachaud eds., 2015) (citing JOHN OF SALISBURY, *THE METALOGICON OF JOHN OF SALISBURY: A TWELFTH-CENTURY DEFENSE OF THE VERBAL AND LOGICAL ARTS OF THE TRIVIUM* 167 (Daniel D. McGarry trans., Univ. of Cal. Press 1955)) ("Bernard of Chartres used to compare us to dwarfs perched on the shoulders of giants. He pointed out that we see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature."). (emphasis added); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 451 (2007) (stating "[the predictable result of [fair use] uncertainty is a chilling effect on forms of creative expression that build upon the works of others].") See also Kirby Ferguson, *Everything is a Remix*, YOUTUBE (June 25, 2012), https://www.youtube.com/watch?v=cOGpmA4saEk ("Creation requires influence."). Many creative works build upon other preceding works. Without the ability to draw from works that have come before, the creative process would be severely hindered. For instance, this article alone heavily on the ideas of Michael Donaldson. See generally Michael Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. COPYRIGHT SOC’Y U.S.A. 477 (2012) (suggesting a three-question test for analyzing non-fiction works in the fair use context). Sir Isaac Newton once wrote, "[I]f I have seen further, it is by standing on the shoulders of giants," when explaining how he built his work upon the work of others. Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1675). However, even Newton’s quote required the inspiration of Bernard of Chartres.

4. The specific terminology "clusters" was coined by Pamela Samuelson in her article, *Unbundling Fair Uses*. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009). See Donaldson, *supra* note 3, at 479 n.1 (listing academics who have discussed various patterns or trends in fair use cases “but have been unsuccessful in providing practitioners and courts with a dependable, concise statement of such patterns for any category of uses”).


6. *Id.*

7. See *id.* at 479-80 ("[I]n order to find the pattern, one must focus on the items that are the subjects of the litigation, rather than the language of the cases themselves.") (emphasis added).

8. During lunch, Mr. Donaldson made his entire office watch the full-length feature film, *Made in America*, to better understand the context for one short scene in the film that became the subject of litigation in *Jackson v. Warner Bros.* Interview with Michael Donaldson, Managing Partner, Donaldson + Callif, LLP, in Beverly Hills, Cal. (Oct. 5, 2016) [hereinafter Donaldson Interview].

9. See NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 66 (Oxford University Press 2008) ("Given the doctrine’s open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify.").
Much of the confusion in fair use stems from the statutory language of the Copyright Act’s four-factor test. The statute asks for a determination of (1) the purpose of the use in the new work; (2) the nature of the underlying work; (3) the amount taken from the underlying work in the new work; and (4) the market effect that the use in the new work has on the underlying work. Because Congress did not include any indication of how to weigh these factors, however, courts have been left to skew some of these determinations into an almost unidentifiable analysis. To those well versed in the complex legal system of copyright law, the four-factor test is merely an ex post vehicle for a decision predetermined by court opinion. It is no secret within this community that a literal reading of the four-factor test would be unhelpful at best and downright misleading at worst.

Mr. Donaldson’s proposition takes the analysis one step beyond even a literal reading of the courts’ language into an examination of the “items” behind the litigation. It may well be that patterns tend to reveal themselves best when doing a little bit of both. To get inside the judges’ minds, it is beneficial to read what they wrote and see what they saw. This practice can help sort the many different clusters that have been previously identified into a few basic characterizations. When works are characterized rather than categorized into clusters, patterns are easier to identify and more broadly applicable.

In preparation for this article, the patterns for these characterizations were discovered and tested through a wide range of fair use cases. The research methodology was similar to that of Mr. Donaldson and Professor Barton Beebe. However, where Mr. Donaldson parsed out any cases not considered to involve non-fiction works, this article picks up where he left off by exploring every fair use case recognized by the Copyright Office’s Fair Use Index.

This article begins by suggesting a change in the way certain works are labeled. The first part of the article includes an explanation of the cluster theory as well as an introduction and comparison to the newly proposed characterization.
theory. In the next part, this article explains Mr. Donaldson’s analysis and suggests a shift in how to apply it more effectively to fair use cases. The third part of this article introduces a completely novel pattern and analysis for a newly discovered group of works. This article concludes by explaining which patterns have been discovered and which are still waiting to be unveiled.

II. RETHINKING THE LANDSCAPE

“If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair.”18

A. MULTI-PART CLUSTER THEORY

Professor Samuelson’s cluster theory of predictability presents a ‘pie in the sky’ ideology to many in the legal community even today.19 Yet, this suggestion is a key building block to the brave few daring enough to use the fair use doctrine as a predictable staple in their practice. Professor Samuelson’s suggestion is precisely what Mr. Donaldson built on in selecting the cluster of non-fiction works he used to identify a pattern that would lead to a reliable prediction of the outcome of each particular case.20 In labeling his cluster with a word as broad and as polarizing as “non-fiction,” Mr. Donaldson implicitly suggested that works are to be divided into two categories—fiction and non-fiction.21

This is not an outlandish place to start, as these are commonplace labels in the community.22 However, these tend to be equivocal categories, suiting literary works well but causing confusion as to where to draw the line for other works.23

18. Samuelson, supra note 4, at 2542.
19. Id. at 2542 n.12.
21. Id. at 486.
23. Take, for instance, a painting. As with beauty, drawing the line between fiction and non-fiction is largely in the eye of the beholder. One may suggest that non-fictional paintings are strictly limited to historical realist works, and anything that is not an accurate depiction of a real-world scene (such as Emanuel Leutze’s Washington Crossing the Delaware) must be considered fictional. Others may argue a broader view that non-fictional paintings may extend to works inspired by real world scenery but that deviate from realism such as Picasso’s Blue Period works (see The Old Guitarist) or even as far as post-impressionist paintings such as Vincent van Gogh’s Starry Night. This broad view may only find fiction in styles such as surrealism (see Salvador Dali’s Persistence of Memory) or abstract expressionism (see Jackson Pollock’s No. 9, 1948). Still others could look at the subjective viewpoint of the artist in determining when the painting departed from an actual real-world event. Consider Leonardo Da Vinci’s Mona Lisa; it has been rumored that the painting began as a self-portrait (a non-fiction real world scene) that evolved layer by layer into a portrait of a woman, “Mona Lisa” (never an actual scene in the real world). See Nick Watt & Ammu Kannampilly, Is Da Vinci’s Mona Lisa a Self-Portrait?, ABCNEWS (Jan. 26, 2010), http://abcnews.go.com/GMA/leonardo-da-vincis-mona-lisa-self-portrait/story?id=9662394 (addressing the possibility of a hidden layer comprised of a self-portrait of Leonardo Da Vinci within the Mona Lisa). Should the original self-portrait be considered a work of non-fiction, while the final version be considered fictional? If so, at what layer did the work transition from non-fiction to fiction? Some
This is another reason why the characterizations used in this article provide for a simpler and broader analysis. It is exceedingly important to note that these characterization considerations must be limited to the new work that uses an asset from an underlying work—not the underlying work itself.\textsuperscript{24} The new work may or may not even be copyrightable in its own right, but that discussion is not relevant to its characterization and is outside the scope of this article.

\section*{B. Three-Part Character Theory}

\subsection*{1. Redefining Labels}

When redefining labels for new works, the characterizations were borrowed from language in the courts’ discussion of the second statutory factor, the nature of the work. The new characterizing labels became \textit{functional} works, \textit{informational} works, and \textit{creative} works.\textsuperscript{25} Functional works are those of which the primary purpose is to provide a practical service for the user such as search engines and databases, home video recording devices, and music file sharing services.\textsuperscript{26} Creative works are those of which the primary purpose is to capture the author’s artistic expression such as motion pictures, paintings, novels, and songs.\textsuperscript{27} Finally, informational works are those of which the \textit{only} purpose is to transmit factual information to another such as promotional flyers, awareness campaigns, and news reporting.\textsuperscript{28}
Sometimes, although rare, a work will blend the technical traits of functional works with the artistic traits of creative works, such as architectural blueprints. However, functional and creative works tend to contrast each other and generally do not blend. Conversely, works that transmit information are very likely to exhibit qualities consistent with either functional or creative works. For that reason, true informational works are purposely defined as those that only transmit information. Should a work transmit information in a practical or technical manner, it should be analyzed as a functional work. If the work transmits information in an imaginative or expressive way, however, it may be characterized as creative. It is important to understand the distinction between works that provide information in functional or creative ways.

2. Determining Characterization

Creative works generally have imaginative traits often created by artists such as novelists, filmmakers, and painters. A good place to start in characterizing a creative work is to first ask whether the new work in the case required some artistic expression or imagination. Even important social change documentaries demand filmmakers' expression and creativity to bring the information that they are transmitting to life, tilting these types of borderline cases to the creative side.
Conversely, functional works tend to be more technical in nature and offer some practicality to the user. A good indication of functional practicality is when the user must refer to another work or interact with the work to appreciate its full benefit. For example, a reference index to a popular newspaper is meant for the practical use of quickly locating desired subject matter in the newspaper.\textsuperscript{35} Also, a search engine database requires users’ interaction by inputting a search query into the search engine to reveal relevant search results.\textsuperscript{36} These types of cases are better identified as functional works.

However, some works simply do not have such traits and must be characterized as informational. As opposed to functional works, informational works tend to stand alone, transmitting information independently without requiring the user to interact with the work or refer to another work. In \textit{Reyes v. Wyeth Pharmaceuticals, Inc.},\textsuperscript{37} a sculptor sued a pharmaceutical company for using a photo of one of her glass sculptures in an advertisement for the company’s Rheumatoid Arthritis awareness campaign.\textsuperscript{38} The new work in this case, the campaign advertisement, sits close to the middle of the road, because it exhibits neither noticeable creative elements nor evidence of practical uses—its only purpose is to transmit information. Therefore, neither analysis works particularly well for this type of case, and even the court offered a tepid opinion for its decision against fair use.\textsuperscript{39} Ultimately, the first step of the analysis is to identify either definitive expressive elements for creative works or practical elements for functional works in order to continue on with question sets explained hereafter.

\textbf{III. ANALYZING CREATIVE WORKS}

In \textit{Refuge}, Mr. Donaldson set out to create a “Safe Harbor” fair use for any non-fiction work by laying out the Three-Question Test.\textsuperscript{40} He suggested that if all three questions were answered in the affirmative, then the use could be considered low risk.\textsuperscript{41} The three questions are as follows:

\begin{itemize}
\item \textsuperscript{35} \textit{See generally N.Y. Times Co. v. Roxbury Data Interface, Inc.}, 434 F. Supp. 217 (D.N.J. 1977) (demonstrating where the new work was the “Personal Name Index to the New York Times Index”).
\item \textsuperscript{36} \textit{See White v. West Publ’g. Corp.}, 29 F. Supp. 3d 396, 398 (S.D.N.Y. 2014) (holding where the new work was a searchable database of legal documents created to facilitate legal research).
\item \textsuperscript{37} \textit{Reyes v. Wyeth Pharm., Inc.}, 603 F. Supp. 2d 289 (D.P.R. 2009).
\item \textsuperscript{38} \textit{Id. at 293}.
\item \textsuperscript{39} \textit{See id. at 300} (finding two of the four statutory factors to be neutral).
\item \textsuperscript{40} Donaldson, \textit{supra} note 3, at 488.
\item \textsuperscript{41} \textit{Id.}.
\end{itemize}
1. *Does the Asset Illustrate or Support a Point That the Creator Is Trying to Make in the New Work?*

The essence of this first question is whether the defendant’s use illustrated or supported a point. In defining the segment “illustrate or support a point,” Mr. Donaldson wrote:

> If a filmmaker, author, or artist is using original material to make a point through voiceover, interviews, or on-screen cards, and is using the material to illustrate the point he or she is making, the answer to the first question will be “yes.” If, however, the filmmaker or author is not using any original material to make a point, but is merely relying on assets owned by others, the answer to the first question would be “no.”

The use may either make the point itself by “illustration,” or simply “support” a larger point that the creator is trying to make elsewhere in the work. This question relates to the first statutory factor in 17 U.S.C. § 107 but narrows the analysis by requiring that the purpose be in support of a point in the new work. The United States Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, borrowing from Judge Pierre Leval’s *Toward a Fair Use Standard*, adopted the “transformativeness” analysis for determining the purpose of the use. Mr. Donaldson caught onto the fact that courts would generally accept a use as transformative if it tied into a point that the creator was trying to make.

2. *Does the Creator of the New Work Use Only as Much of the Asset as is Reasonably Appropriate to Illustrate or Support the Point Being Made?*

Mr. Donaldson especially noted the third statutory factor of 17 U.S.C. § 107 that this second question reflects on. As written in the statute, the third factor reads, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Nowhere does the statute ask for a consideration of how the amount taken relates to the purpose of use. Over time, however, courts had twisted the meaning of this statutory factor, requiring it to be considered alongside the first factor. Recounting a discussion with Judge Leval, Mr.

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42. *Id.* at 486.
43. *Id.* at 488.
46. *Id.* at 490.
48. *Id.*
49. The Supreme Court opened the floodgates to this broad statutory reading in *Campbell* with the often-cited quote, “the extent of permissible copying varies with the purpose and character of the use,” which has set a frequently followed precedent among the lower courts. *Campbell*, 510 U.S. at 586-87. *See also* Bouchat v. Balt. Ravens P’ship, 737 F.3d 932, 943 (4th Cir. 2013) (demonstrating subsequent cases which have quoted to the proposition from *Campbell* to consider the purpose alongside the character.
Donaldson credited the father of transformativeness with inspiring him to use the elastic standard of "reasonably appropriate." Mr. Donaldson acknowledged that for years his firm used the more restrictive standard of the use being "necessary" to illustrate or support the point. After a careful review of the case law, he recognized that courts would offer wide deference to the amount of the underlying work being used (even up to copying entire works) when the amount taken was reasonable to further the creator's point.

3. **Is the Connection Between the Point Being Made and the Asset Being Used to Illustrate or Support the Point Clear to the Average Viewer?**

The final question in the test also had its roots in the first statutory factor analysis of transformativeness. This question tested the strength of the creator's point by requiring its connection to the use to be apparent to the "average viewer." The analysis that follows for functional works requires a consideration of the "interested public," which parallels Mr. Donaldson's concept here of the "average viewer" for works that can be "viewed." Either way, it seems that there are strong patterns when it comes to the public's relationship with the work.

**A. SHIFTING THE SCOPE OF THE THREE-QUESTION TEST**

Make no mistake—this fundamental discovery of an identifiable pattern for a particular cluster has the potential to transform the perception and practice of fair use in copyright law. Mr. Donaldson's Three-Question Test can be effective for its intended purpose of analyzing non-fiction works as evidenced by the substantial appendix of analyzed non-fiction cases included at the end of *Refuge*. With a slight shift in the scope of the "cluster" being analyzed, however, the same Three-Question Test can be applied more broadly and with less ambiguity. Rather than focusing on non-fiction works, Mr. Donaldson's approach is better suited for use on creative works.

Functional works make up a large group of non-fiction works; however, they will rarely pass the Three-Question Test regardless of whether a court ultimately

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50. Donaldson, supra note 3, at 489.
51. Id.
52. Id. at 486.
53. Id.
54. Id.
55. If these patterns can increase the certainty of fair use outcomes, this could offer justification for more reliance on the fair use doctrine in general.
56. Donaldson, supra note 3, at 553.
57. See Donaldson Interview, supra note 8 (suggesting that Mr. Donaldson agreed with the idea that creative works may be a better fit for his analysis).
finds fair use.\textsuperscript{58} Even some informational cases that involve non-fiction works should not necessarily invoke the Three-Question Test.\textsuperscript{59} Conversely, fictional creative works can lead to some of the ripest cases for analysis under the Three-Question Test, yet they are wholly left out of the Refuge article.\textsuperscript{60} In fact, Mr. Donaldson unintentionally laid the groundwork for the shift to creative works himself by consistently referring to potential infringers as creative professionals such as "filmmakers, authors, and artists" and limiting the public to "viewers" instead of using more broad terms such as users or consumers.\textsuperscript{61} Moreover, the majority of cases that Mr. Donaldson used to prove the Three-Question Test involved creative new works.\textsuperscript{62} When viewed in this light, the shift from non-fiction to creative is natural.

B. CASE LAW SUPPORTS A SHIFT IN SCOPE FOR THE THREE-QUESTION TEST

This section will begin by exploring limitations of the Three-Question Test when applied to functional or informational works included in the "non-fiction" cluster. Although this article will define an affirmative analysis for functional works infra, the first case, New York Times Co. v. Roxbury Data Interface, Inc., concerns a functional non-fiction work, which was ruled fair use but could likely fall outside of the non-fiction Safe Harbor.\textsuperscript{63} To note, this case is not included for any reason of disproving the Three-Question Test.\textsuperscript{64} Instead, it is introduced here as a "gray area" case to be revisited later in the functional analysis section as an example of how the test explained therein can be an advantageous alternative when these types of cases come up. The next case, Reyes v. Wyeth Pharmaceuticals, Inc., covers an informational non-fiction work, which was ruled against fair use but would arguably pass the Three-Question Test and fall under

\textsuperscript{58} Functional works tend to be informative and factually based works such as reference materials, architectural designs, and search engines, which generally lack fictional imagination.

\textsuperscript{59} See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 91 (2d Cir. 2014) (holding fair use when the defendant, a news service, made available online the entire transcript of the plaintiff's company conference without any commentary).

\textsuperscript{60} See generally Donaldson, supra note 3 (demonstrating the lack of discussion in the Refuge article on fictional creative works under analysis of the Three-Question Test).

\textsuperscript{61} Id.


\textsuperscript{64} Refuge contains an entire section titled "The Waters Between the Safe Harbor and the Gray Area" discussing the instances where a new work may fall outside of the Safe Harbor yet still be ruled a fair use of the underlying asset. Donaldson, supra note 3, at 524.
the non-fiction Safe Harbor.\textsuperscript{65} This case is included to suggest that some informational works, while entirely non-fiction, may not cater to the Three-Question Test as well as the fictional cases that follow. Finally, this section will conclude by comparing \textit{Amsinck v. Columbia Pictures Industries, Inc.}\textsuperscript{66} with \textit{Ringgold v. Black Entertainment Television, Inc.}\textsuperscript{67} demonstrating the benefits of the Three-Question Test when applied to creative fictional works, which are currently excluded from the Safe Harbor analysis.

\textit{1. New York Times Co. v. Roxbury Data Interface, Inc.}

In this case, Plaintiff New York Times Co. ("Times Co."), publisher of \textit{The New York Times} newspaper, sued Defendant Roxbury Data Interface, Inc. ("Roxbury") for copyright infringement of the "New York Times Index" ("the Times Index").\textsuperscript{68} Beginning in 1863, Times Co. began publishing the Times Index annually, which listed data appearing in \textit{The New York Times} with citations correlating to the pages and columns where the data appeared in the newspaper.\textsuperscript{69} At the time of the case, Roxbury had just begun publishing the "Personal Name Index to the 'New York Times Index' 1851-1974" ("the Personal Name Index").\textsuperscript{70} In producing the Personal Name Index, Roxbury perused through the Times Index, extracted all personal names from the list of data, and created its own alphabetized list of the personal names included in the Times Index.\textsuperscript{71} However, instead of copying the Times Index's citations to \textit{The New York Times} newspaper, Roxbury created its own citations corresponding to the Times Index itself.\textsuperscript{72} Subsequently, Times Co. claimed copyright infringement of its compilation of personal names in the Times Index.\textsuperscript{73}

As Mr. Donaldson suggested in \textit{Refuge}, the Three-Question Test analysis applies to non-fiction works.\textsuperscript{74} Here, the new work at issue is Roxbury's Personal Name Index. This is a highly factual writing, absent any fictional imagination, and meant to function as a reference guide for users to quickly identify personal names in the Times Index. The Personal Name Index, therefore, must fit into the non-fiction cluster required in order to proceed with the analysis.

\begin{itemize}
\item \textsuperscript{65} Reyes v. Wyeth Pharm., Inc., 603 F. Supp. 2d 289 (D.P.R. 2009).
\item \textsuperscript{66} 862 F. Supp. 1044 (S.D.N.Y. 1994).
\item \textsuperscript{67} 126 F.3d 70 (2d Cir. 1997).
\item \textsuperscript{68} \textit{N.Y. Times Co.}, 434 F. Supp. at 218.
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.} at 219.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{See id.} at 220 ("Defendants, however, copied only the names appearing in the Times Index and correlated those names to citations of the multivolume New York Times Index on which the names appear.").
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} Donaldson, \textit{supra} note 3, at 488.
\end{itemize}
a. Did Roxbury Use the Times Index to Illustrate or Support a Point That the Roxbury Was Trying to Make in the Personal Name Index?

Here, Roxbury’s use consisted of carving down Times Co.’s list of data to only include personal names. This is similar to an author relying on assets owned by others (Times Co.’s list of personal names within the larger compilation) without introducing any original material. The corresponding citations are not original either because Roxbury derived them from the existing Times Index. Further, Roxbury’s use showed no effort to illustrate or support some particular idea or argument, but rather, to provide a practical tool for users to refer to. Because Roxbury relied heavily on Times Co.’s compilations in the Times index without introducing original material, the use would not seem to illustrate or support a strong point. In this case, the analysis could stop here and the Personal Name Index would likely involve a “gray area” use as described in Refuge. However, the outcome may become clearer under the functional test explained infra.

2. Reyes v. Wyeth Pharmaceuticals, Inc.

This case, mentioned briefly supra, involved a sculptor, Plaintiff Martha Reyes (“Reyes”), who brought action for copyright infringement of her sculpture, “Watcher of the Fire” (“the Watcher”). After completion of the Watcher, Reyes gave the sculpture to Defendant Felix Cordero to photograph it. While in Cordero’s possession, the Watcher was featured in an advertisement for co-defendant Wyeth Pharmaceuticals, Inc.’s (“Wyeth”) public service health campaign focused on rheumatoid arthritis (“RA”) awareness. The advertisement contained a picture of a woman holding the Watcher in her hands. The following text overlaid the photo in large letters: “I was born to create... but I was diagnosed with [RA].”

Upon recognizing her sculpture in the advertisement, Reyes brought suit against Wyeth and Cordero for their alleged infringing use of the Watcher as photographed in the advertisement. The defendants claimed they made fair use of the Watcher, submitting that it “intended for the sub-campaign to raise awareness to the existence of RA and to motivate people suffering from the disease...
to seek information and treatment.”86 The court disagreed, ruling against fair use.87

As to whether this case is relevant to the non-fiction cluster, the new work to be analyzed here was Wyeth’s advertisement. Although the underlying work was a highly creative work, the advertisement itself was a highly factual and informational work, raising awareness for a public health concern.88 There were no signs of fictional imagination, so the advertisement was clearly a non-fiction work. Additionally, because the only purpose of the advertisement was to transmit information about RA, this would sit neatly with other informational works.

a. Did Wyeth Use the Watcher to Illustrate or Support a Point That Wyeth Was Trying to Make in Its Advertisement?

As evidenced by Wyeth’s declaration, the point of the advertisement was to raise awareness of RA and motivate people to seek treatment.89 The court expressly noted that Wyeth’s use of the Watcher sculpture, as depicted in the advertisement, supported this point of awareness and treatment.90 The court also acknowledged that the use of text in Wyeth’s advertisement made for a stronger point beneficial to a fair use determination.91 Based on the court’s language, it is reasonable to answer this first question in the affirmative.

b. Did Wyeth Use Only as Much of the Watcher as Was Reasonably Appropriate to Illustrate or Support the Point Being Made?

Here, Wyeth used almost the entire sculpture in the advertisement except for small portions cropped out of the top and bottom.92 This question, however, only asks that the amount taken be “reasonably appropriate” to support Wyeth’s point. In discussing the third factor, the court explicitly wrote that Wyeth “could not have been communicated as effectively” without using the entire sculpture.93 Thus, according to the court, Wyeth’s use would even pass the more restrictive

86. Id.
87. Id. at 300.
88. See id. at 298 (“Defendants do not dispute that the Watcher is a creative work of art.”).
89. See id. at 296 (“The Court notes... that the purpose behind the advertisement itself is to raise awareness concerning RA and treatment options available for people suffering from RA.”).
90. Id.
91. See id. (“The implicit message of the image combined with the text is that the woman depicted... suffers from RA and yet, because of treatments currently available, she was not inhibited from creating the Watcher.”). See also Donaldson, supra note 3, at 545 (discussing Lennon v. Premise Media Corp. where the filmmakers’ use of the John Lennon song “Imagine” was bolstered as Safe Harbor fair use by the inclusion of the lyrics in text at the bottom of the screen).
92. Reyes, 603 F. Supp. 2d at 293.
93. See id. at 299 (“Given that defendants chose to present an artist exhibiting art, their message could not have been communicated as effectively by obscuring or including only part of the sculpture. Thus the Court finds that the defendants did not copy more of the Watcher than was necessary to communicate their message.”).
“necessary” standard, so the use would certainly be “reasonably appropriate” to support Wyeth’s point. The answer to this second question must be “yes.”

c. Is the Connection Between the Use of the Watcher and the Point That Wyeth Was Making Clear to the Average Viewer?

Because Wyeth’s advertisement was intended as a public service campaign, the average viewer would likely be part of a broad group—probably extending to anyone viewing the advertisement. Unlike the previous two questions, the court did not speak directly to this question. However, two points could be made in support of this question. First, because this was a straightforward advertisement with explicit, first person text explaining the mindset of the woman holding the sculpture, it is likely that the average viewer would appreciate the point Wyeth was trying to convey. Second, the court affirmatively stated that Wyeth’s use of the Watcher did, in fact, “[allow] them to communicate their overall message.”

This is the closest evidence of the court acknowledging the effectiveness that Wyeth’s use of the Watcher had in communicating Wyeth’s point to the average viewer. Hence, the answer here would also probably be “yes.”

Despite strong evidence in the court opinion to answer all three questions affirmatively, the court ruled against fair use in this case. To be clear, the inclusion of Reyes in this article is not intended to disprove the Three-Question Test entirely but merely to show its limitations for some non-fiction works. Yet, while this section narrows the application of the Three-Question Test, the next section broadens it, thus, creating the “shift” referred to supra.

The next two cases cover litigation arising from copyrighted artwork used as set dressing in two creative works: a movie and a television show. The defendants’ uses may seem very similar from a quick reading of the facts, but the courts ruled the first case for fair use and the second case against fair use. Although both new works are fictional in nature, a firm grasp of Mr. Donaldson’s Three-Question Test differentiates the fine line between the two creative works at issue in the following cases. As Mr. Donaldson instructed in Refuge, the factual backgrounds included below are based on actual viewings of the allegedly infringing scenes, which afford a deeper fair use analysis than just a reading of the court opinion.

94. Id. at 293.
95. Compare Reyes, 603 F. Supp. 2d at 292 (demonstrating the advertisement contained “a picture of a woman holding a rectangularly shaped stained glass sculpture”) with Donaldson, supra note 3, at 529 (discussing the painting in Blanch as an example for a work without an obvious connection to the point, because it was an abstract work of art that made it difficult for the average viewer to draw any point from at all).
96. Reyes, 603 F. Supp. 2d at 299.
97. Id. at 300.
98. See Donaldson, supra note 3, at 479-80 (citing Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901)) (“[In order to find the pattern, one must focus on the items that are the subjects of the litigation, rather than the language of the cases themselves. Our law firm has developed a library of non-fiction films, books, and other works that were the subject of various litigations, beginning with the two-volume biography of George Washington, which was the subject of Folsom v. Marsh, through the latest cases as they are being filed. An unavoidable pattern popped out of the pages and off the screen.”).
1. **Amsinck v. Columbia Pictures Industries, Inc.**

In *Amsinck*, Plaintiff Carola Amsinck, owner of the copyrighted artwork on a child's mobile, sued Defendant Columbia Pictures Industries, Inc. ("Columbia"), a motion picture studio, for using the mobile as set dressing in a movie.\(^9\) Columbia's film, *Immediate Family*, was about a married, upper-class couple attempting to adopt a child from a pregnant teenage girl named Lucy.\(^1\) During the scene that gave rise to the litigation, Lucy was on the porch of the married couple's house and noticed the mobile in an upstairs window.\(^2\) This prompted her to go to the room, which the couple was preparing for the new baby, and spin the mobile as she pondered what life would be like for her baby in this environment.\(^3\) The room was empty except for the mobile, which was decorated with bear artwork (Amsinck's disputed artwork), and matching bear wallpaper.\(^4\) The mobile itself was a focal point in the scene, even becoming the only object in the scene for a moment when Lucy walked away, and it gave the impression of a baby nursery while still leaving the room open to imagination.\(^5\) Columbia argued fair use, and the court agreed ruling against Amsinck.

a. Did Columbia Use Amsinck's Artwork to Illustrate or Support a Point That Columbia Was Making in the Movie?

Columbia first used the mobile as the object that alerted Lucy to the window of the baby's room and prompted her to go to the room.\(^6\) Lucy then interacted with the mobile by spinning it while trying to imagine what it would be like for her child to grow up there.\(^7\) Here, Columbia was supporting the point that the room was still bare and had many possibilities, but the mobile was the first piece toward filling the room with similar nursery items. The answer to this first question would be "yes."

b. Did Columbia Use Only as Much of Amsinck's Artwork as Was Reasonably Appropriate to Illustrate or Support the Point Being Made?

The court described the use as "short-term" based on the total of ninety-six seconds the mobile was shot and only being shown for a few seconds at a time.\(^8\) The fact that the mobile was featured prominently and interacted with only helped make the point clearer to the viewer and made the use of the artwork more

\(^1\) Id. at 1045-46; *IMMEDIATE FAMILY* (Columbia Pictures 1989).
\(^2\) *Amsinck*, 862 F. Supp. at 1045-46.
\(^3\) Id.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) *Amsinck*, 862 F. Supp. at 1050.
reasonably appropriate to support Columbia’s point. Because Columbia strictly used Amsinck’s work as much as necessary to get the point across to the viewer, this question may also be answered affirmatively.108

c. Is the Connection Between the Use of Amsinck’s Artwork and the Point That Columbia Was Making Clear to the Average Viewer?

This is where Lucy’s interaction with the mobile and the way Columbia shot the scene helped the fair use case. Had the mobile been shown fleetingly in the background, the viewer would have had a more difficult time making the connection that the mobile was meant to further the sense of an empty nursery preparing for a new baby. While a fleeting background shot may have made for a stronger de minimis argument, it will not help convey a point to the viewer as required by this last question.109 In a pure fair use analysis, making a clear point to the audience is of great importance. The way Columbia used Amsinck’s artwork succeeded in making a clear point to the viewer, so the final answer should also be “yes.”


In this case, Plaintiff Faith Ringgold, owner of the copyrighted quilt artwork “Church Picnic Story Quilt” (“the Quilt”), sued Defendant Black Entertainment Television, Inc. (“BET”), producer of the television series Roc, when BET used a poster of the Quilt as set dressing in the television show.110 In the scene that gave rise to the litigation, the main character’s brother was giving a performance with his music students in a church.111 The pastor, performers, and audience were all African-American.112 Other than the Quilt, the church walls were bare of any decoration.113 The Quilt depicted a gathering of African-Americans having a picnic in a park.114 This was the only piece of black heritage in the entire room.115 The Quilt was never featured, interacted with, or mentioned in the scene; it was also usually obstructed.116

108. See id. at 1050 (holding that although the mobile was displayed in its entirety, the short-term display of the mobile did not preclude a finding of fair use).
113. Id.
114. Id.
115. Id.
116. Id.
a. Did BET Use Ringgold's Quilt to Illustrate or Support a Point That BET Was Making in the Television Show?

The producers were probably using the Quilt to give the impression that the scene was being shot in an African-American church. With no other wall decoration, the setting was very vague, so the point that BET was trying to support was unclear. Had the church been ripe with African-American culture, the point would have been more obvious. Additionally, the point may have been stronger had the pastor or the congregation interacted with the work. However, as used, the Quilt was a mere afterthought and gave very little support to an already indistinct point. Therefore, the answer is likely “no.”

b. Did BET Use Only as Much of Ringgold’s Quilt as Was Reasonably Appropriate to Illustrate or Support the Point Being Made?

The court decided that the brevity of time that the work was observable and the fact that in some segments the Quilt was not in focus left questions of fact about this factor. Although the court did not affirmatively conclude as to the third factor, it would be understandable to think that the brevity of use favored a finding of fair use. However, this question goes a bit further by requiring that the amount taken be considered alongside the point being supported. It is more difficult to decide a use to be reasonable when the point being supported is so vague. While a fleeting, out-of-focus use of an asset can bolster a de minimis claim, the fair use defense demands more clarity as to the transformative purpose.

Done properly, BET likely could have placed more emphasis on the painting, increasing the substantiality of the use, but also, in effect, sharpening the clarity of the point being made. The vague point here, however, did not leave the set designers with much to rely on. Without a clear point to support, the amount used will always be more difficult to justify as reasonably appropriate. It is difficult to give a definitive “yes” or “no” answer to this question.

117. Ringgold, 126 F.3d at 80.

118. BET’s set design likely fell somewhere between the de minimis use in Sandoval and the fair use in Amsinck, because Ringgold’s quilt was clear enough for viewers to discern (as opposed to the photos in Sandoval) but too obstructed and unsupported by the storyline to make a clear enough point (as opposed to the mobile in Amsinck).

119. Had there been a stronger point in the script, there may have been more theme to the set design. Likewise, had there been more theme in the set design, there may have been a stronger point communicated to the viewer. This causality dilemma shows how mutually dependent the point being illustrated and the amount being used are.
c. Is the Connection Between the Use of Ringgold’s Quilt and the Point That BET Was Trying to Make Clear to the Average Viewer?

The average viewer is likely not astute enough to pick out the Quilt from the background and feel a strong sense of African-American culture in the scene. Because the poster was often obstructed and not shown in its entirety, it would be difficult for the average viewer to gain a full appreciation for the connection to the television show. Had BET producers asked themselves about the clarity of the connection between the Quilt and the point that they were trying to support, they may have made a stronger effort to make their point more obvious. As is, it is difficult to draw a clear connection from the way the producers used the poster to the setting of an African-American church. The answer to this question must be “no.”

Reading the court opinions for both Amsinck and Ringgold on a surface level may lead to frustration in that two very similar fact patterns were decided differently. However, a deeper analysis of fair use and an incisive viewing of each scene can offer some resolution and clarity as to why the cases were decided the way they were. As evidenced supra, the Three-Question Test can be especially helpful for creative fictional works like these and should not be limited to non-fiction works.

IV. ANALYZING FUNCTIONAL WORKS

If a Safe Harbor exists for creative works, then the same may be true for functional works. However, the analysis must be quite different, because many of these cases involve copying of entire works. Therefore, the pattern would seem to reside in factors other than the third factor (i.e. amount and substantiality) relied on in the previous analysis. The key would be to find what courts favored so much in these types of works that would cause them to look past such wholesale copying, a notion unthinkable in earlier fair use decisions. Whereas Mr. Donaldson highlighted the courts’ focus on the first and third statutory factors for creative works, the test (“Two-Question Test”) explained below is meant to highlight the courts’ focus on the first and fourth statutory factors for functional works.

120. See Ringgold, 126 F.3d at 73 (“[N]othing in the dialogue, action, or camera work particularly calls the viewer’s attention to the poster.”).
121. Donaldson, supra note 3, at 488.
123. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978) (citing Benny v. Loew’s, Inc., 239 F.2d 532, 536 (9th Cir. 1956) (“Thus Benny should stand only as a threshold test that eliminates near-verbatim copying.”).
A. THE TWO-QUESTION TEST FOR SAFE HARBOR FAIR USE IN FUNCTIONAL WORKS

1. Is the Existence of the New Work Beneficial to the Interested Public?

To qualify for Safe Harbor fair use, the answer to this first question must be "yes." The first part of this question requires constructive utility by asking whether the new work is "beneficial."\(^{124}\) Consistent with the constitutional drafters' intent, fair use courts tend to display leniency toward works that are beneficial to the public interest.\(^{125}\) Copyright law was constitutionally enacted in order to "promote the progress of science."\(^{126}\) This reflects the utilitarian philosophy of U.S. copyright law as opposed to a natural rights philosophy consistent with many European countries.\(^{127}\) The drafters of the Constitution wanted to promote the dissemination of knowledge and information through copyright law, which explains why courts will offer wider latitude when new works serve the public interest by disseminating such knowledge.\(^{128}\)

Works in the public interest are generally those that have an appeal or relevance to the general populace.\(^{129}\) Such works include research tools like the search engine "Google."\(^{130}\) The second part of this question narrows the general populace down to the "interested public," borrowing language from the patent law case *In re Hall*.\(^{131}\) For this question, a work need not benefit the general public at large so long as it offers a benefit to those interested in the particular subject matter. A search engine that facilitates legal research and a peer-to-peer music

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\(^{124}\) See *Roxbury*, 343 F. Supp. at 221 (demonstrating the court's leniency when the word constitutes a benefit to the public. "It seems likely that defendants' index will serve the public interest in the dissemination of information."); For reference, this constructive utility is a higher standard than the utility required in patent law, because it requires utility that promotes the public interest. See also 35 U.S.C. § 101 (2011) ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent") (emphasis added).

\(^{125}\) See, e.g., *Roxbury*, 343 F. Supp. at 221.

\(^{126}\) U.S. CONST. art. I, § 8, cl. 8. The fact that copyright law is geared at furthering "science" is more evidence that U.S. copyright law tends to favor many types of functional new works with technical aspects.

\(^{127}\) See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.") (emphasis added); *JOHN LOCKE, SECOND TREATISE OF GOVERNMENT* § 27 (Jonathan Bennett 2005) ("So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property.").

\(^{128}\) Interview with McDonald, *supra* note 30.

\(^{129}\) Although not exactly a transformative or commercial aspect, courts have discussed public interest in the purpose of the use first factor. See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1267 (11th Cir. 2014) (holding that the first factor favors fair use in part, because "the use provides[d] a broader public benefit-furthering the education of students at a public university"); *Public interest*, BLACK'S LAW DICTIONARY (10th ed. 2014) (public interest is defined as "[t]he general welfare of a populace considered as warranting recognition and protection").

\(^{130}\) See *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 285 (S.D.N.Y. 2013) (demonstrating that Google is a search engine which has relevance to the general populace).

\(^{131}\) *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986).
file sharing service would both likely offer benefits to their respective interested publics of lawyers and music listeners.\textsuperscript{132} However, an architectural blueprint or a single license to a computer software for use in a Sherriff’s Department, while beneficial to the individual users, would not draw the same type of significant relevance to the broader interested publics of all architects or police officers.\textsuperscript{133}

2. \textit{Does the Use of the Asset Avoid Reducing the Need for the Underlying Work in Some Market?}

Only after determining that the new work can be characterized as functional and answering “yes” to the first question above may the reader proceed to this final step of the analysis. For a functional work to fall under safe harbor fair use, the answer to this second question must also be “yes.” This question derives directly from the market effect fourth factor.

First, it is important to point out the distinction between reducing the need, as written here, and reducing the desire for the underlying work in the market. This distinction comes up frequently in cases of criticism or commentary where the new work uses an asset from the underlying work for the purpose of attacking or parodying the underlying work itself.\textsuperscript{134} In effect, this reduces the desirability and harms the market for such works.\textsuperscript{135} However, the courts have been very clear in their interpretation of the fourth factor as to not weigh such market harm against a finding of fair use.\textsuperscript{136} One effective way to test if the new work reduces

\begin{itemize}
  \item \textsuperscript{132} See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1012 (9th Cir. 2001) (demonstrating that a peer-to-peer music file sharing service offers a benefit to the interested public of music listeners); White v. West Pub. Corp., 29 F. Supp. 3d 396, 398-99 (S.D.N.Y. 2014) (demonstrating that a search engine that facilitates legal research offers a benefit to the interested public of lawyers).
  \item \textsuperscript{133} See Wall Data, Inc. v. L.A. Cty. Sheriff’s Dep’t, 447 F.3d 769, 774-76 (9th Cir. 2006) (demonstrating that a single license to a computer software for a specific Sheriff’s Department may be beneficial to an individual user); Ranieri v. Adirondack Dev. Grp., LLC, 164 F. Supp. 3d 305, 339 (N.D.N.Y. 2016) (demonstrating that an architectural blueprint may be beneficial to an individual user).
  \item \textsuperscript{134} In a fair use determination, there is an important distinction between a parody and a satire. Parodies will use the asset to make a comment on the underlying work itself, whereas satires will use the asset to make a comment on something other than the underlying work. See Campbell, 510 U.S. at 580-81 (“Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”). While courts look favorably upon parodies, the same does not hold true for satires. Compare Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 693 (7th Cir. 2012) (finding fair use when the “underlying purpose and character of the defendant’s work was to comment on and critique the social phenomenon that is the ‘viral video’ [and the plaintiff’s] video exemplifie[d] the ‘viral video’”), with Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179, 1188 (C.D. Cal. 1998) (finding against fair use when the defendant “merely used the copyrighted work as a vehicle to poke fun at another target”).
  \item \textsuperscript{135} See Wojnarowicz v. Am. Family Ass’n, 745 F. Supp. 130, 133-34 (S.D.N.Y. 1990) (stating Plaintiff, a controversial artist, sued Defendant, a nonprofit corporation, when Defendant used photocopied fragments of Plaintiff’s artwork in a pamphlet campaigning “in an effort to stop public funding . . . of art works such as Plaintiff’s” “directed at bringing attention to the devastation wrought upon the homosexual community by the AIDS epidemic”).
  \item \textsuperscript{136} See id. at 145-46 (“Because excerpting a work for criticism and comment does not produce a work in competition with the copyrighted work, the infringing material does not supplant the original work . . . . Plaintiff’s argument that it is the misrepresentative nature of the critique that harmed the value of his work is again inapposite to an infringement claim.”).
\end{itemize}
the need for the underlying work is to consider whether it poses a threat as a competitor in the marketplace. Courts are far more likely to view competing works as market substitutes and look unfavorably upon them from a fair use perspective.\textsuperscript{137}

The other aspect of this question meriting explanation is the phrase "in some market." First note that for there to be \textit{some} market there must be \textit{a} market for the work. Courts are very reluctant to find against fair use when the underlying work has no real marketability.\textsuperscript{138} Just because a work does not currently occupy a particular market, however, does not necessarily mean an absence of some market. Often, courts will consider potential markets as well for the work in deciding market harm.\textsuperscript{139} This comes up frequently when the underlying work is unpublished or when there is a potential licensing market for the work.\textsuperscript{140} Courts are generally able to find a market when the owner of the underlying work is able to allege some economic value in the work.\textsuperscript{141}

\section*{B. CASE LAW SUPPORTS THE TWO-QUESTION TEST FOR FUNCTIONAL WORKS}

In order to demonstrate the two question test for functional works and explore the judicial pattern of statutory interpretation giving rise to the test, this section will examine various cases where functional works were the subject of fair use litigation. While the court opinions do not go deeper than discussing the statutory four-factor test, their preference toward certain factors is evident upon a closer review. This section will show that the preference is consistent across all functional cases and reveals a pattern for which the Two-Question Test is built upon. This case study will begin with two Safe Harbor fair use cases that pass the Two-Question Test, followed by two cases that fail based on either the first or

\textsuperscript{137} See BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005) (finding that free downloads of music files competed in the market with purchased downloads).

\textsuperscript{138} For cases where the court found no market for the underlying work, and thus no market harm, see, e.g., A.V.ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 643, 647 (4th Cir. 2009) (holding that a market for high school essays was dishonest and the plaintiffs did not express any interest in such a market); Righthaven, LLC v. Jama, No. 2:10-CV-1322 JCM LRL, 2011 WL 1541613 (D. Nev. Apr. 22, 2011) (finding no market when the plaintiff failed to allege that the work had marketability); Field v. Google, Inc., 412 F. Supp. 2d 1106, 1121 (D. Nev.2006) (finding no market when the author disseminated his work to the public for free).

\textsuperscript{139} See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage.").

\textsuperscript{140} See Educ. Testing Servs. v. Katzman, 793 F.2d 533, 547 (3d Cir. 1986) (finding market harm when the defendant, president of an exam preparation course for the Scholastic Aptitude Test ("SAT"), stole unpublished SAT tests from the plaintiff, developer of standardized tests such as the SAT, and distributed them to his students in his exam prep course, destroying the value of the SAT tests that depended so heavily on their unpublished nature); Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1498 (11th Cir. 1984) (finding a potential market when the defendant videotaped the plaintiff's news broadcast and sold the tapes to the subjects of the news reports, because the defendant "use[d] the broadcasts for a purpose that [the plaintiff] might use for its own benefit").

\textsuperscript{141} See Chi. Sch. Reform Bd. OfTrs. v. Substance, Inc., 79 F. Supp. 2d 919, 933-34 (N.D. Ill. 2000) (finding a market for unpublished standardized tests when it cost millions of dollars for the school board to create them and the defendant's unauthorized publication of the tests rendered their reuse value worthless).
second question. Once familiarized with the Two-Question Test, this section will conclude by revisiting New York Times to show the advantages of performing the fair use analysis as suggested by this article.142

1. Sony Corp. of America v. Universal City Studios, Inc.

In possibly the most important case involving a functional new work, the Supreme Court took on the issue of home videotape recording of television broadcasts.143 The plaintiffs, Universal City Studios and Walt Disney Productions ("Universal"), brought suit against the defendant, Sony Corporation ("Sony"), when Sony began manufacturing and selling Betamax home videotape recorders ("the Betamax") that were capable of allowing home viewers to record Universal’s television broadcasts.144 Sony raised fair use in defense of the Betamax’s alleged infringement, and the Supreme Court ultimately granted Sony’s defense ruling that the Betamax made fair use of Universal’s content.145 The Court’s reasoning was largely dependent on the same two considerations described by the Two-Question Test.146

Before getting into the analysis, the case must be properly characterized by looking for evidence of practicality or expressiveness. While the underlying work, the television broadcasts, could easily be said to have expressive qualities, the focus should be on the new work, the Betamax, which has no expressive elements. On the other hand, the Betamax had the clear practical quality of allowing users through interaction to, as the court famously described it, “time-shift” and record programs for later viewing.147 Therefore, this can be characterized as a functional case and, as such, is subject to the functional safe harbor analysis.

a. Was the Existence of the Betamax Beneficial to the Interested Public?

In other words, did the new work benefit the user in a way that was relevant or appealing to those interested in the particular subject matter? Here, the answer must be “yes.” This case was decided in 1984, long before the time of the Digital Video Recorder ("DVR") or online streaming (or even the Internet for that

143. Sony, 464 U.S. at 419-20.
144. Id.
145. Id. at 456.
146. Id. Discussing the Betamax’s alleged infringement practices, the Court balanced the benefit to the television viewing audience against any likelihood of market harm explaining, 

[that practice, known as “time-shifting,” enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm.]

Id. at 421.
147. Id.
Consider then, how much an invention like this changed the game for the interested public—casual television watchers. The Betamax allowed millions of viewers the ability to watch their favorite television shows even if they were busy at the time it aired or if there were multiple shows of interest airing at the same time. This was a revolutionary process that paved the way for the abovementioned devices that we now enjoy and take for granted.

b. Did the Use of Universal’s Television Broadcasts Avoid Reducing the Need for These Broadcasts in Some Market?

Again, it is particularly important to consider the technological era of when this case was decided in defining the market. In the early 1980’s, video recording tapes cost $20 each, fast forwarding was an art of guesswork, and markets such as Internet streaming were inconceivable. Universal was not able to show evidence of any actual market harm but raised four arguments for potential markets, each systematically rejected as meritless by the district court and later affirmed by the Supreme Court. First, Universal raised the concern that their ratings would drop due to lower live viewers, but the court rejected this noting that “Nielsen Ratings had already developed the ability to measure when a Betamax in a sample home is recording the program.” Next, Universal argued that viewers would watch the recorded shows during the same time that they would watch other programs, but the court dismissed this argument concluding that there would be no such overlap.

Universal then moved on to arguing that their syndication and rerun markets would be harmed, but the district court made two points in opposition. The court

149. See Sony, 464 U.S. at 454 (“[T]o the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits.”); DVR Definition, TECH TERMS, https://techterms.com/definition/dvr (last visited Jan. 31 2017) (“A DVR is basically a [video recorder] that uses a hard drive instead of video tapes. It can be used to record, save, and play back television programs.”).
150. Explaining the societal benefits of the Betamax, the court offered, [f]or example, plaintiffs’ witnesses testified about “Betamax Sunday,” February 18, 1979. On that evening, one network broadcast “Gone With the Wind” against the other network’s “One Flew Over the Cuckoo’s Nest” against the other network’s “Elvis.” The public may well have wanted to see all three, but the networks forced a choice. Betamax increases the viewer’s access from one to two programs.
151. Id. at 467-68. See Andrews, supra note 149 (demonstrating the Universal City Studios, Inc. case was litigated before the invention of the Internet).
152. Sony, 464 U.S. at 454-55. See Universal City Studios, 480 F. Supp. at 466-69 (“Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios’ financial picture.”).
154. See id. at 466 (“Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend.”).
began by addressing the fact that the price Universal could demand for syndicated television was directly related to ratings and viewership—figures that were actually bolstered by the Betamax.\textsuperscript{155} Then the court tackled Universal’s rerun argument by discussing the economic inefficiency for users to “library” their recordings instead of erasing the broadcast after watching it.\textsuperscript{156} Had the case been decided with modern technologies that have the ability to library with ease, such as the DVR, the court’s analysis of this issue might have been different.\textsuperscript{157}

Similarly, Universal’s final concern would likely have more merit today as well than at the time of the decision. Universal posited that their advertisement market would be harmed because viewers would fast-forward through the commercials—a common practice today made simple by the DVR.\textsuperscript{158} However, the process of fast-forwarding was much different with the Betamax in 1984, and the court dismissed this argument as well concluding that due to the tedious nature of fast forwarding, viewers were likely to continue watching the advertisements, and no harm would come to this market.\textsuperscript{159}

While many of these arguments may seem outdated in light of current technology, the fact remains that, at the time, the Betamax did not reduce the need

\textsuperscript{155.} See id. at 466 (“Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters for rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given current market practices, this should aid plaintiffs rather than harm them.”).

\textsuperscript{156.} See id. at 467 (“[Universal] fear[s] that persons will not erase the tapes after one viewing but rather will build a library, I. e., maintain the tapes for subsequent repeat viewing.”) (emphasis added); At the time, Betamax videotapes cost $20 to purchase, as opposed to the $15.95 that Universal charged for tapes of several full versions of their shows. Id. Therefore, it would be more expensive for a viewer to retain a taped show from the Betamax rather than simply purchasing a videotape of the show directly from Universal. The court used this comparison to determine that librarying was not a viable option as a market competitor to Universal’s rerun sales. Id.

\textsuperscript{157.} However, the Supreme Court has failed to offer a ruling on whether the DVR constitutes a fair use of television broadcasts, so currently, lower courts are left to rely on \textit{Sony} when confronted with newer versions of video recorders. See Fox Broadcasting Co., Inc. v. Dish Network, 747 F.3d 1060, 1069 (9th Cir. 2014) (citing to \textit{Sony} in its discussion of each of the four fair use factors).

\textsuperscript{158.} In \textit{Fox Broadcasting}, the court addressed the issue of whether the Dish Network DVR system the “Hopper,” which allowed users to easily “hop” over commercial breaks, made fair use of Fox Broadcasting’s (Fox) television broadcasts. 747 F.3d at 1063. While the Fox court reached the same conclusion as the Supreme Court in \textit{Sony}, its reasoning was much different. The court opinion in \textit{Universal City Studios} acknowledged Universal’s concern that “if Betamax owners use the pause control to delete commercials or the fast forward to pass them by, advertisers will pay less to networks and networks will pay less to producers and owners” but dismissed this argument because “[t]o avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed.” Universal City Studios, 480 F. Supp. at 468. However, faced with a device that’s main purpose was to “hop” commercials without any guesswork at all, the court in \textit{Fox Broadcasting} focused its discussion of market harm on the fact that “commercial-skipping does not implicate Fox’s copyright interest because Fox owns the copyrights to the television programs, not to the ads aired in the commercial breaks.” 747 F.3d at 1068. As technology has advanced in this area, lower courts have continued to fit video recorder cases under the Supreme Court’s holding in \textit{Sony} even if it requires new reasoning. Therefore, for purposes of the Two-Question Test, cases involving digital recording would likely be similar to the “grey area” cases. \textit{Refuge, supra note 4, at 524}.

\textsuperscript{159.} See \textit{Universal City Studios, Inc.}, 480 F. Supp. at 468 (“Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, [this] practice may be too tedious.”).
for Universal's live broadcasts in any market, and conversely, created a potential increase in profitability for broadcasters such as Universal. Therefore, the answer to the second question must also be "yes," allowing this case to fall under Safe Harbor fair use.

2. White v. West Publishing. Corp. In this case, Edward White ("White"), a lawyer, brought action against the online legal publisher West Publishing Corp. ("West") claiming that West's searchable database ("Westlaw"), which included legal documents prepared by White such as a summary judgment motion and motion in limine briefs, infringed the registered copyrights in his briefs. West claimed that it made fair use of White's legal documents with Westlaw. The district court agreed and granted fair use, despite the fact that West's use exhibited evidence generally considered adverse to fair use when considering the second and third factors. The court's overlooking of the second and third factors in this case is further evidence of the courts' reliance on the first and fourth factors in this situation.

To assess whether the Two-Question Test applies to this case, the first step is to determine the character of the new work. Here, the new work was West's Westlaw legal database, which provided users access to legal documents for researching purposes. Westlaw converted all documents into a text-searchable file to offer a legal search engine feature for users. This database was highly practical to users, because they had to interact with the database's search engine to obtain its benefit. The new work went beyond merely transmitting information by providing specific information based on the users' particular topic of research.

a. Was the Existence of Westlaw Beneficial to the Interested Public?

The interested public for a searchable legal database would tend to be limited to those needing to perform legal research such as lawyers, paralegals, and law

160. See Sony, 464 U.S. at 454 ("It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts.").
162. Id. at 397.
163. Id. at 400.
164. As to the second factor, the court acknowledged, "the briefs at issue [were] functional presentations of fact and law, and this cuts towards finding in favor of fair use." Id. at 399. The court went on to discuss the fact that White's briefs were unpublished, which generally deserves more protection, but even this did not hold much weight in their balancing of the factors. Id. But see Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1178 (9th Cir. 2012) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985)) ("[W]e apply the Supreme Court's admonition that with respect to unpublished works, this [second] factor 'outweighs' [the defendant's] claim of fair use.").
165. White, 29 F. Supp. 3d at 399 (finding the amount and substantiality third factor to be neutral even after admitting that West "copied the entirety of White's briefs").
166. Id.
students. Prior to online legal databases, legal professionals and students had to perform their research by searching through large libraries for their specific case, article, or document. Westlaw greatly simplified this task by combining all of these documents into one database and allowing users to find their document on demand. Therefore, the answer to the first question of whether the new work benefits this interested public is clearly "yes."

b. Did the Use of White's Briefs Avoid Reducing the Need for These Briefs in Some Market?

This question requires a bit more analysis than its predecessor, because this case concerned two traits that are generally good indicators of market harm—verbatim copying and an unpublished work. However, this case illustrates how a seemingly harmful use may still be fair when the plaintiff cannot adequately define a market that has been harmed. The only market that the court could find for White's brief was providing legal advice for his specific clients. The court rejected White's notion that a market existed for licensing attorney works. Without a cognizable market, West's use could not possibly reduce the need for the underlying work. In fact, beyond the legal advocacy already offered by White's briefs, there was no further economic need for the work at all. Therefore, it is unlikely that any use of White's briefs, including use in the entirety, would create market harm. The answer to this second question must also be "yes," fitting West's use of White's underlying works into Safe Harbor fair use.


At the onset of online music piracy, peer-to-peer file sharing services such as those provided by Napster, Inc. ("Napster") became lightning rods for infringement litigation. The Ninth Circuit Court described Napster as "a system which permits the transmission and retention of sound recordings

167. See Ronald E. Wheeler, Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research, 103 LAW LIBR. J. 359, 360 (2011) (discussing the implications of Westlaw with regards to the technological advances in legal research).
168. See id. at 376 ("WestlawNext will certainly change the landscape for both legal researchers and teachers of legal research. Its new search algorithm, WestSearch, is a powerful tool that returns more focused results.").
169. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985) ("[W]e find that [the defendant's] use of these verbatim excerpts from the unpublished manuscript was not a fair use.") (emphasis added).
171. Id.  
172. See id. at 400 ("[N]o secondary market exists in which White could license or sell the briefs to other attorneys . . . .").
173. 239 F.3d 1004 (9th Cir. 2001).
174. E.g., id. (demonstrating a premier example of online file sharing services inducing litigation); Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998) (demonstrating peer-to-peer file sharing services became highly litigated); UMG Recordings, Inc. v. MP3.com, Inc. 92 F. Supp. 2d 349 (S.D.N.Y 2000) (demonstrating similar litigation regarding music piracy was alleged from online file sharing).
employing digital technology. Napster allowed users to make MP3 files stored on their computer available to other users for the purpose of copying to the other users’ computer hard drives. The plaintiff A&M Records, Inc. ("A&M"), a record label, filed suit against Napster alleging vicarious and contributory copyright infringement of their copyrighted musical compositions and sound recordings. In defense, Napster argued that its users made fair use of the copyrighted material. The court determined Napster’s system did not engage in fair use of A&M’s recordings; thus the court afforded the lion’s share of the discussion to the “market effect” fourth factor.

The first step of the analysis is to characterize the new work—Napster’s file sharing service. To be clear, the fact that A&M’s copyrighted musical compositions are clearly creative works, again, has no bearing on this characterization. Only the Napster’s new work is to be characterized. Napster’s system was highly interactive, requiring users to create accounts, user libraries, and search queries for its index. This interactivity is strong evidence of the practicality of Napster’s new work. This peer-to-peer filing service, therefore, can certainly be characterized as a functional work.

a. Was the Existence of Napster’s Service Beneficial to the Interested Public?

The interested public for such a work could be defined broadly to extend to all music listeners. Before Napster came along, these listeners had to go to the store to buy compact discs ("CDs") to copy the music contained therein to their computer hard drives. Due to Napster’s service, these listeners no longer had to go to the store to buy CDs. Instead, they could use Napster’s service to copy virtually any song directly to their computer through a network of servers free of charge. Napster’s benefit can be deduced by its quick rise to popularity, accruing over 80 million users in only two years of operation. Thus, the first question must be answered in the affirmative.

175. A&M Records, 239 F.3d at 1011.
176. Id.
177. Id. at 1012.
178. Id. at 1014.
179. Id. at 1016-17.
180. Id. at 1012.
181. Id. at 1011.
182. Id.
183. See Mark Harris, The History of Napster, LIFEWIRE (May 8, 2017), https://www.lifewire.com/history-of-napster-2438592 ("The big advantage for many users was the fact that there was a vast amount of music that could be downloaded for free.").
b. Did the Use of the A&M's Songs Avoid Reducing the Need for These Songs in Some Market?

Unsurprisingly, A&M had no shortage of evidence to support their claim of actual and potential market harm caused by Napster. The court found two of A&M's claims particularly convincing. First, the opinion explicitly addressed the language of this second question by noting that Napster "reduce[d] audio CD sales among college students." Next, the court displayed willingness to extend its consideration to potential future markets by recognizing the "raise[ed] barriers to [A&M's] entry into the market for the digital downloading of music." Because Napster's use reduced the need for A&M's recordings in current CD markets and future digital markets, it fundamentally failed the second question of this Safe Harbor analysis.

4. Ranieri v. Adirondak Development Group, LLC

In Ranieri, the defendant Adirondak Development Group, LLC ("ADG") hired the plaintiff Dominick Ranieri ("Ranieri"), an architect, to create a blueprint for buildings in a condominium project. Ranieri drafted a blueprint as requested, but ADG terminated the employment relationship due to "buildability" issues with the Ranieri's designs. Subsequently, ADG proceeded to hire a third party architect, co-defendant John Kazmierczak ("Kazmierczak"), to modify technical aspects of Ranieri's designs to make them "buildable." Ranieri brought action against ADG and Kazmierczak claiming the new blueprint designs infringed upon his original designs. The defendants asserted a fair use defense; however, the district court denied this motion on summary judgment.

The new work in this case was the derivative blueprint created by Kazmierczak. To characterize this blueprint as a functional work, it must exhibit some practical traits. While architectural designs do require some level of creativity, their primary purpose is generally practical as opposed to expressive. Contractors must constantly refer to blueprints during construction. Since they serve such an important reference function, blueprints are generally drafted with high levels of practicality. In fact, Kazmierczak was specifically instructed to

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184. A&M Records, 239 F.3d at 1016.
185. Id.
186. Id. (emphasis added).
189. Id. at 321.
190. Id. at 333.
191. Id. at 322.
192. Id. at 354.
193. See id. at 338 (quoting Thomas M. Gilbert Architects, P.C. v. Accent Builders and Developers, LLC, 377 Fed. Appx. 303, 308 (4th Cir. 2010)) ("[T]he designs 'would be utterly useless to [a project owner] unless it had permission to use the [designs] for construction.'").
create “buildable” designs. The practical traits of Kazmierczak’s blueprint were sufficient to characterize this work as functional.

a. Was the Existence of Kazmierczak’s Blueprint Beneficial to the Interested Public?

From In re Hall, the interested public is limited to those interested in the particular art. The art in this case is architecture, so the interested public would encompass professionals that interact with the art such as contractors, developers, and other architects. Due to the limited nature of Ranieri’s blueprint designed specifically for ADG’s development project, these designs were likely of little benefit to the rest of the interested public. Had the designs been more generally applicable or perhaps introduced some revolutionary novelty to the field of architecture, they may have drawn more interest from those working with the art. However, in this case, the new work fails the first question, and the analysis would ordinarily stop here.

b. Did the Use of Ranieri’s Blueprint Avoid Reducing the Need for This Blueprint in Some Market?

For demonstrative purposes, this section will include an analysis of the second question as well. In contrast to A&M Records, this case is meant to show an example of how a defendant can fail the first question while passing the second question. Ironically, while specificity was the downfall of the defendants’ work in the first question, it benefitted the defendants when considering whether their use inflicted some market harm. In discussing the fourth factor, the court noted that Kazmierczak’s blueprint “certainly” competed with Ranieri’s designs for the ADG project. However, this one specific instance of competition was not sufficient evidence for the court to consider the new work a competitor in the broader market as a whole. The court suggested that Ranieri was still free to license or sell his designs to other developers who could “market the finished buildings in the same or different location.” In concluding, the court found the fourth factor to favor fair use, because Ranieri’s designs were still viable and marketable for other projects. Therefore, the second question would be

195. 781 F.2d 897, 899 (Fed. Cir. 1986).
197. Id.
198. Id. at 353.
199. Id. at 354.
200. See id. ("[T]he Court does not believe that [the defendants’] use usurps the market for Plaintiff’s designs.").
201. Id.
202. Id.
answered in the affirmative, because the defendants’ use avoided reducing the need for Ranieri’s blueprint designs in the market that they potentially occupied.


Finally, this section will revisit New York Times, but here the Two-Question Test will be implemented. In a previous section, it was determined that Roxbury’s use of the Times Index to create the Personal Name Index was a “gray area” use under the non-fiction analysis from Refuge. While considered a non-fiction work, the Personal Name Index goes beyond just transmitting information. The Personal Name Index is a practical tool that the user must reference in connection with the Times Index to gain any benefit. In fact, the court even addressed the character of this work explaining, “defendants’ index is not another version of plaintiffs’ index, but a work with a different function . . . .” Therefore, Roxbury’s new work would cleanly fit into the functional characterization.

a. Was the Existence of the Personal Name Index Beneficial to the Interested Public?

In their discussion of the first statutory factor, the court offered helpful insight for defining the interested public. The court specifically considered how the Personal Name Index could be used by “an individual seeking to find articles which appeared in The New York Times” and continued to refer to this person as a “researcher.” Therefore, the public interested in the art would likely be limited to those engaged in literature research.

After determining the interested public, the next part of the analysis asks whether the new work is beneficial to this group. The court spoke directly to this question writing, “[the Personal Name Index] appears to have the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information.” Roxbury bolstered this by offering testimony from a librarian and a professor of library science explaining the benefits of the Personal Name Index in their profession. It would be difficult to find a court opinion with a more clear-cut “yes” to this first question.
b. Did the Use of the Times Index Avoid Reducing the Need for This Index in Some Market?

Addressing the fourth statutory factor, the court began their discussion with the following: “The effect of defendants’ personal name index on the market for the Times Index appears slight. Since defendants’ index carries citations only to the New York Times Index, defendants’ index is useless unless its user has access to the Times Index . . . .”\textsuperscript{211} In ruling the fourth factor in favor of fair use, the court relied heavily on the fact that not only did the Personal Name Index avoid reducing the need for the Times Index, but it actually increased the need due to the “absolute dependence of defendants’ index on the Times Index . . . .”\textsuperscript{212} The court expressly answered this second question concluding, “purchase of defendants’ index in no way supersedes the need for plaintiffs’ index . . . .”\textsuperscript{213} Therefore, the answer to this question is also clearly “yes.”

This case shows how effective the Two-Question Test can be for these types of functional non-fiction works. When analyzing \textit{New York Times} with the Three-Question Test from the non-fiction analysis \textit{supra}, the determination was incomplete.\textsuperscript{214} However, the Two-Question Test provided some of the most explicit “yes” answers from the court for any case under either test. This is further evidence of what courts are implicitly considering when they come across a functional new work. Court opinions like this are very helpful in recognizing patterns for particular types of works.

V. CONCLUSION

“Surely other patterns exist . . . . They are just waiting to be unveiled.”\textsuperscript{215}

In the last two sentences of \textit{Refuge}, Mr. Donaldson gave a call to action for which this article builds on.\textsuperscript{216} Throughout his article he acknowledged the building blocks of his analysis, crediting Professor Samuelson, Judge Leval, and even Congress for the original four-factor test.\textsuperscript{217} Accordingly, this article does not mean to undermine Mr. Donaldson’s Safe Harbor analysis, Professor Samuelson’s cluster theory, or Judge Leval’s transformativeness test, nor does it mean to suggest a change in the statutory language of the four-factor test. Conversely, the objective was to further these prior teachings and unveil the most comprehensive set of patterns possible.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{211} Id. at 223.
\item \textsuperscript{212} Id. at 224.
\item \textsuperscript{213} Id. at 224 (emphasis added).
\item \textsuperscript{214} See generally id.
\item \textsuperscript{215} Donaldson, \textit{supra} note 3, at 549.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. at 495.
\end{enumerate}
\end{footnotesize}
Based on the wide variety of fair use cases determined after the Copyright Act of 1976, there is a common sense in the legal community that fair use simply cannot be relied on. This article argues back at this notion of unpredictability. Just because courts may take broad liberties in interpreting the fair use statute does not mean that there are not patterns to their decisions. After breaking down works into characterizations, the patterns become clearer. This article illuminates patterns for a substantial portion of case law—creative and functional works. While there still remains a large gap of unidentified patterns for informational works, hopefully the discovery of patterns for creative and functional works may offer another building block toward a complete alternative fair use analysis.