# MEASURING FAIR USE'S MARKET EFFECT

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Copyright law seeks to encourage creativity and the creation of new works of authorship. To facilitate this creativity, the law allows authors to use portions of preexisting copyrighted materials when the new use survives a "fair use" analysis. In adjudicating the fair use question, courts apply a multifactor test which includes consideration of the new work's market effect. This market effect consideration asks how the new work influences sales of the original copyright materials. The scholarship analyzing this market effect is incomplete because this inquiry requires empirically measuring how consumers react to the third-party reuse of a copyrighted work. Thus, courts and authors are currently ill equipped to accurately forecast ex ante market effects because these empirical determinations occur only after the work has been reused—*i.e.*, ex post to creation of the putative fair use. Building from this recognition, we provide a more robust theoretical framework for categorizing and analyzing market effects.

This Article builds from our expanded theory by empirically measuring the effect of reusing copyrighted material in subsequent works. We use a novel experimental design with one type of third-party reuse (music sampling) and find that the market reception of a new work that incorporates copyrighted material can impact perceptions about the original work (and thus, influence the original's market). We find evidence that if the new work is a failure, this in turn has a negative impact on the original work's perception. Accordingly, our study points to a negative spillover effect that may harm perceptions of the underlying copyrighted work. Because this recognition expands the foundation for courts considering a new work's market effect, we argue that these insights are crucial to making efficient and effective fair use determinations.



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## INTRODUCTION

Copyright law is meant to promote the creation of new works of authorship.[1] As such, authors must be given adequate rewards to incentivize creating works. Copyright law thus encourages authors by giving them an exclusive right to utilize their expressions.[2] The law affords the author the sole right to license, reproduce, and sell their expression, with the proceeds compensating the author for the cost of producing novel works.[3]

Though this exclusivity is critical to copyright law, courts recognize at times others must reuse copyrighted material in a new expression.[4] Allowing subsequent work to use a preexisting work without permission from the original author is termed "fair use."[5]

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1. *See* Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 410 (2002).

2. *See* Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 6 (2008).

3. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015); *see also* Daniel R. Cahoy, *Toward a Fair Social Use Framework for College and University Intellectual Property*, 41 J. COLL. & U.L. 485, 524 (2015) (noting copyright owners have an interest in profit).

4. *See, e.g.*, *Oyewole v. Ora*, 291 F. Supp. 3d 422, 432–33 (S.D.N.Y. 2018) (discussing the fair use doctrine), *aff'd*, 776 F. App'x 42 (2d Cir. 2019).

5. Fair use originates in common law. *See Folsom v. Marsh*, 9 F. Cas. 342, 345–47 (C.C.D. Mass. 1841); *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869); *see also* Adrienne J. Marsh, *Fair Use and New Technology: The Appropriate Standards to Apply*, 5 CARDOZO L. REV. 635, 638 n.14 (1984) (examining the origins of the fair use doctrine).

To determine when works of authorship can be fairly used, courts turn to a multifactor test. These four factors[6] estimate social and economic gains that can be garnered from allowing a work to be reused in a later work.[7] Although courts often employ all four factors, one has received substantial attention in fair use determinations[8]—the so called "market effects" (Market Effects) factor.

When considering the Market Effects factor, courts ask what the economic effect on an existing work will be from its reuse by a subsequent author. Although seemingly easy, in reality this determination poses at least two inherent problems. First, understanding an economic effect is by its nature an empirical endeavor. Judges, from their armchair, cannot determine what the economic effect of using a piece of existing expression will be without hard data. Second, would-be fair users must ascertain whether a new expression is a fair use before deciding whether to proceed. However, if this determination looks to a market effect that is only identifiable ex post, authors cannot reasonably determine if a work is infringing until after investing resources in its creation.

This Article addresses both problems. We initially further the understanding of Market Effects by proposing an expanded taxonomy describing several discrete effects not previously described in the literature. From there, our research uses a novel experimental design focused on music sampling to introduce empirical evidence of the economic effect of reusing copyrighted material in subsequent works (Usage Effect). Although previous work has theorized how works can be economically affected after they are used,[9] no research has systematically tested these theories. We experimentally manipulate information about sampled songs to determine what the economic effect on an existing work is when that work is sampled.

The studies in this Article find evidence of Usage Effects not previously evidenced in the literature. We hypothesized that market

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6. The four factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (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.

17 U.S.C. § 107.

7. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1614 (1982).

8. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 555, 582–83 (2008).

9. For background on the theories that underpin the Usage Effect, see *infra* Part III.

perceptions of a work expression can be influenced by the perceived quality of a work that reuses the original. Consistent with this expectation, our studies show that when a subsequent work is perceived negatively, the copyrighted work it samples is also perceived more negatively (Negative Spillover Effect).

These empirical findings provide courts data on how reusing underlying copyrighted material in subsequent works economically effects the original work. Moreover, even though these effects occur ex post to a fair use determination, we provide solutions for potential fair users and courts on how to incorporate these findings ex ante. Ultimately, this Article seeks to encourage further rigorous analysis in the Market Effects prong of a fair use determination and empirical research on the economic effects of reuse (both within and outside of the music context). It is important to note that we do not claim to make a normative point here on whether specific economic effects of music sampling (in particular) should prove outcome determinative in a fair use determination. However, courts have hinted that they do take these effects into account in the music field and beyond.[10] Hence, we argue it is critical that if these effects are going to be considered, empirical research like that presented herein is necessary to better understand these effects.

This Article proceeds as follows. Part I discusses the background of copyright law and fair use, including the four-factor test. Part II analyzes the fourth factor—Market Effects—focusing on theories addressing how existing works can be economically affected when they are integrated into new expressions. Part III details our empirical studies that measure the Usage Effect and presents evidence that the quality of a reuse (*e.g.*, a sampling song) can influence perceptions about the original (*e.g.*, a sampled song). Part IV discusses the implications of the empirical studies and gives courts insights on how to better analyze the fair use test's Market Effects prong.

## I. THE FAIR USE DOCTRINE IN COPYRIGHT LAW

To begin our analysis of copyright, fair use, and Market Effects, this Section gives a brief overview of applicable law and policy. In particular, we address copyright law and the fair use doctrine with an emphasis on their goals of encouraging creative activities. This lays the groundwork for the following Section's discussion of prior research on the Market Effects consideration and its discussion on how our current study broadens the literature by analyzing consumer perceptions of an original work after a third party reuses the material.

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10. *See* Sam Claflin, *How to Get Away with Copyright Infringement: Music Sampling as Fair Use*, 26 B.U. J. SCI. & TECH. L. 159, 164 (2020).

### *A. Copyright*

Consistent with the U.S. Constitution, the copyright system is largely utilitarian in nature.[11] A primary goal of these laws is encouraging the creation of new works of authorship for public benefit.[12] Recognizing this aim, courts have found that any benefit given to an author is a means to an end and not the end itself.[13]

Copyright's scope is broad, encompassing works of authorship that are fixed in a tangible medium.[14] Included in this protection are derivative works—new expressions that incorporate elements of prior work—but only to the extent that they add new material and the author had the legal right to reuse the original.[15] In the music realm, two types of works are protected: sound recordings (*e.g.*, MP3s or compact discs) and written musical compositions (*e.g.*, sheet music).[16] Copyright owners enjoy the exclusive right to reproduce, distribute copies of, and create their copyrighted material and derivatives from their works.[17]

To prove copyright infringement, a plaintiff must show ownership, copying by the defendant (often evidenced by showing the defendant's access to the work), and a substantial similarity between the original and allegedly infringing work.[18] To satisfy the last element, something more than simple copying must have occurred; rather, the defendant must have engaged in an "improper or unlawful appropriation."[19] This standard is

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11. *See* Loren, *supra* note 2, at 6.

12. Ciolino & Donelon, *supra* note 1, at 410.

13. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (noting copyright law is "neither unlimited nor primarily designed to provide a special private benefit").

14. 17 U.S.C. § 102 (2018).

15. *See Earth Flag Ltd. v. Alamo Flag Co.*, 153 F. Supp. 2d 349, 353 (S.D.N.Y. 2001); *Mulcahy v. Cheetah Learning, LLC*, 386 F.3d 849, 852 (8th Cir. 2004) ("[T]he creator of an original derivative work is only entitled to a copyright if [they] had permission to use the underlying copyrighted work."); *see also Keeling v. Hars*, 809 F.3d 43, 49 (2d Cir. 2015) (noting "the originality of the derivative work . . . makes it protectable"). Examples of derivative works are translations, creating a movie from source material, and abridgments. 17 U.S.C. § 101.

16. *See* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 465 (2016).

17. 17 U.S.C. § 106 (providing a full list of copyright owners' exclusive rights).

18. *See New Old Music Grp., Inc. v. Gottwald*, 122 F. Supp. 3d 78, 84–85, 93 (S.D.N.Y. 2015); *see also White v. Twentieth Century Fox Corp.*, No. CV 11-01987, 2012 WL 13008330, at *2 (C.D. Cal. Apr. 11, 2012) (noting, to prevail on a copyright infringement claim, a plaintiff must show (1) ownership, (2) defendant had access to the original work, and (3) substantial similarities between the original and allegedly infringing work), *aff'd*, 572 F. App'x 475 (9th Cir. 2014).

19. *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (quoting *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992)).

not satisfied by a de minimis use of an earlier work.[20] And even if this standard is satisfied, the Copyright Act allows third parties to use works when their use would further copyright's utilitarian function. This is the fair use doctrine's goal.

### *B. Fair Use*

Courts have historically recognized that absolute control of later uses of a copyrighted work can stifle innovative activities.[21] Creative endeavors often build upon prior works.[22] Thus, when copyright's goals are furthered by a reuse, the fair use doctrine allows new parties to employ earlier works as the building blocks of new creativity without permission.[23]

Although its origins are in common law,[24] Congress codified the fair use doctrine in 1976.[25] In doing so, it stated that judges should consider four factors in applying the doctrine:

> (1) the purpose and character of the use, including whether such 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.[26]

This list is not exhaustive; rather, these considerations provide a general guide to applying the doctrine.[27] Satisfaction of each element is

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20. *See Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003) (quoting *Castle Rock Ent., Inc.*, 150 F.3d at 137–38).

21. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015); *see also* Cahoy, *supra* note 3, at 524 (examining how fair use gained traction in copyright law in order to balance the interests of the copyright owner and society).

22. Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1103 (2008); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 41 (4th ed. 1992).

23. *See Oyewole v. Ora*, 291 F. Supp. 3d 422, 432–33 (S.D.N.Y. 2018), *aff'd*, 776 F. App'x 42 (2d Cir. 2019).

24. *See* sources cited *supra* note 5.

25. 17 U.S.C. § 101.

26. § 107.

27. *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 506 (S.D.N.Y. 2017), *aff'd*, 729 F. App'x 131 (2d Cir. 2018); *see also Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (noting "the provision's list of factors is not exhaustive").

not required to invoke fair use; rather, the court will holistically consider whether the doctrine applies to a situation.[28]

There is a significant body of literature discussing fair use and its constituent factors. Professor Barton Beebe empirically analyzed almost thirty years of court opinions (1978 to 2005) and found that the first and fourth factors are commonly outcome determinative.[29] Professor Matthew Sag evaluated the fair-use defense's success as a function of various attributes of the case.[30] Professor Jiarui Liu evidenced a recent increase in importance of "transformative use"[31]—consideration of whether the new work creates "new information, new aesthetics, new insights and understandings."[32] Professor Neil Weinstock Netanel similarly found a "high correlation between judicial findings of transformativeness and [success under] fair use."[33]

This Article adds to the literature by presenting expanded theory and empirical evidence regarding how certain third-party uses favor or disfavor application of fair use. To set the stage for this analysis, the Subsections below discuss application of each consideration. Given its centrality to our research, particular attention is given to the fourth factor (Market Effects), which analyzes how the new use affects the original work's market.

### 1. PURPOSE AND CHARACTER OF USE

The first factor evaluates the new work's "purpose and character," including whether it is commercial or nonprofit.[34] Of primary concern is whether the "new work merely 'supersede[s] the objects' of the original."[35] To that point, courts ask whether the new work is transformative—meaning they ask if the new work uses the original as

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28. *See Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 145 (N.D. Cal. 1994); *see also Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) (noting a party does not need to establish all four factors to prevail).

29. *See* Beebe, *supra* note 8, at 555–56.

30. *See* Matthew Sag, *Predicting Fair Use*, 73 OHIO STATE L.J. 47, 84–85 (2012).

31. *See* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 166, 179–80 (2019) (noting transformative use decisions account for nearly ninety percent of all fair use decisions under Section 107 in recent years).

32. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

33. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 741 (2011).

34. 17 U.S.C. § 107(1) (2018).

35. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

raw material toward creating a new expression.[36] Simply repackaging an earlier expression will not satisfy this standard.[37]

A primary example of transformative use is the Supreme Court's 1994 case, *Campbell v. Acuff-Rose Music*.[38] In *Campbell*, the Court found a parody of Roy Orbison's *Oh, Pretty Woman* could be a fair use because it commented on the "naiveté of the original of an earlier day."[39] Commentary or criticism of the earlier work is not, however, necessary to transformative use.[40] Indeed, the Supreme Court recently found that Google's use of another firm's computer code was fair because it was used to create a "new product," rather than to comment on or criticize the original.[41]

Recognizing the increased importance of transformativeness in the fair use analysis,[42] some courts assert that it is now overemphasized.[43] For example, the Seventh Circuit recently held that the statutorily enumerated considerations are of primary importance, and transformative use should be a secondary factor because it is not included

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36. *See Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 185 (D. Mass. 2007) ("In general, for a use to be transformative, the 'copyrightable expression in the original work [must be] used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.'") (quoting *Castle Rock Ent. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998)). A putative fair use that "makes no alteration to the [earlier work's] expressive content or message" is unlikely to be transformative. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (emphasis omitted).

37. *See Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver*, 685 F. Supp. 2d 217, 227 (D. Mass. 2010) ("A simple repackaging of a work in a new format, whether on the Internet or on a CD–ROM or on a flash drive, is not transformative when the result is simply a mirror image reflected on a new mirror."), *aff'd*, 689 F.3d 29 (1st Cir. 2012).

38. 510 U.S. 569; *see also* W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443, 459 (2015) (noting *Campbell* is the "seminal" modern fair use opinion).

39. 510 U.S. at 583.

40. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). "Although the most straightforward cases of fair use thus involve a secondary work that comments on the original in some fashion, in *Cariou v. Prince*, we rejected the proposition that a secondary work must comment on the original in order to qualify as fair use." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 110 (2d Cir. 2021).

41. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021).

42. *See* Liu, *supra* note 31, at 180.

43. *See, e.g.*, *Campinha-Bacote v. Evansville Vanderburgh Sch. Corp.*, No. 3:14-cv-00056, 2015 WL 12559889, at *4 (S.D. Ind. Nov. 5, 2015); *see also Andy Warhol Found. for the Visual Arts, Inc.*, 992 F.3d at 125–26 (Sullivan, J., concurring) ("Placing dispositive weight on transformative use while reducing evidence of market harm to an afterthought is difficult to square with the Supreme Court's guidance that the fourth factor 'is undoubtedly the single most important element of fair use.'") (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

in the statute.[44] Similarly, other jurisdictions recognize the importance of transformative use, but do not hold it necessary to fair use.[45]

The first factor analysis of "purpose and character" also considers whether the new work is commercial or noncommercial, with a finding of the former disfavoring fair use.[46] However, this aspect tends to be of minor concern as most new uses worth litigating are commercial.[47] Thus, courts focus on whether the commercial endeavor is attempting to exploit an earlier work without paying the relevant expense.[48]

### 2. NATURE OF THE COPYRIGHTED WORK

The second consideration evaluates the extent to which the original is fact-centric or creative, with the latter receiving greater protection.[49] Furthermore, courts are less likely to find fair use when the original is unpublished.[50] Although these attributes of earlier works are important to the analysis, fair use can apply to reuse of unpublished or creative works if the new use is highly transformative.[51] When contemplated

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44. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) ("The Copyright Act sets out four non-exclusive factors for a court to consider. . . . [Transformativeness is] not one of the statutory factors.") (citing 17 U.S.C. § 107); *see also Campinha-Bacote*, 2015 WL 12559889, at *4 (noting transformativenes should not be over-emphasized).

45. *See, e.g.*, *Rosebud Ent., LLC v. Pro. Laminating LLC*, 958 F. Supp. 2d 600, 605 (D. Md. 2013) ("Although transformative use is not 'absolutely necessary' for a finding of fair use, the goal of copyright . . . is 'generally furthered by the creation of transformative works.'") (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)); *see also Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 931–32 (E.D. La. 2017) (noting the Supreme Court has instructed courts that while transformative use is not necessary to establish fair use, it "lie[s] at the heart of the fair use doctrine") (quoting *Campbell*, 510 U.S. at 579).

46. *See Robinson v. Random House, Inc.*, 877 F. Supp. 830, 840 (S.D.N.Y. 1995), *modified*, No. 93 Civ. 3108, 1995 WL 502525 (S.D.N.Y. Mar. 26, 1995).

47. *See id.* ("[B]ecause nearly all authors hope to make a profit with their work, courts should be wary of placing too much emphasis on the commercial nature in a fair use determination.").

48. *E.g.*, *Rubin v. Brooks/Cole Publ'g Co.*, 836 F. Supp. 909, 917 (D. Mass. 1993) (noting the relevant question about commercial use is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price") (first quoting *Penelope v. Brown*, 792 F. Supp. 132, 137 (D. Mass. 1992); and then quoting *Haberman v. Hustler Mag., Inc.*, 626 F. Supp. 201, 210–11 (D. Mass. 1986)).

49. *See Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007) (noting fair use is more difficult to establish when the former work is unoriginal—for example, fair use is more likely to be established with a fictional short story than with a factual compilation).

50. *See, e.g.*, *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 861 F. Supp. 2d 336, 341 (S.D.N.Y. 2012) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985)), *aff'd*, 756 F.3d 73 (2d Cir. 2014).

51. *See Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 330 (S.D.N.Y. 2005) (quoting *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*,

alongside the other considerations, this factor is of lesser importance[52] and is unlikely to be outcome determinative.[53]

### 3. THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

The third consideration evaluates the quality and quantity of the portion of the original appearing in the new work. The more of the original used, the less likely fair use will apply,[54] though there is no absolute rule about how much can be taken.[55] Indeed, courts analyze the portion of the original used in relation to the new work's goal.[56] For example, a parody requires allusion to the original; thus, it must copy enough of the original to make that connection.[57] Beyond quantity, the third factor also requires evaluation of the *qualitative* attributes of the original portions being used.[58]

From a qualitative perspective, judges consider whether the new piece took particularly important parts ("the heart") of the original or whether it used less significant portions.[59] The more important the part

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150 F.3d 132, 144 (2d Cir. 1998)), *aff'd*, 448 F.3d 605 (2d Cir. 2006); *see also Arrow Prods., Ltd. v. Weinstein Co.*, 44 F. Supp. 3d 359, 371 (S.D.N.Y. 2014) (noting the second fair use factor "may be of less (or even of no) importance when assessed in the context of certain transformative uses") (quoting *Bill Graham Archives, LLC*, 386 F. Supp. 2d at 330).

52. *Leibovitz v. Paramount Pictures Corp.*, No. 94 Civ. 9144, 2000 WL 1010830, at *4 (S.D.N.Y. July 21, 2000) (noting the second fair use factor "is not very important to the fair use analysis").

53. *Arrow Prods.*, 44 F. Supp. 3d at 371; *see also Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (noting the second fair use factor "is rarely found to be determinative"); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 18 (2020) (finding the correlation between the overall fair use test outcome and the second fair use factor outcome is "relatively weak").

54. *See Philpot v. Media Rsch. Ctr. Inc.*, 279 F. Supp. 3d 708, 719 (E.D. Va. 2018).

55. *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 205 (4th Cir. 1998) (quoting *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986)).

56. *See, e.g.*, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (citing Leval, *supra* note 32, at 1123); *see also Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 354 (S.D.N.Y. 2017) (quoting *Author's Guild*, 755 F.3d at 96) (noting "the Court must weigh 'whether the amount copied is reasonable in relation to the purported justifications for the use under the first factor'").

57. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

58. *See Threshold Media Corp. v. Relativity Media, LLC*, No. CV 10-09318, 2013 WL 12331550, at *11 (C.D. Cal. Mar. 19, 2013) (noting the third fair use factor requires examining "both quantitative and qualitative factors") (citing *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1178 (9th Cir. 2012)).

59. *See Lish v. Harper's Mag. Found.*, 807 F. Supp. 1090, 1103 (S.D.N.Y. 1992) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985)), *amended by* No. 91 CIV. 0782, 1993 WL 7576 (S.D.N.Y. Jan. 7, 1993).

used, the less likely it is a fair use.[60] For example, a song's generic guitar riff that is heard one time is likely less important than a famous refrain repeated throughout. The qualitative and quantitative aspects exist on a sliding scale. The more important that the part used is to the original, the less quantity that needs to be taken to disfavor fair use and vice versa.[61]

It must be noted that the statutory text asks "how much of the original was taken," and not "how much of the new work contains a part of the original."[62] Thus, if a very small part of an original exists repeatedly throughout a new work, this factor instructs courts to only consider the use of the small part and not its prevalence throughout the putative fair use.[63] Furthermore, courts should not consider any of the original's unprotectable elements (*e.g.*, facts or uncopyrightable expression) in this calculus because the new work has not used any copyrighted expression with regard to those elements.[64]

### 4. The Effect of the Use on the Potential Market for the Value of the Copyrighted Work

The fourth consideration (Market Effects) analyzes "the impact of the use on the traditional market for the copyrighted work."[65] Initially, this query evaluates if the new work serves as a market substitute for the original.[66] The Supreme Court held that this evaluation should look to

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60. *See id.* at 1102–03 (noting "courts have found that use was not fair . . . where the quoted material was 'essentially the heart of' the copyrighted work") (quoting *New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990)).

61. *Adjmi v. DLT Ent. Ltd.*, 97 F. Supp. 3d 512, 533 (S.D.N.Y. 2015) (citing Leval, *supra* note 32, at 1122).

62. Quoted material included for exemplary purposes; quotations not taken from cited material. *See* 17 U.S.C. § 107(3) (2018) (directing courts to look to "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) ("The third factor looks to the quantitative amount and qualitative value *of the original work* used in relation to the justification for that use.") (emphasis added).

63. *See Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (noting a court should "consider the proportion of the original work used, and not how much of the secondary work comprises the original"). Given that the court can look beyond the four statutory considerations, it is free to consider the prevalence throughout the new work—but this is not mandated by the text of the third consideration. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021).

64. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115–16 (2d Cir. 1998) (noting the court "must focus only on the protected elements of the original" when assessing the third fair use factor).

65. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014).

66. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–92 (1994); *see also NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481–82 (2d Cir. 2004) (noting analysis of the fourth fair use factor focuses on "whether defendants are offering a market substitute for the original" work); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 120 (2d Cir. 2021) ("In assessing market harm, we ask not

substitution in the "potential market for the copyrighted work" and in the market for derivatives of the original.[67] Beyond this market substitution consideration, some courts have considered whether a new work has the capacity to *increase* the market for the original.[68] Economic considerations of this nature have historically been of particular importance in the fair use analysis.

Indeed, in 1985, the Supreme Court stated that Market Effects was "undoubtedly the single most important element of fair use."[69] However, some courts have interpreted later precedent to mitigate this holding as the importance of transformativeness has come to the fore.[70] In 2013, the Fourth Circuit noted that judges "place[] primary focus on the *first factor* [*e.g.*, transformative use]."[71] This statement is not, however, totally inconsistent with the earlier primacy of the Market Effects consideration, as the first and fourth factors overlap in some instances. Importantly, uses that are transformative are unlikely to supplant the original in the marketplace and vice versa.[72] To further emphasize the varying influence of each factor, there has been a resurgence in emphasis on the fourth factor in recent years,[73] with one Second Circuit judge (in a concurrence supported by a majority of the panel) emphasizing a "renewed focus on the fourth fair use factor."[74]

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whether the second work would damage the market for the first (by, for example, devaluing it through parody or criticism), but whether it usurps the market for the first by offering a competing substitute.").

67. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985); *see also* 17 U.S.C. § 107(4); *Campbell*, 510 U.S. at 590; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274 (11th Cir. 2001); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000).

68. See *infra* Section II.B for a discussion of *Authors Guild v. Google, Inc.* in which the court held that a reasonable jury could only conclude that Google Books increases book sales.

69. *Harper & Row, Publishers, Inc.*, 471 U.S. at 566.

70. *See McGucken v. Pub Ocean Ltd.*, No. 2:20-CV-01923, 2021 WL 3519295, at *5 (C.D. Cal. July 27, 2021).

71. *Bouchat v. Balt. Ravens Ltd. P'ship* (*Bouchat II*), 737 F.3d 932, 937 (4th Cir. 2013) (emphasis added).

72. *Werner v. Red Blue Media Inc.*, No. 2:20-cv-01024, 2021 WL 3560588, at *6 (C.D. Cal. Aug. 9, 2021); *see also* Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 629 (2015).

73. David Tan & Angus Wilson, *Copyright Fair Use and the Digital Carnivalesque: Towards A New Lexicon of Transformative Internet Memes*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 864, 892 (2021).

74. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 125 (2d Cir. 2021) (Sullivan, J., concurring) ("Placing dispositive weight on transformative use while reducing evidence of market harm to an afterthought is difficult to square with the Supreme Court's guidance . . . .") (quoting *Harper & Row, Publishers, Inc.*, 471 U.S. at 566); *see also Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1216 (2021) (Thomas, J., dissenting) (emphasizing the fourth factor).

## II. DIFFERENT TYPES OF MARKET EFFECTS

Recognizing the historical import of the fourth factor and the renewed interest thereof, this Part delves into a detailed analysis of Market Effects. Attention is given to both traditional facets of the consideration and more recent approaches. From there, this Part considers the theory underlying new and unexplored Market Effects mechanisms grounded in marketing and psychology literature. Note that we do not seek to make a normative point here about which of the Market Effects we describe below should matter more or less for fair use determination. We note only that courts and legal scholars posit that economic effects should be taken into consideration. This research attempts to better characterize what those effects are by presenting an expanded taxonomy drawing from marketing and consumer psychology theories.

### *A. Negative Market Effects*

Prior work identifies various types of Market Effects. The first category focuses on new uses that economically harm the original work's market, with a historic emphasis on direct "substitution." In this instance, a new work replaces the original in the primary marketplace. For example, when a photographer took advertising photos of a yacht, another's use of those images to sell the boat was not deemed fair use.[75] In the words of that district court, fair use is disfavored under the Market Effects consideration when the original works were reused "for the exact purpose for which they were [created] and, as such, constitute market substitution."[76]

A review of the legislative history of the Copyright Act of 1976 favors a conclusion that direct substitution was a focal market effect to the drafters.[77] On this point, Abraham Kaminstein—the then Register of Copyrights—stated that "use in the market in replacing the original work" was of primary concern.[78] Kaminstein similarly characterized the

75. *Odom v. Navarro*, No. 09-21480, 2010 WL 11505459, at *1 (S.D. Fla. Mar. 11, 2010).

76. *Id.* at *5.

77. David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 375 (2014) ("What few direct comments the legislative history offers about factor four do make it clear that the factor was actually inspired by concern about the potential of unauthorized uses to create market substitutions for owners' works—*i.e.*, direct reduction in demand for copies of those works.").

78. *Id.* (quoting and citing *Transcript of Meeting of Panel of Consultants on the General Revision of the U.S. Copyright Law, in* COPYRIGHT LAW REVISION 26 (1963)).

fourth factor as "the competitive character of the use."[79] Contemporary texts echoed this sentiment.[80]

This focus on market substitution is distinct from parodic or other disparaging uses of a work.[81] A new parody may harm the original's market by presenting unfavorable commentary that alters the consuming public's perception.[82] Likewise, a scathing book review may hinder future sales.[83] Despite these commentaries' ability to hamper the commercial success of the original, they are not acting as market substitutes because a consumer is unlikely to buy a parody or review *instead* of the original.[84] Accordingly, the Market Effects consideration does not disfavor these uses.[85]

Beyond evaluating whether the new work acts as a substitute for the original, the fourth consideration requires analysis of injury in the market to create derivative works.[86] This evaluation looks to harm in any derivative market that currently exists or that might reasonably be developed.[87]

An example of a derivative market is the licensing of copyrighted photos "to serve as the basis of a stylized derivative image."[88] In *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, the Second Circuit addressed whether a photo's uncompensated use as the basis of pop art prints of the musician Prince constituted fair use or infringement.[89] In

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79. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REPORT, PART 1, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24–25 (Comm. Print 1961).

80. One 1972 treatise emphasizes that "the doctrine of fair use permits the reproduction, for legitimate purposes, of material taken from a copyrighted work to a limited extent that will not cut into the copyright owner's potential market for the sale of copies." Abe A. Goldman, *Copyright As It Affects Libraries: Legal Implications*, *in* COPYRIGHT: CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 30, 39 (Allen Kent & Harold Lancour eds., 1972). Another contemporary text interpreted caselaw to focus this question on if "this kind of use [is] capable of serving as a substitute for the original or otherwise affecting the potential for the copyrighted work for producing income?" ALAN LATMAN, THE COPYRIGHT LAW 215 (5th ed. 1979).

81. *See, e.g.*, *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1226 (S.D.N.Y. 1996), *aff'd*, 137 F.3d 109 (2d Cir. 1998) ("[A] parody is unlikely to serve as a market substitute for the original.").

82. *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

83. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994).

84. *See id.*

85. *Id.*

86. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

87. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 120 (2d Cir. 2021).

88. *Id.* at 122.

89. *Id.* at 120. The process of producing the relevant art was described as probably consisting of:

applying the Market Effects consideration, the court recognized an existing market to license photos as the starting point for creation of stylized images.[90] It then stated that the Defendant's unauthorized use of the photo to create a new image deprived the Plaintiff from licensing royalties in a reasonable market, which disfavored fair use.[91] The court ultimately found no fair use.[92]

There are, however, inherent problems in analyzing derivative markets as part of the fair use analysis. In situations where fair use has never been tested in court, Professor James Gibson points out that many putative fair users facing a lawsuit will purchase a license to mitigate litigation costs and potential liability.[93] Standing alone, this behavior is rational. However, when later parties face the same decision (to litigate or settle), the copyright owner can now point out that earlier parties have paid for a license. This evidences a market for derivatives and disfavors fair use.[94] Recognizing this evidenced market for derivatives, a potential fair user will pay for a license, strengthening the derivative market and continuing the cycle.[95] Accordingly, what was previously a possible fair use becomes disfavored under the derivative market aspect of the fourth factor.

Beyond the unintended effects of rational settlements, uncertainty arises during courtroom arguments about what future derivative markets might reasonably be developed. In analyzing "reasonable markets" at the time of litigation, any disputed use seems like a reasonable derivative market because, by definition, the putative fair user has used the original in that very manner. The copyright owner thus argues that this particular derivative market previously existed or was reasonably foreseeable.

Professor Jeanne Fromer appropriately points out that this line of reasoning is incoherent from a policy perspective.[96] She begins by recognizing that copyright should encourage authors to create new works

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> [I]t was Warhol's usual practice to reproduce a photograph as a high-contrast two-tone image on acetate that, after any alterations Warhol chose to make, would be used to create a silkscreen. For the canvas prints, Warhol's general practice was to paint the background and local colors prior to the silkscreen transfer of the image. Paper prints, meanwhile, were generally created entirely by the silkscreen process without any painted embellishments. Finally, Warhol's typical practice for pencil sketches was to project an image onto paper and create a contoured pencil drawing around the projected image.

*Id.* at 107–08.

90. *Id.* at 122.

91. *Id.*

92. *Id.* at 105.

93. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007).

94. *See id.*

95. *Id.*

96. Fromer, *supra* note 72, at 643.

by incentivizing them with the promise of monopoly profits.[97] From there, Fromer notes that a derivative market that was "[t]ruly inconceivable" when the original was created could not possibly have any incentive effect; therefore, rights over that market need not be protected to achieve copyright's goals.[98] Although some courts attempt to engage in this sort of analysis, her article calls for further research on identifying empirically "plausibly potential markets."[99]

### *B. Positive Market Effects*

Up to this point, this Article has discussed the Market Effects factor from the perspective of potential economic injuries to the copyright owner. However, a plain reading of the Copyright Act broadens this factor's scope beyond market harm. Rather, the Act mandates consideration of "the effect" on the market caused by the new use—positive or negative.[100] A primary line of literature analyzes the capacity of a new work to serve as advertising for the original.[101] The new use exposes (or re-exposes) consumers to the original, which may increase purchases. As stated by Professor David Fagundes, "[t]he simplest way that unauthorized use can stimulate demand for a work is to further its popularity by getting the work in front of a broader swath of its intended market."[102]

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97. *Id.* at 643.

98. *Id.*

99. *Id.* at 645; *see also* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1571 (2009); Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U.L. REV. 969, 970 (2007).

100. Fagundes, *supra* note 77, at 362 ("Nothing in the statute's language limits judicial consideration to a particular kind of effect on the value of or market for a work."); *see also* Mike Schuster, David Mitchell & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 195 (2019) ("This fixation on harm is inconsistent with the statute's instruction to evaluate 'the effect' brought about by the new work.") (quoting 17 U.S.C. § 107(4) (2012)); John Carl Zwisler, *(Mis)appropriation Art: Transformation and Attribution in the Fair Use Doctrine*, 15 CHI.-KENT J. INTELL. PROP. 163, 193 (2015) ("Courts should look to the overall market effect of the original work and not solely examine market harm."); Clark D. Asay, *Software's Copyright Anticommons*, 66 EMORY L.J. 265, 324 (2017); Fromer, *supra* note 72, at 632 ("A full-bodied assessment of market effects fits better with the policies underpinning copyright law and fair use than an assessment that looks to market harms alone.").

101. *See, e.g.*, Schuster, Mitchell & Brown, *supra* note 100, at 206–07; Schuster, *supra* note 38, at 484–86.

102. Fagundes, *supra* note 77, at 378. Fagundes actually divided the advertising effect into two distinct considerations: recognition and reincarnation. *Id.* "Recognition requires . . . increasing attention to a work so that consumers who would not otherwise have noticed it can 'discover' something they already would have liked." *Id.* at 380. "Unauthorized use can provide the vehicle for this latter form of increased demand—

Indeed, this reasoning has been adopted by some courts.[103] In *Authors Guild v. Google, Inc.*, the Southern District of New York addressed whether the *Google Books* project infringed on a host of literary copyrights.[104] In relevant part, the project entailed unauthorized digitization of millions of books that were made publicly available for digital search.[105] System users could view "snippets" (approximately one eighth of a page) of relevant texts.[106] A group of book copyright owners alleged infringement, and Google sought summary judgment due to fair use.[107]

In addressing Google's fair use defense and the Market Effects inquiry, plaintiffs asserted that *Google Books* would harm their market because it served as a "market replacement" for books.[108] The court disagreed, holding that a reasonable jury could only conclude that *Google Books* actually *increased* sales.[109] To this end, the opinion adopted an advertisement effect rationale—finding that potential readers identify and purchase texts found through *Google Books*.[110] The court accordingly determined that the Market Effects consideration "weigh[ed] strongly" toward fair use, and after consideration of each factor, it granted summary judgment.[111]

Empirical research has likewise addressed the capacity for new uses of a work to increase sales of the original. Along with two other scholars, Professor Mike Schuster addressed whether being sampled in a song that appeared on the Billboard Music Year End Charts increased sales of the original (sampled) music.[112] More than 450 sampled songs were

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which I term 'reincarnation'—by creating visibility for a work that has fallen out of (and, perhaps, was never even in) the public eye." *Id.* at 382.

103. *See, e.g.*, *Nat'l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12-cv-00044, 2012 WL 4052111, at *5 (C.D. Cal. Sept. 14, 2012); *see also Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044, 1045, 1049 (S.D.N.Y. 1994); *Bond v. Blum*, 317 F.3d 385, 390, 396–97 (4th Cir. 2003); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1256–57, 1264 (2d Cir. 1986); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001); *Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos., Inc.*, 621 F.2d 57, 58, 62 (S.D.N.Y. 1980).

104. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 285 (S.D.N.Y. 2013), *aff'd sub nom. Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

105. *Id.* at 286.

106. *Id.* at 286–87.

107. *Id.* at 284.

108. *Id.* at 292.

109. *Id.* at 293.

110. *Id.* ("Many authors have noted that online browsing in general and Google Books in particular helps readers find their work, thus increasing their audiences. Further, Google provides convenient links to booksellers to make it easy for a reader to order a book. In this day and age of on-line shopping, there can be no doubt but that Google Books improves books sales.").

111. *Id.*

112. Schuster, Mitchell & Brown, *supra* note 100, at 178.

analyzed, and the study found that—to a high degree of significance—being sampled *increased* the original's sales.[113] The authors attributed the positive market effect to "free advertising" through the new songs.[114] In furtherance of this line of literature, our study seeks to measure the changes in perceptions of an underlying work when it is reused in subsequent works (Usage Effect). This Usage Effect can be further broken down into two separate conceptual processes.

### *C. The "Usage" Market Effect*

Beyond advertising effects and market substitution, other types of market influence exist that the literature has yet to fully explore. Fagundes took initial steps in this area by describing the phenomenon of "affirmation," whereby "widespread use of a work creates a perception that the work is good."[115] This in turn may encourage subsequent purchases of the original.[116] We believe that this category of market influence can be broken into two distinct—and to this point, unexplored—mechanisms. To make this taxonomical distinction clear, two of Fagundes' examples warrant discussion.

First, he references Shepard Fairey's "HOPE Poster." Fairey created this image by editing[117] a photo of Barack Obama, which was taken by photographer Manny Garcia, and adding a "HOPE" caption at the bottom.[118] The resulting poster was "one of the most stunningly successful derivative uses of a news photo in recent memory."[119] After the poster became immensely popular, Garcia was able to sell prints of his original (unedited) photos for more than a thousand dollars each.[120]

Fagundes' second example is the production and sale of unauthorized T-shirts depicting Bart Simpson when *The Simpsons* was particularly popular.[121] He argues that the "ubiquitous presence" of these

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113. *Id.* at 178, 201–02; *see also* Schuster, *supra* note 38, at 484 (making similar findings).

114. Schuster, Mitchell & Brown, *supra* note 100, at 179. An interesting open question is whether this sales increase is found for all of the sampled musicians' work (beyond just the sampled song).

115. Fagundes, *supra* note 77, at 380.

116. *Id.*

117. William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 250–52 (2012) (describing the editing process).

118. Fagundes, *supra* note 77, at 381.

119. Fisher et al., *supra* note 117, at 308.

120. Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES (Mar. 23, 2009), http://www.nytimes.com/2009/03/24/arts/design/24photo.html.

121. Fagundes, *supra* note 77, at 381 (first citing Julia C. Martinez, *Fox Sues 22 Philadelphia Stores Over "Simpsons" Sales*, PHILA. INQUIRER (May 11, 1990), http://articles.philly.com/1990-05-11/business/25889170_1_simpsons-t-shirts-

unauthorized shirts signaled to consumers that "*The Simpsons* was the hot show to watch in America."[122] We believe that the market effects underlying these examples are of the same genus (*i.e.*, the "affirmation" phenomenon) but represent different species due to distinct underlying mechanisms.

In *The Simpsons* example, people looked fondly on the original *simply because others chose to reuse it* by making unauthorized shirts. The quality or success of the new works (*i.e.*, the shirts) was unimportant. This Article refers to this influence as the "Mere Use Effect." In contrast, the HOPE Poster example shows that people favor an original when it is reused in a new work *that is particularly popular or successful*. This Article refers to this phenomenon as the "Spillover Effect." These distinct mechanisms are addressed below.

The Mere Use Effect (*e.g.*, *The Simpsons* knock-off effect) arises from the positive message conveyed to an observer when someone apparently endorses a work by making a new use of it. Psychological theory predicts that when something is used by another, this simple fact creates a signal that the underlying item being used is of high quality.[123] After all, if something were not "good" or "high quality," why would it be used in subsequent works? This psychological rational underlies the Mere Use Effect.

Phenomena of this sort are documented in various contexts—mostly in marketing and hospitality literature.[124] For instance, "[l]everaging the endorsement of products by celebrities, as a marketing practice, has a distinguished history."[125] Relevant research shows that when famous individuals used a product or service, it immediately gained positive perceptions in consumers' minds.[126] In one study, the authors measured

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counterfeit-items-simpsons-merchandise; and then citing David Mills, *Bootleg Bart Simpson, the Hip Hop T-Shirt Star*, WASH. POST (June 28, 1990), https://www.washingtonpost.com/archive/lifestyle/1990/06/28/bootleg-black-bart-simpson-the-hip-hop-t-shirt-star/11b3b65d-4033-41da-a5f7-e13ea56ce498/ [https://perma.cc/6HN8-L95Z]).

122. *Id.*

123. *See* Christopher Courtney, Supradeep Dutta & Yong Li, *Resolving Information Asymmetry: Signaling, Endorsement, and Crowdfunding Success*, 41 ENTREPRENEURSHIP THEORY & PRAC. 265 (2017) (arguing endorsements create a signaling effect that decreases information asymmetry).

124. *See, e.g.*, Diana Seno & Bryan A. Lukas, *The Equity Effect of Product Endorsement by Celebrities: A Conceptual Framework from a Co-Branding Perspective*, 41 EUR. J. MKTG. 121 (2007) (outlining a framework of how celebrity endorsements help product perceptions); Samuel Seongseop Kim, Jinsoo Lee & Bruce Prideaux, *Effect of Celebrity Endorsement on Tourists' Perception of Corporate Image, Corporate Credibility and Corporate Loyalty*, 37 INT'L J. HOSP. MGMT. 131 (2014) (modeling how celebrity endorsements of a hotel increased the perceptions of the loyalty and quality of the hotel).

125. Seno & Lukas, *supra* note 124, at 121.

126. *See, e.g.*, Kim, Lee & Prideaux *supra* note 124.

the change in a hotel's image if a celebrity endorsed it.[127] They found that post-endorsement, perceptions of loyalty and quality increased.[128]

One explanation of this phenomenon focuses on signaling. That is, the endorsement sends a signal to a consumer that the product is worthy in some respects. This decreases information asymmetries and information gaps for the consumers (*i.e.*, they are more confident in the product or service).[129] In turn, the uncertainty caused by the information asymmetry is reduced,[130] and the choice to purchase a product or service is easier to make.

Another explanation for the Mere Use Effect looks to "people's tendency to develop a preference for things merely because they are familiar with them."[131] Repeated advertisements employ this effect by increasing consumers' familiarity with, and therefore liking of, relevant products.[132] The literature explains that this positive response is driven by ease of recall, as opposed to recollection of positive experiences with a stimulus.[133] Consistent with this explanation, cognitive psychologists

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127. *Id.* at 131–32.

128. *Id.* at 131–33.

129. Information asymmetry arises because the consumer is not familiar with the product and lacks adequate information to trust the product; thus, it is a risky proposition. The endorsement decreases this risk by decreasing the amount of information asymmetry. Many argue that a good brand accomplishes the same thing. Knowing the quality of a brand decreases the uncertainty—*i.e.*, the information asymmetry—that exists for consuming a particular product that the brand produces. *See* Tülin Erdem & Baohung Sun, *An Empirical Investigation of the Spillover Effects of Advertising and Sales Promotions in Umbrella Branding*, 39 J. MKTG. RSCH. 408 (2002) (providing empirical evidence that advertising and branding reduce uncertainty in decision making).

130. Courtney, Dutta & Li, *supra* note 123, at 265–66. This effect is similar to the "mere-exposure" effect. *See* Angela Y. Lee, *The Mere Exposure Effect: An Uncertainty Reduction Explanation Revisited*, 27 PERSONALITY & SOC. PSYCH. BULL. 1255, 1264–65 (2002) (arguing uncertainty reduction is the explanation for the mere exposure effect).

131. Gregory S. Parks & E. Bahati Mutisya, *Hazing, Black Sororities, and Organizational Dynamics*, 43 LAW & PSYCH. REV. 25, 89 (2019) (citing R.B. Zajonc, *Mere Exposure: A Gateway to the Subliminal*, 10 CURRENT DIRECTIONS IN PSYCH. SCI. 224, 225 (2001)); *see also* David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1310 ( "Simply being exposed to something will cause you to like it more . . . .").

132. Parks & Mutisya, *supra* note 131, at 90; Marc Vanhuele, *Why Familiar Stimuli Are Better Liked. A Study on the Cognitive Dynamics Linking Recognition and the Mere Exposure Effect*, 22 ADVANCES IN CONSUMER RSCH. 171, 171 (1995).

133. Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1266–67 (2008) (citing Piotr Winkielman & John T. Cacioppo, *Mind at Ease Puts a Smile on the Face: Psychophysiological Evidence That Processing Facilitation Elicits Positive Affect*, 81 J. PERSONALITY & SOC. PSYCH. 989, 994 (2001)).

cite this effect as a shortcut employed to avoid cognitive efforts associated with decision making.[134]

It is therefore possible that repeated exposure to a song through reuse (*e.g.*, sampling) increases consumer preference for the work. However, some research brings this assumption into question. Professor Phillip Russell found that chart performance (used as a proxy for exposure) was highly correlated with *familiarity* of the song, but that *likeability* was not closely linked to success on the charts.[135] The author did not, however, rule out the possibility of a correlation between likeability and exposure.[136] Indeed, other research shows that the liking of music *can* be influenced by repeated exposure in some instances.[137]

In the study below, we expected these phenomena to manifest when a new work uses (*i.e.*, samples) a preexisting copyrighted song. This perceived endorsement can serve as a signaling mechanism to a consumer that the original song is worthy in some respect or the reuse will increase perceptions through familiarity, which will increase the positive perceptions of that work. Accordingly, we expected third-party uses to have a positive effect on perceptions of the original work, and this influence to increase with the number of third-party uses made (*i.e.*, the number of times a song is sampled).

The second effect—embodied in the HOPE Poster example—is the Spillover Effect.[138] A Spillover Effect is the process of transferring a perception about a product or service to another related product or service. For example, if a song uses a sample in its composition and the new work is a hit, then the original (sampled) piece will theoretically be viewed more positively. The positive perceptions of the new work are transferred to the underlying copyrighted work. This is a common psychological phenomenon that has been demonstrated in many contexts,

134. Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1284 (2011).

135. Philip A. Russell, *Effects of Repetition on the Familiarity and Likeability of Popular Music Recordings*, 15 PSYCH. MUSIC 187, 195–96 (1987).

136. *See id.* at 187–97.

137. *See* Mark G. Orr & Stellan Ohlsson, *The Relationship Between Complexity and Liking in Jazz and Bluegrass*, 29 PSYCH. MUSIC 108, 108–09 (2001); Isabelle Peretz, Danielle Gaudreau & Anne-Marie Bonnel, *Exposure Effects on Music Preference and Recognition*, 26 MEMORY & COGNITION 884, 890 (1998).

138. Some have termed this a "halo effect." *See, e.g.*, Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 821 (2015).

including personal relationships[139] and product brand evaluations.[140] Importantly, the Spillover Effect is agnostic on the evaluation's outcome. Spillover Effects can move in *positive or negative* directions depending on how the new use is perceived.[141]

The Spillover Effect is often explained by the associative network model.[142] According to the theory, concepts (or nodes) in the mind connect via a network of associated memories (or concepts).[143] Links between memories come about as individuals have experiences.[144] After the links between memories form, the memory comes to mind when a person receives sufficient mental input to trigger that idea.[145] For example, viewing a red soda can with white lettering is probably a sufficient trigger to make you think of "Coca-Cola." After the relevant memory activates, continued exposure to pertinent input begins to trigger

139. *See, e.g.*, Rosalind C. Barnett & Nancy L. Marshall, *Worker and Mother Roles, Spillover Effects, and Psychological Distress*, 18 WOMEN & HEALTH 9, 9–40 (1992) (documenting both the negative and positive spillover effects in work and parenting roles); *see also* Andrew V. Papachristos, Anthony A. Braga, Eric Piza & Leigh S. Grossman, *The Company You Keep? The Spillover Effects of Gang Membership on Individual Gunshot Victimization in a Co-offending Network*, 53 CRIMINOLOGY 624, 643 (2015) (analyzing the spillover of risk of being shot based upon proximity to a gang membership network).

140. *See, e.g.*, Bernard L. Simonin & Julie A. Ruth, *Is a Company Known by the Company It Keeps? Assessing the Spillover Effects of Brand Alliances on Consumer Brand Attitudes*, 35 J. MKTG. RSCH. 30, 39 (1998) (showing spillovers when one brand works with another separate brand on product promotions); *see also* Yao-Chin Wang, Hailin Qu & Jing Yang, *Love Spillover from a Hotel Sub-brand to Its Corporate Brand: An Associate Network Theory Perspective*, 44 J. HOSP. & TOURISM MGMT. 263, 268–70 (2020) (showing the spillover effects of a hotel to its holding company); Zifei Fay Chen & Weiting Tao, *The Association Spillover Mechanism of CSR Crises: Evidence from the Uber Case*, 32 J. PUB. RELS. RSCH. 178, 190–93 (2020) (documenting spillovers from CSR endeavors to the corporate brand).

141. *See* Jing Lei, Niraj Dawar & Jos Lemmink, *Negative Spillover in Brand Portfolios: Exploring the Antecedents of Asymmetric Effects*, 72 J. MKTG. 111, 120–22 (2008) (demonstrating the potential of negative spillovers via brand portfolio extensions); *see also* Nicole L. Votolato & H. Rao Unnava, *Spillover of Negative Information on Brand Alliances*, 16 J. CONSUMER PSYCH. 196, 200–01 (2006) (demonstrating negative spillovers associated with co-branding initiatives). We note that one prior article found some evidence that a poor-quality reuse of a work harms consumer perceptions of the original. Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 27 (2013).

142. *See* Wang, Qu & Yang, *supra* note 140.

143. DANIEL REISBERG, COGNITION: EXPLORING THE SCIENCE OF THE MIND 231 (6th ed. 2016).

144. *See id.* at 231–32; Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, 57 J. MKTG. 1, 2–3 (1993) ("Most widely accepted conceptualizations of memory structure involve some type of associative model formulation.").

145. REISBERG, *supra* note 143, at 237.

associated memories.[146] For instance, if you continue to think about Coca-Cola, you might recall the associated memory of drinking Coca-Cola at the park with your grandma.[147]

According to associative network theory, spillovers (of the sort we are interested in) occur when the two previously unrelated nodes form a connection through a life experience.[148] For example, if a Coca-Cola bottle is seen on the dashboard of a Porsche, the Porsche's node and the Coca-Cola node are brought together in the mind of an observer. Thereafter, it becomes likely that some of the characteristics of a Porsche may become connected to the concept of Coca-Cola. An observer may subsequently view Coca-Cola as more luxurious or higher quality (*i.e.*, qualities associated with Porsche). In the HOPE Poster example, positive associations to Fairey's poster became associated with Garcia—the photographer—and his other works, which increased their consumer appeal and value.

Studies have shown this kind of Spillover Effect in various areas, including—most famously—the brand extension context.[149] There, research has found that when a company releases a new product, characteristics of (*i.e.*, associations to) their existing products may spillover to the new offerings. This again is because the two concepts (the two products) are closely associated in a consumer's mind because they are made by the same company.[150]

The studies discussed below seek to discretely measure the Mere Use and Spillover Effects that arise when a copyrighted work (a sampled song in this study) is used (sampled) in a subsequent work (the sampling song). Together these effects make up the Usage Effect. As described above, the Usage Effect is an important concept in evaluating Market Effects in fair use determinations. The following Part describes our empirical methodology toward evaluating the impact of the Mere Use and Spillover Effects.

## III. MEASURING THE "USAGE EFFECT"

To measure the scope of the two discrete effects that make up the Usage Effect, we must isolate each relevant impact that a third-party use

146. *Id.* at 231.

147. Keller, *supra* note 144, at 2–3 (referring to this phenomenon as "spreading activation"); *see* REISBERG, *supra* note 143, at 231.

148. *See* Wang, Qu & Yang, *supra* note 140.

149. For articles discussing spillover effects in a brand context, see *supra* note 140.

150. *See* Subramanian Balachander & Sanjoy Ghose, *Reciprocal Spillover Effects: A Strategic Benefit of Brand Extensions*, 67 J. MKTG. 4, 4–13 (2003) (demonstrating the spillover effects when products are thought of as close together because they are made by the same brand).

of an earlier work has on the relevant market. These include advertising effects (studied in earlier works), Mere Use Effects, and Spillover Effects. As described below, we were able to isolate the latter two effects by keeping any advertising effect constant and then varying the availability of information that should bring about Mere Use and Spillover Effects. However, before discussing our empirical methodology, this Article situates our study within the fair use framework. Specifically, this Article proceeds by discussing how the Mere Use and Spillover Effects may influence ex ante predictability of fair use decisions and why this is important to the copyright regime.

### *A. Motivation for the Empirical Study*

Copyright law is intended to further the utilitarian goal of encouraging the creation of new works.[151] If the fair use doctrine is to achieve this end, authors must be able to ascertain whether a new work would be a fair use or not *ex ante*.[152] Absent the capacity to make a reasonable ex ante assessment of this issue, many would-be fair users will not rely on the defense, and the creation of news works is discouraged.[153] This is a reasonable choice as it seems like a poor decision to invest the effort to create a work of authorship only to later face infringement damages or an injunction precluding distribution.[154] Unfortunately, the literature recognizes that a significant amount of ex ante uncertainty exists with regard to the fair use doctrine.[155]

This uncertainty can be divided into two forms—one much better explored in the literature than the other. The better-explored type of uncertainty addresses unpredictability in application of the statutory fair

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151. *See* Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COLUM. L. REV. 1887, 1889 (2019) (noting copyright law's goal of "encouraging the creation and dissemination of expressive works"); *see also Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (noting copyright law's goal of "promot[ing] the Progress of Science and useful Arts") (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)).

152. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092 (2007).

153. *See* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 189 (2017).

154. *See* 17 U.S.C. § 502, 504.

155. *See, e.g.*, 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1 (3d ed. Supp. 2022-2); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2022); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 413–568 (2d ed. 1995); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 280 (2003) (claiming if "Congress legislated a dartboard rather than the particular four fair use factors . . . , it appears that the upshot would be the same"); Colin Kennedy, *An Economic Analysis of Market Failures in Copyright Law: Iatrogenesis and the Fair Use Doctrine*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 208, 234 (2016).

use considerations to a given set of facts. Due to the multi-factor analysis, it has been asserted that "it is often impossible to know ex ante whether any particular use will qualify as fair."[156] The literature includes significant discussion of the doctrinal difficulties in making ex ante predictions about fair use decisions.[157]

A second, less-explored form of uncertainty is particularly relevant to this study. This uncertainty—which could be called factual or empirical uncertainty—arises because some fair uses rely on fact issues that can only be determined *after* the new work enters the market.[158] For instance, the question of whether and to what extent a putative fair use influences the original work's market can, *by definition*, only be ascertained after the new work is created. Indeed, the Market Effects consideration is of significant concern with regard to this sort of ex ante empirical uncertainty.

To be sure, certain factual concerns associated with the Market Effects consideration have been addressed through factual presumptions. For instance, courts are willing to presume market harm when a new work is clearly a market substitute.[159] Indeed, factual presumptions of this nature might be applicable to resolve other factual uncertainties that cannot be resolved ex ante—including both the Spillover and Mere Use Effects. However, no empirical studies of these effects have been conducted to this point; thus, any presumption would be merely guesswork. This Article is a first step toward addressing whether a

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156. Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185, 185–86 (2007).

157. *See, e.g.*, Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 574 (2008) ("Fair use is a classic example of a multi-factor test. The outcomes of multi-factor tests are notoriously difficult to predict."); *see also* Carroll, *supra* note 152, at 1095 (claiming the doctrine is a cause of "significant ex ante uncertainty"); *See* GOLDSTEIN, *supra* note 155, at § 12.1 ("No copyright doctrine is less determinate than fair use. Indeterminacy may be a necessary cost of a fact-specific doctrine that aims to negotiate liability in situations too fine-grained for Congress to address specifically in the statute. But it is nonetheless a source of frustration to the lawyer who needs to know whether his or her client can safely proceed with a project that skirts the edges of liability . . . ."); Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and Users' Rights*, 56 J. COPYRIGHT SOC'Y U.S. 485, 497 (2009) ("[T]he fair use doctrine provides us with very little direction in making legal or ethical decisions."). It is notable, however, that this criticism is not universal. *See, e.g.*, Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 871 (2015); *see also* Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L.J. 143, 145 (1993).

158. Sag, *supra* note 30, at 64 (recognizing the need to forecast future market effects under the Market Effects consideration).

159. *See Dr. Seuss Enters., L.P. v. ComicMix LLC*, 300 F. Supp. 3d 1073, 1082 (S.D. Cal. 2017) ("A court may presume market harm when the second work supersedes the original and 'serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.'") (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994)).

factual presumption is feasible and what sort of presumption would be appropriate.

With this in mind, we attempted to identify whether third-party use of an original work can bring about Spillover or Mere Use Effects. Proof of a statistically significant influence arising from the Mere Use Effect would further ex ante predictability. In that case, the hypothesized effect could only be positive because the theory posits that third-party use increases perceptions of the original. There is no mechanism for harm to the original. Thus, evidence of the Mere Use Effect would facilitate an ex ante presumption that third-party use *benefits* the market for the original work.

In contrast, Spillover theory presents the possibility of a *positive or negative* effect on the market for the original. If the third-party use receives a warm post-release reception, the expected spillover will benefit the earlier work. For instance, if you sample my song and your new work is a hit, I can expect goodwill from your hit to spillover onto my original work. In contrast, if the public response to the new work is negative, I expect to see market harm to the original. Accordingly, the Spillover Effect is necessarily a function of ex post consumer response to the new use. Barring some manner of predictably forecasting the response to the new work, ex ante factual presumptions associated with the Spillover Effect are not feasible.

With this in mind, we proceeded under the belief that evidence supporting the Mere Use Effect furthers ex ante predictability of fair use determinations. This in turn furthers parties' willingness to engage in fair uses and contribute to the constitutional goal of encouraging authorship. In contrast, evidence supporting the Spillover Effect hinders ex ante predictability and discourages certain potential fair uses. Unfortunately, as will be seen, the results of our studies do not support the creation of predictability enhancing assumptions that encourage the goals of copyright.

### *B. Subject of the Study: Music Sampling*

The empirical strategy below uses sampling—the incorporation of earlier song recordings into a new piece of music[160]—to study whether reuse of a copyrighted work brings about evidence of the Mere Use or Spillover Effects. Music sampling began in the 1970s[161] and became commonplace by the "golden age" of hip-hop (the late 1980s to early

160. *Woolfsongs Ltd. v. Slaughterhouse, LLC*, No. CV1503049, 2016 WL 6662721, at *1 (C.D. Cal. Feb. 5, 2016); *see also Jeopardy!* (NBC television broadcast May 30, 2018) (defining "sampling" as "taking a snippet of one song & using it in another" for the $200 clue under Music Industry Terms in the *Jeopardy!* round).

161. NELSON GEORGE, HIP HOP AMERICA 60 (2005).

1990s).[162] During that period, musicians often employed samples without seeking permission from copyright owners.[163]

That legal environment changed in 1991 with the first court case to address sampling and copyright—*Grand Upright Music v. Warner Bros. Records*.[164] In addressing the plaintiff's copyright infringement claim against a rapper who sampled his music, the judge set forth the absolute (and much-criticized[165]) proposition to "[g]et a license or do not sample."[166] Although subsequent courts have considered limitations to this proposition (*e.g.*, de minimis sampling is not infringing),[167] the

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162. Alexander Stewart, *"Been Caught Stealing": A Musicologist's Perspective on Unlicensed Sampling Disputes*, 83 UMKC L. REV. 339, 339 (2014).

163. Josh Norek, Comment, *"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 87 (2004); *see also* Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 118 (2007); KEMBREW MCLEOD & PETER DICOLA WITH JENNY TOOMEY & KRISTIN THOMSON, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 132 (2011).

164. 780 F. Supp. 182 (S.D.N.Y. 1991); *see also* Carl A. Falstrom, Note, *Thou Shalt Not Steal:* Grand Upright Music Ltd. v. Warner Bros. Records, Inc. *and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 361 (1994).

165. One commenter stated: "The court of appeals reversed in an opinion that is a compendium of almost every error that can be made in construing the U.S. Copyright Act." WILLIAM PATRY, HOW TO FIX COPYRIGHT 92 (2011); *see also* Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 277 (2009); Eric Charles Osterberg, *Should Sound Recordings Really Be Treated Differently Than Other Copyrighted Works? The Illogic of* Bridgeport v. Dimension Films, 53 J. COPYRIGHT SOC'Y U.S.A. 619, 639–42 (2006); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1340–41 (S.D. Fla. 2009); *Steward v. West*, No. CV 13-02449, 2014 WL 12591933, at 8 n.8 (C.D. Cal. Aug. 14, 2014); *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 (E.D. La. 2014); *EMI Recs. Ltd. v. Premise Media Corp.*, No. 601209, 2008 WL 5027245, at 6 (N.Y. Sup. Ct. Aug. 8, 2008); NIMMER & NIMMER, *supra* note 155, § 13.03(A)(2)(b); Menell, *supra* note 16, at 451; Tracy Reilly, *Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in* Metall Auf Metall, 13 MINN. J.L. SCI. & TECH. 153, 183–86 (2012); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 544 (2006).

166. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

167. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016) ("We hold that the 'de minimis' exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions."). *But see Bridgeport Music, Inc.*, 410 F.3d at 798 ("The heart of [plaintiff's] arguments is the claim that no . . . *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording. We agree and accordingly must reverse the grant of summary judgment.").

ruling furthered a general approach among record companies to require clearance of *all* samples.[168]

This Article does not address the question of whether or in what circumstances sampling should be a fair use. A significant body of literature already exists on this point.[169] Instead, our study used sampling as a vehicle to empirically analyze theoretical types of market effects.

To this end, this Article builds on prior research showing how external information can influence perceptions about consumer products or art—in this case, music.[170] In one meta analysis, Professor David Hargreaves discovered that six of seven studies "found social influences to have a significant effect on aesthetic judgements, and it may be that these are more powerful in the case of music than in other art forms."[171] Professor Bethany Bryson reported that openness to new music types correlated with increased education.[172] Research has likewise shown that opinions about music expressed by other parties can influence the opinions expressed by listeners.[173] In each of these cases, some extrinsic data (*e.g.*, social influences, education) altered perceptions about underlying music. We employed a similar approach to address how knowledge about sampling of a song (*i.e.*, extrinsic data) can influence perceptions about the sampled work.

### *C. Overview of the Empirical Studies*

To measure any Mere Use and Spillover Effects arising from reuse of copyrighted works, we employed an experimental design focusing on

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168. Julian Azran, Note, *Bring Back the Noise: How* Cariou v. Prince *Will Revitalize Sampling*, 38 COLUM. J.L. & ARTS 69, 73 (2014) (citing Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 727 (1992)) ("After Grand Upright, the music industry responded by negotiating licenses before releasing any sample-based music.").

169. *See, e.g.*, Schuster, Mitchell & Brown, *supra* note 100, at 206; *see also* Schuster, *supra* note 38, at 484; Azran, *supra* note 168, at 70–71; Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371, 372 (2019).

170. Ruth V. Brittin, *The Effect of Overly Categorizing Music on Preference for Popular Music Styles*, 39 J. RSCH. MUSIC EDUC. 143, 143–44 (1991) (presenting a literature review on this effect).

171. DAVID J. HARGREAVES, THE DEVELOPMENTAL PSYCHOLOGY OF MUSIC 198 (1986).

172. *See* Bethany Bryson, *"Anything but Heavy Metal": Symbolic Exclusion and Musical Dislikes*, 61 AM. SOCIO. REV. 884, 895 (1996); *see also* Dianne Gregory, *Analysis of Listening Preferences of High School and College Musicians*, 42 J. RSCH. MUSIC EDUC. 331, 341 (1994).

173. *See* Charles E. Furman & Robert A. Duke, *Effect of Majority Consensus on Preferences for Recorded Orchestral and Popular Music*, 36 J. RSCH. MUSIC EDUC. 220, 228 (1988).

music—a commonly studied copyrighted work. In the following studies, we manipulated the information that respondents read about numerous songs and then asked them to rate their perceptions of the song after hearing it. We predicted that various forms of information about the song being sampled in later songs would affect how individuals rated each song (*i.e.*, the Usage Effect). If this is the case, it has implications for fair use as this Article describes further below.

On this point, we hypothesized that if a listener believes that a song was sampled in a later song, then the original will be more positively perceived. This would be a simple case of the Mere Use Effect. That is, the listener draws a positive inference about the song from the fact that it is used in a later work. We also hypothesized that a Spillover Effect will take place if the listener is made aware of positive or negative associations to the new (sampling) song. That is, if a listener is told that the sampling song was negatively or positively perceived, this would influence perceptions of the original (sampled) song. In both instances, we use the provision of relevant information as a proxy for the consumer actually experiencing the new, sampling song.

Our design described below allowed us to isolate the Mere Use from the Spillover Effects. This is often very difficult to achieve in archival studies because both effects are at play at all times. Using an experiment allowed us to control for Spillover Effects by not giving information about how positively or negatively a song was received. Likewise, we controlled for Mere Use Effects by controlling whether respondents knew if a song was sampled or not.

Our studies took the form of an experimental design survey in which we asked respondents to listen to several songs while reading information about those songs. We created surveys using Qualtrics and administered them using a combination of Cloud Research recruiting and Amazon Mechanical Turk data collection. We randomly assigned respondents to various conditions. Each condition gave respondents a different set of information about each song. Generally, the information focused on how the song was subsequently used in other media (*i.e.*, information about the song being subsequently sampled). Respondents were then asked to rate their perceptions of the songs on various metrics using a Likert Scale (a one-to-five rating). This allowed us to compare the perceptions of each song given the differing information provided to see if any Mere Use and Spillover Effects were apparent.

We found several interesting takeaways. First, the Mere Use Effect does not seem to be as powerful as predicted. The fact that a song was sampled in a subsequent work did not significantly alter perceptions of the original song (if at all). Second, we found that when a work was used in a negative context (in our case the music was sampled in a song that was negatively received), the perceptions of the underlying work were harmed. This is evidence of a negative Spillover Effect (and in turn a

negative Usage Effect) and puts into question how exactly courts and authors can evaluate fair use cases ex ante.[174] This Article now documents our studies in greater detail.

### *D. Study 1*

In Study 1, we pre-tested various songs to identify those suitable for Study 2—in which we measured the Mere Use and Spillover Effects. To test these effects, it was important to identify songs that did not already create strong emotions or thoughts in respondents' minds. If a song is well known and is either very positively or very negatively perceived, then information about that song and any third-party uses of it (*e.g.*, sampling) are unlikely to significantly influence respondent preferences. This is because preferences and perceptions are sticky.[175] If a respondent already has a strong view of something, it is difficult to change their view through one survey because any preexisting view has been instilled over various exposures over longer lengths of time.

As such, our first study attempted to identify a set of songs that were both relatively unknown and more neutrally perceived (measured on our one-to-five Likert Scale). We wanted to find works that people did not have strong feelings about because these would be the most likely to manifest a Mere Use or Spillover Effect. We chose the following seventeen songs to pretest.[176]

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174. We also found that providing any information at all positively effects how individuals perceive the copyrighted work. This is consistent with previous studies, although for reasons we describe below we do not put too much emphasis on this result.

175. There has been ample research on how perceptions and preferences are sticky and actually quite difficult to influence. *See, e.g.*, Anders Fremstad, *Sticky Norms, Endogenous Preferences, and Shareable Goods*, 74 REV. SOC. ECON. 194, 211 (2016) (documenting how norms and preferences are difficult to change in the peer-to-peer markets where consumers borrow and lend goods); *see also* Lisa Elizabeth Bolton & Americus Reed, *Sticky Priors: The Perseverance of Identity Effects on Judgment*, 41 J. MKTG. RSCH. 397 (2004) (showing one's identity creates sticky judgments and moving individuals away from those judgments is difficult); Majken Schultz, Jan Mouritsen & Gorm Gabrielsen, *Sticky Reputation: Analyzing a Ranking System*, 4 CORP. REPUTATION REV. 24, 25 (2001) (arguing reputations of companies are sticky even if criteria and structure of a ranking system change); Joseph W. Alba, Susan M. Broniarczyk, Terence A. Shimp & Joel E. Urbany, *The Influence of Prior Beliefs, Frequency Cues, and Magnitude Cues on Consumers' Perceptions of Comparative Price Data*, 21 J. CONSUMER RSCH. 219, 219 (1994) (documenting the importance of prior beliefs on the effects of advertising).

176. We chose these songs mostly randomly. The authors went to Spotify and found songs from different genres that were not popular.

*Table 1: Songs Tested*

| Song Title | Artist |
|---|---|
| "My Heart's a Cannonball" | Lelia Broussard |
| "Gwan" | The Suffers |
| "Weirdo" | Johnny Polygon |
| "Tell 'Em" | Chill Rob G, R.A. the Rugged Man |
| "Eye on the Gold Chain" | Ugly Duckling |
| "Greatest Man Alive" | Three Times Dope |
| "Over" | Jessica Hernandez & the Deltas |
| "Master Heartache" | Sir Lord Baltimore |
| "Beautiful Alone" | Strangelove |
| "Walk Like a Zombie" | HorrorPops |
| "My Girl" | Random Song Generator |
| "Fuel The Fire" | Roman Holiday |
| "Perfect Girls of Pop" | Elizabeth Cook |
| "This Life Ain't for Everybody" | Eric Lee Beddingfield |
| "Bold Soul Sister, Bold Soul Brother" | The Black On White Affair, Calvin Law, Robbie Hill, Curtis Simeo, Manuel Stanton, Victor Lewis |
| "Try My Love Again" | Bobby Moore & the Rhythm Aces, Chico |
| "Needle to the Groove" | Mantronix |

Respondents were recruited via Cloud Research.[177] We used Amazon Mechanical Turk to field the survey.[178] Two hundred people

177. Cloud Research is an independent company that allows researchers to more precisely recruit panels from Mechanical Turk. It also provides a way to easily manage payments and respondent output. *See* Leib Litman, Jonathan Robinson & Tzvi Abberbock, *TurkPrime.com: A Versatile Crowdsourcing Data Acquisition Platform for the Behavioral Sciences*, 49 BEHAV. RSCH. METHODS, 433 (2017).

178. Mechanical Turk is an online platform that allows researchers to pay for respondents to complete surveys. Thousands of articles have used Amazon Mechanical Turk and currently do. The following is a non exhaustive list of articles that used the online marketplace specifically for conjoint studies: Thomas Stevens, Aaron Hoshide, Francis Drummond, *Willingness to Pay for Native Pollination of Blueberries: A Conjoint Analysis*, 2 INT'L J. AGRIC. MKTG. 67 (2015); Karoline Mortensen and Taylor Hughes, *Comparing Amazon's Mechanical Turk Platform to Conventional Data Collection Methods in the Health and Medical Research Literature*, 33 J. GEN. INTERNAL MED. 533 (2018); Kirk Bansak, Jens Hainmueller, Daniel J. Hopkins & Teppei Yamamoto, *The Number of Choice Tasks and Survey Satisficing in Conjoint Experiments*, 26 POL. ANALYSIS 112, 113 (2018); Cindy Wu, Scot Hultman, Paul Diegidio, Steven Hermiz,

took our survey and the demographics of the respondents were as follows:

*Table 2: Study 1 Sample Demographics*

| Gender | |
|---|---|
| Male | 56% |
| Female | 43% |
| Other | 1% |
| **Education** | |
| High School | 7% |
| Some College | 33% |
| 2-year Degree | 34% |
| 4-year Degree or more | 27% |
| **Average Age** | 35–44 |

The study proceeded as follows. Respondents first listened to a recording of someone talking about their hometown and answered a question about it to make sure that they were able hear the audio. After this, respondents listened to thirty-five-second portions of ten songs. We attempted to include an aspect that represented its feel and genre.[179] We made sure that respondents listened to songs by not allowing them to move past the audio file until they had listened to the full thirty-five seconds.

After each song, respondents were asked to rate the song on several metrics. We measured the following characteristics for each song[180]:

1. How much did you like the song?
2. How likely would you be to stream the song?

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Roja Garimella, Trisha Crtuchfield & Clara Lee, *What Do Our Patients Truly Want? Conjoint Analysis of an Aesthetic Plastic Surgery Practice Using Internet Crowdsourcing*, 37 AESTHETIC SURGERY J. 105 (2017); Yu Pu & Jens Grossklags, *Using Conjoint Analysis to Investigate the Value of Interdependent Privacy in Social App Adoption Scenarios*, *in* INTERNATIONAL CONFERENCE ON INFORMATION SYSTEMS (ICIS 2015) 4498 (2015).

179. Basically, we did not want to give respondents a drawn-out intro or outro, as those parts of the song may not really represent the actual meat of the musical work.

180. We settled on these metrics for a few reasons. First, given that the context of the survey is copyright's market effect, we wanted clear market driven measurements of songs, which included streaming, recommending, and attending a concert. These metrics generally imply a direct relationship to sales. Second, we wanted to measure feelings and perceptions of a song that may indirectly affect sales. To do this, we used the prevailing measures that academic literature studying music perception and preferences use. *See, e.g.*, Manuel Anglada-Tort, Jochen Steffens, & Daniel Müllensiefen, *Names and Titles Matter: The Impact of Linguistic Fluency and the Affect Heuristic on Aesthetic and Value Judgements of Music*, 13 PSYCH. AESTHETICS CREATIVITY & ARTS 277 (2019).

3. How familiar with the song are you?
4. Would you attend a concert of the artist?
5. Would you recommend the song to friends or family?
6. How high quality was the song?
7. How beautiful was the song?
8. How happy was the song?
9. How inspiring was the song?
10. How authentic was the song?

Each of these characteristics were measured on a one-to-five Likert Scale. Respondents were given the artist and title of the song to ensure that when asked about whether they would like to listen to it again, they had the necessary information to do so.

We then analyzed the results of the survey by song. That is, we averaged the ratings of each song on every metric to identify which ones were relatively unknown and neutral on our metrics. Below, Table 3 shows the results of our first study.

*Table 3: Study 1 Results*

| **Song** | Like. | Str. | Fam. | Att. | Rec. | Qual. | Beaut. | Hap. | Insp. | Auth. |
|---|---|---|---|---|---|---|---|---|---|---|
| Tell 'Em | 2.45 | 2.18 | 1.35 | 1.76 | 2.00 | 3.02 | 2.04 | 2.42 | 2.17 | 3.35 |
| Master | 2.64 | 2.18 | 1.39 | 1.97 | 2.14 | 3.11 | 2.17 | 2.32 | 2.08 | 3.40 |
| Weirdo | 2.75 | 2.48 | 1.45 | 2.08 | 2.31 | 3.06 | 2.42 | 2.64 | 2.45 | 3.24 |
| Zombie | 2.79 | 2.24 | 1.37 | 1.86 | 2.08 | 2.98 | 2.22 | 2.52 | 2.14 | 3.45 |
| Needle | 2.80 | 2.35 | 1.52 | 2.14 | 2.29 | 3.00 | 2.27 | 2.67 | 2.24 | 3.17 |
| This Life | 2.90 | 2.38 | 1.42 | 2.02 | 2.28 | 3.38 | 2.44 | 2.75 | 2.47 | 3.47 |
| Eye | 2.91 | 2.53 | 1.46 | 2.05 | 2.30 | 3.18 | 2.25 | 2.71 | 2.35 | 3.60 |
| Man Alive | 2.92 | 2.52 | 1.54 | 2.08 | 2.26 | 3.11 | 2.20 | 2.76 | 2.27 | 3.49 |
| My Girl | 3.03 | 2.32 | 1.47 | 1.93 | 2.32 | 3.01 | 2.90 | 2.94 | 2.51 | 3.22 |
| Beautiful | 3.08 | 2.67 | 1.36 | 2.22 | 2.42 | 3.37 | 2.74 | 2.84 | 2.58 | 3.45 |
| Over | 3.14 | 2.66 | 1.42 | 2.22 | 2.58 | 3.61 | 2.69 | 2.88 | 2.70 | 3.74 |
| Gwan | 3.22 | 2.62 | 1.33 | 2.20 | 2.53 | 3.62 | 2.73 | 3.19 | 2.66 | 3.83 |
| Bold | 3.25 | 2.68 | 1.48 | 2.32 | 2.66 | 3.36 | 2.73 | 3.06 | 2.63 | 3.67 |
| Heart | 3.35 | 2.98 | 1.64 | 2.46 | 2.71 | 3.64 | 3.20 | 3.20 | 2.87 | 3.83 |
| Perfect Girl | 3.46 | 3.00 | 1.35 | 2.59 | 2.75 | 3.70 | 3.03 | 3.19 | 2.96 | 3.91 |
| Fuel | 3.47 | 3.08 | 1.75 | 2.56 | 2.75 | 3.60 | 3.01 | 3.45 | 3.10 | 3.68 |
| Try My Love | 3.84 | 3.32 | 1.85 | 2.75 | 3.12 | 3.98 | 3.41 | 3.69 | 3.14 | 4.15 |

*Survey ratings from left to right: Liked, Stream, Familiar, Attend Concert, Recommend, High Quality, Beautiful, Happy, Inspiring, Authentic*

The point of this first study was to test the survey structure and, more importantly, to choose a subset of songs that were perceived neutrally. We also attempted to choose songs from different genres of

music. Taking this into consideration, we chose four songs from Study 1 that fit our criteria:

1. "Gwan" by The Suffers.
2. "Eye on the Gold Chain" by Ugly Duckling.
3. "Over" by Jessica Hernandez & the Deltas.
4. "Beautiful Alone" by Strangelove.

### *E. Study 2*

In Study 2, we presented the four selected songs to respondents while manipulating the information respondents received about the music. Given our hypotheses about the Mere Use and Spillover Effects, we attempted to present a set of information dealing with third-party use (*i.e.*, sampling) that would alter respondents' perceptions about the music.

To this end, we chose four types of information (*i.e.*, the experimental study had four randomly assigned conditions). To deliver the information for each song, we used a novel "Pop Up Video" style of stimuli.[181] Through this approach, respondents were shown white text over a black background while listening to the relevant song. In our first condition (control condition), we gave respondents four "control" facts for each song, representing generic data about the song or artist. The control data was unrelated to any sampling of the work. None of these facts should have implicated a Mere Use or Spillover Effect—*i.e.*, the control condition was a baseline for us to measure the Mere Use or Spillover Effects against. For example, a fact for the song by Jessica Hernandez & the Deltas was that "the band's name refers to a former drummer's 1987 Delta automobile." In each subsequent condition, we randomly changed one of the facts.

In our second condition (sampling condition), one of the control facts was changed to a fact about sampling. Specifically, we informed the respondent that the song had been sampled in a subsequent song. This condition was meant to create the Mere Use Effect—*i.e.*, a positive perception of the underlying song given knowledge that it was used in a later work. For example, for one song we informed respondents that it "was later sampled in another rapper's music."

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181. *Pop Up Video* was a classic VH1 television show that played music videos of famous songs while simultaneously giving viewers information about the video, artist, and song in text. For a description of the television show, see Gary Burns, Pop Up Video*: The New Historicism*, 32 J. POPULAR FILM & TELEVISION 74 (2004) (discussing the show and how it harkens back to silent films); *see also* Maisy Fernandez, *VH1 Brings Back* Pop Up Video, MTV NEWS (May 25, 2011), http://www.mtv.com/news/2766145/vh1-brings-back-pop-up-video/ [https://perma.cc/35CL-L6YY] (describing the show).

In our third condition (multiple sampling condition), one of the control facts was changed to a fact about repeated sampling. We informed the respondent that the song had been sampled in multiple subsequent songs. For example, one fact informed the respondent that the song "has been sampled in nine different songs." This condition was meant to create a more complex Mere Use Effect—*i.e.*, a *greater* positive perception of the underlying song given knowledge that the song was used in *many* subsequent songs.[182]

In our fourth condition (negative sampling condition), one of the control facts was changed to a negative fact about sampling. We informed the respondent that the song had been sampled in a subsequent song, but that the later song was received negatively in the marketplace. For example, listeners of one song were told: "this song was sampled in a 2014 song, which was criticized as being *awful*." This condition was meant to elicit a negative Spillover Effect—*i.e.*, a negative perception of the underlying song given knowledge that it was used in a subsequent song that was a critical failure.[183]

Based on feedback from the pretest survey, we limited our dependent variables and therefore decreased the number of questions we asked. Instead of having respondents rate each song on ten dimensions, we had them rate each song on only eight dimensions. These dimensions were as follows:

1. How much did you like the song?
2. How likely would you be to stream the song?
3. Would you attend a concert of the artist?
4. Would you recommend the song to friends or family?
5. How high quality was the song?
6. How happy was the song?
7. How inspiring was the song?
8. How authentic was the song?

Respondents then followed the same procedure as in Study 1, except in this instance we randomly assigned respondents to one of the four

182. We did not have a condition where we gave positive information about the song. This is because we noted that the Mere Use effect is already positive in nature. Therefore, we were more interested in how the Mere Use effect mixed with a negative spillover effect would change perceptions. We assumed, however, that when saying that a song was "sampled," it would lend itself to a more positive evaluation of that song precisely because of the Mere Use effect.

183. It is possible that this condition could theoretically trigger a negative Spillover effect *and* a positive Mere Use effect, as it gives information that the work was both used and used in a poorly received song. As will be seen, the fact that we found no significant results with regard to the Mere Use effect mitigates any concerns arising from this fact.

information conditions. Each participant then heard and rated four songs.[184] Respondents only received one of the four conditions. Hence, the study was a between-subjects study.[185] The sample size of Study 2 was 381, and the demographic characteristics of the sample are represented below in Table 4.

*Table 4: Study 2 Sample Demographics*

| Gender | |
|---|---|
| Male | 46% |
| Female | 53% |
| Other | 1% |
| **Education** | |
| High School | 12% |
| Some College | 18% |
| 2-year Degree | 10% |
| 4-year Degree or more | 60% |
| **Average Age** | 35–44 |

We did not have any prior hypotheses as to why any particular song would show larger or smaller Mere Use or Spillover Effects. Therefore, we collapsed the responses by song. That is, we aggregated all songs' responses by condition. This gave us one set of observations for each metric for each condition. Collapsing the data this way gave us 460 observations for each metric for each condition, which allowed us to have enough power to find any statistical differences.[186]

We then compared these combined ratings of the songs for each condition to see if any differences arose. The Mere Use Effect predicted

184. We randomized the order of the songs as well to prevent any order effects.

185. Note that we decided to use this kind of design in order to prevent any demand effects or order effects. Had we assigned respondents to multiple conditions, we risked respondents figuring out what the point of the study was. For example, if a respondent were to hear four songs with the following types of information (sampled, control, sampled a lot, sampled negative), there is a risk that the respondent would determine that the type of information changing perceptions of the song is exactly what the study is seeking to measure. Additionally, if we were to use this type of design, we would have to further randomize the order in which information was received. This would yield over sixteen various survey designs and would risk too small of a given set of observations. Therefore, to prevent these issues, we simply ran a survey design that was completely between subjects.

186. We also ran an analysis using a repeated measures regression. We did not find any different results. Collapsing the results is an easier way to express the results; thus, we simply present the collapsed average results rather than the results by song. For discussions on best practices for repeated measures analysis, see Joseph Dien, *Best Practices for Repeated Measures ANOVAs of ERP Data: Reference, Regional Channels, and Robust ANOVAs*, 111 INT'L J. PSYCHOPHYSIOLOGY 42 (2017).

that the combined ratings of the songs would be higher in the sampled and repeated sample conditions as compared to the control condition.[187] In addition, the Spillover Effect predicted that the combined ratings of the songs would be lower in the negative sample condition than all other conditions.[188] The fact that a song was sampled in a subsequent song that was negatively received was expected to create a negative Spillover Effect on the original song, decreasing its perceptions and preferences.

We used a multiple comparison analysis of variance test (ANOVA) to analyze the data.[189] The results were somewhat surprising. We found almost no Mere Use Effect in our study. That is, the combined perceptions of the songs did not change when respondents were told that the song was sampled or that the song was repeatedly sampled. This suggests that the knowledge of sampling may not have a large effect on the perceptions of the underlying song.

However, we observed a strong Spillover Effect in the negative sampled condition. When respondents were told that a song was sampled in a subsequent song that received negative reviews, respondents almost always rated the underlying song more negatively in comparison to all other conditions. Restated, the fact that a song was used in a negatively perceived song caused respondents to view the original song more negatively. The differences between each of the other conditions and the negative sampled condition were statistically significant for almost all metrics measured.[190] This is strong evidence that if an original is sampled

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187. For details on why the Mere Use Effect would predict that, see *supra* Section II.C.

188. This is because all conditions other than the negative sampling condition should show a positive net effect in comparison to the control condition. Given that the negative sampling condition should show a negative effect in comparison to the control condition, logically the negative sampling condition should show a negative effect in comparison to the other conditions as well.

189. An analysis of variance test is used to compare the average response rate of two groups. The means of each response are compared using the variance of each sample to determine whether the two samples have means that are statistically different from each other. A statistically significant result indicates that the means of the two groups are highly likely to be different from each other. In social science methodology, the level of significance that is deemed to be statistically significant is 5% or 1% (which means that there is a 5% or 1% likelihood of seeing a difference in means between two groups, when in reality the means of the two groups are the same). A 10% significance is deemed "marginally significant." The level of significance of each test below is designated "p." For a detailed discussion of ANOVA, see Kevin P. Weinfurt, *Repeated Measures Analysis: ANOVA, MANOVA, and HLM*, *in* READING AND UNDERSTANDING MORE MULTIVARIATE STATISTICS 317 (Laurence G. Grimm & Paul R. Yarnold eds., 2000) (explaining the various forms of measuring for significant differences between groups).

190. Here, we document significance of 5% and 1%, which is in line with social science research. *See* B. Don Franks & Schuyler W. Huck, *Why Does Everyone Use the .05 Significance Level?*, 57 RSCH. Q. FOR EXERCISE & SPORT, 245 (1986); *see also* Sanford Labovitz, *Criteria for Selecting a Significance Level: A Note on the Sacredness*

in a song that ends up receiving negative reviews, the original song is going to be harmed. Below, Table 5 presents the results of an ANOVA comparing combined perceptions of the underlying songs between the negative sampled condition and all other conditions.

*Table 5: Study 2 Results (Negative Sampling Condition vs. All Other Conditions)*[191]

| Metric | Comparison Condition | Mean Difference | Significance |
|---|---|---|---|
| **Concert** | | | |
| | Control-Negative** | 0.392 | < .01 |
| | Sample-Negative | 0.232 | 0.08 |
| | Repeated-Negative** | 0.512 | < .01 |
| **Liked** | | | |
| | Control-Negative* | 0.248 | 0.03 |
| | Sample-Negative | 0.243 | 0.06 |
| | Repeated-Negative** | 0.47 | < .01 |
| **Stream** | | | |
| | Control-Negative** | 0.293 | 0.01 |
| | Sample-Negative | 0.128 | 0.63 |
| | Repeated-Negative** | 0.381 | < .01 |
| **Recommend** | | | |
| | Control-Negative* | 0.242 | 0.03 |
| | Sample-Negative* | 0.265 | 0.03 |
| | Repeated-Negative** | 0.342 | < .01 |
| **High Quality** | | | |
| | Control-Negative** | 0.573 | < .01 |
| | Sample-Negative** | 0.435 | < .01 |
| | Repeated-Negative** | 0.684 | < .01 |
| **Happy** | | | |
| | Control-Negative | 0.175 | 0.18 |
| | Sample-Negative | 0.216 | 0.09 |
| | Repeated-Negative** | 0.397 | < .01 |

*of .05*, 3 AM. SOCIOLOGIST 220, 220–22 (1968) (discussing why these significance levels have been used in social science research).

191. * Indicates a significance level of .05%. ** Indicates a significance level of .01%.

| | | | |
|---|---|---|---|
| **Inspiring** | | | |
| | Control-Negative** | 0.245 | 0.01 |
| | Sample-Negative** | 0.288 | < .01 |
| | Repeated-Negative** | 0.445 | < .01 |
| **Authentic** | | | |
| | Control-Negative** | 0.305 | < .01 |
| | Sample-Negative** | 0.281 | < .01 |
| | Repeated-Negative** | 0.335 | < .01 |

As Table 5 shows, on almost all metrics measured, there was a statistically significant difference at the 1% level between the negative sampling condition and the control condition. A positive mean difference indicates that the combined ratings for the song were higher for the first condition listed in the table in comparison to the second condition. For example, the combined perceptions of the quality of the songs were 0.573 higher for the control condition in comparison to the negative sampling condition. Likewise, the quality was rated 0.435 higher for the sampling condition and 0.684 higher for the multiple sampling condition relative to the negative sampling condition. All these differences were highly significant.[192]

192. We did not find any statistical differences by gender for our conditions. We also report the median and mean of each rating by condition here below. It is possible that mean differences do not adequately represent the data if there are outliers. Therefore, reporting medians is also recommended. As is clear, outliers did not affect our results. This can be seen because the mean and median are quite similar and given that our dependent variable is a scale with end points, outliers wouldn't be biasing any results.

**MEAN**

| | Att. | Lik. | Str. | Rec. | Qual. | Hap. | Insp. | Auth. |
|---|---|---|---|---|---|---|---|---|
| Control | 2.66 | 3.21 | 2.92 | 2.61 | 3.61 | 3.11 | 2.72 | 3.86 |
| Sample | 2.50 | 3.21 | 2.75 | 2.63 | 3.47 | 3.15 | 2.76 | 3.84 |
| Negative | 2.26 | 2.97 | 2.62 | 2.37 | 3.04 | 2.94 | 2.48 | 3.56 |
| Repeated | 2.78 | 3.43 | 3.00 | 2.71 | 3.72 | 3.33 | 2.92 | 3.89 |

**MEDIAN**

| | Att. | Lik. | Str. | Rec. | Qual. | Hap. | Insp. | Auth. |
|---|---|---|---|---|---|---|---|---|
| Control | 2 | 4 | 3 | 2 | 4 | 3 | 3 | 4 |
| Sample | 2 | 4 | 3 | 3 | 4 | 3 | 3 | 4 |
| Negative | 2 | 3 | 2 | 2 | 3 | 3 | 2 | 4 |

If we look at the metrics that showed a 5% or 10% significance, then all but two of the twenty-four comparisons would be significant. This gives strong evidence that respondents showed a high negative Spillover Effect. That is, when they were told that the song was sampled in a subsequent song that received negative reviews, their perceptions of the underlying song were harmed. Note that our studies did not test for a positive Spillover Effect. Given the strength of the negative effect that we found, we would expect that a positive Spillover Effect is also likely. These results have important implications for copyright law, in particular the Market Effects prong of fair use. This Article describes the implications of Study 2 further below.

## IV. IMPLICATIONS OF THE USAGE EFFECT AND FUTURE RESEARCH

In this section we detail how our empirical studies above can benefit the law and how to incorporate the results of our studies into better fair use determinations. We divide this section into three parts focusing on how best to resolve the ex-post nature of the effects we measure, the relevance of our results to legal cases, and provide some insight into further areas of research that we believe to be fruitful.

### *A. Resolving Ex Post Usage Effect Issues*[193]

As described above, the Market Effects inquiry in fair use maintains ex ante uncertainty due to—among other issues—the unpredictability of the Mere Use and Spillover Effects.[194] Our studies show that this uncertainty is well grounded. It is difficult to determine what the economic effect will be on copyrighted material when it is used in subsequent works.

As discussed in Section III.A, an evidentiary presumption might be able be used to estimate any Mere Use Effect, as its influence was hypothesized to be positive—to the extent it was found in the data. Such a presumption would reduce ex ante uncertainty as users could assume a positive Mere Use Effect. The studies above showed little to no Mere Use Effect, such that no uncertainty reducing presumption is proper.

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| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Repeated | 3 | 4 | 3 | 3 | 4 | 4 | 3 | 4 |

193. We note here that one response to the studies we present would be that they do not matter. That is, that the Market Effects we isolate and empirically show should not be taken into consideration in any fair use determination. We are agnostic on that normative point. We only sketch out here solutions to the empirical realities of the market effects if a court is interested in using Market Effects in fair use determinations, as they have previously.

194. See *supra* Section III.A for details on how that uncertainty is relevant to determinations of fair use.

In contrast, Spillover Effects will increase uncertainty by their very nature. The sign of this effect (positive or negative) will only be realized *after a work has been created and introduced to the public*. The Spillover Effect's positive or negative influence is a function of public response to the new work. Accordingly, no evidentiary presumption is proper regarding the Spillover Effect, and ex ante uncertainty cannot be reduced through a factual presumption.

It might thus seem that courts have no options with respect to the Usage Effect as we have described here and how it interplays with the Market Effects determination. However, this is not the case. We introduce two potential solutions that incorporate the ex ante behaviors that may mitigate ex ante Market Effects uncertainty.

The first is to return the focus of the Market Effects consideration to whether a new work supplants the original in its primary market. As previously mentioned, the Register of Copyrights—during the drafting of the 1976 Copyright Act—stated that "use in the market in *replacing* the original work" was of primary concern.[195] Treatises of the era likewise emphasized that fair use allows new uses "that will not cut into the copyright owner's potential market *for the sale of copies*."[196] This sort of analysis thus solely asks if the new work acts a substitute for the original in its primary market.

Such a refocusing of Market Effects would move the analysis away from consideration of influences such as the Spillover Effect. A new work's Spillover Effect may positively or negatively bias perceptions of the original, *but spillovers do not provide evidence of market substitution*. Restated, a new use that exists in a different market from the original may create Spillover Effects, but it will not necessarily supplant into the original's market.[197]

Under this refocused understanding of the Market Effects consideration, Spillover Effects become largely superfluous. A new work's critical success or failure in a market that is distinct from the original may create new perceptions about the original, *but it will not act as a market substitute*. With this in mind, ex ante factual predictability of fair use is furthered. No longer do putative fair users need access to ex post data about how the market responds to their work to analyze fair use because that data would no longer be relevant.

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195. Fagundes, *supra* note 77, at 375 (citing STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., Transcript of Meeting on General Revision of the U.S. Copyright Law (Sept. 14, 1961), *in* COPYRIGHT LAW REVISION pt. 2, at 26 (Comm. Print 1963) (comments of Abraham Kaminstein, Register of Copyrights)) (emphasis added).

196. KENT & LANCOUR, *supra* note 80, at 39 (emphasis added).

197. This is not to say that this could not happen. It is possible that I make a poorly received new work that uses an original piece, and my work exists in the same direct market as the original. There, I might create negative spillovers *and* act as a market substitute. However, the effects still stand independent of each other.

However, this proposal would likely receive significant pushback from copyright holders. Those parties would recognize that looking only to market substitution would deprive them of certain royalty payments in secondary markets and might allow fair uses that create negative Spillover Effects. Regardless of whether copyright holders *should* have such control, they do currently enjoy a significant amount of control over their work in the modern "clearance culture."[198]

Recognizing the difficult path toward a judicial sea change in Market Effects jurisprudence (focusing on market substitution), alternative considerations to mitigate ex ante uncertainty are worth considering. As described above, would-be fair users are disinclined to rely on the doctrine when no ex ante analysis can be undertaken. This is of particular concern with regard to necessarily post hoc factual determinations—including Spillover Effects, which cannot be conducted ex ante. However, if uncertainty associated with the Spillover Effect could be mitigated, then ex ante fair use analysis would be furthered, and parties would be more likely to rely on the doctrine.

A possible avenue to achieve this end would be the use of an escrow account. Escrow accounts hold a certain amount of money or funds with a neutral third party and disburse those funds after some specific event takes place.[199] Most commonly, escrow accounts are used in real estate transactions. The buyer will put money into an account as consideration for a property, and the seller will be able to take that money if one of several events occur.[200]

A similar kind of arrangement could be used in fair use determinations.[201] A mechanism could be established whereby the party

198. Michael E. Kenneally, *Commandeering Copyright*, 87 NOTRE DAME L. REV. 1179, 1192 (2012); *see* Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act,"* 29 BERKELEY TECH. L.J. 1595, 1599 (2014) ("One dominant mode of private ordering in the copyright arena is the pervasive licensing of copyrighted works even when such licensing is unnecessary."); *see also* Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 66–67 (2007) ("Rather than risking litigation, consumers and users of copyrighted works are much more likely to seek permission and pay for the right to use works.").

199. For an analysis of how escrow agents can help with legal issues, see Robert A. Kendall, Comment, *The Independent Escrow Agent: The Law and the License*, 38 S. CAL. L. REV. 289 (1965) (detailing the benefits of using an escrow agent in real estate transactions).

200. *Id.* at 289.

201. There is precedent for escrow accounts being used in intellectual property law. *See* Jeremy Lewis & Andrew Moore, *Ensuring IP Protection Through Escrow*, 21 ENT. & SPORTS L. 8 (2003) (arguing a technology escrow agent can facilitate the protection of both a licensee and licensor in connection with copyright and trade secret cases); *see also* John Gladstone Mills II, *Intellectual Property Escrow Agreements in International Joint Ventures, Part II*, 75 J. PAT. & TRADEMARK OFF. SOC'Y 484, 488–90 (1993).

seeking to use a copyrighted work could place some amount of funds in escrow meant to go to the copyright owner if they prove market harm through negative spillovers. Then, after a period, if the use of the copyrighted work economically harms the original via spillover, the copyright owner can request a release of the funds. While establishing the original mechanism and means of proving negative spillover would not be simple, it would allow the new user to "remedy" any negative spillover harms that could not have been identified ex ante.

This approach allows the new user to remove any negative spillover considerations from the fair use analysis ex ante by offering to pay for that harm ex post (should the negative spillover occur). Removing this source of ex ante uncertainty furthers the goals of copyright by allowing parties to make informed fair use decisions *at the time they are deciding whether to invest in a project*. This encourages use of the fair use doctrine and benefits the copyright system generally.

### *B. Relevance of Spillover Findings*

Notably, the importance of Spillover Effects may vary from instance to instance—particularly regarding any negative Spillover Effects. A primary issue underlying this conclusion is that the relevant consumer must be aware of the negatively perceived third-party use (*i.e.*, the poorly received new song that sampled the original) if it is to influence consumer perceptions. If the third-party use and its negative reception is widely known, then a negative Spillover Effect is likely to follow. For example, the movie *Gigli* was widely mocked as one of the worst movies ever made.[202] In this situation, much of the consuming public is aware of *Gigli*'s negative reputation; therefore, those negative associations may spillover to any prior work used in the movie (*e.g.*, songs included in the soundtrack).

However, the *Gigli* example can be distinguished from lesser-known failures. Most songs that are considered bad are not commercial successes. This near tautology has important repercussions for the current analysis. If our music is sampled in a new work that is regarded as low quality and is a commercial failure, it is unlikely that many people actually hear the new work (as it was a commercial failure). Thus, any negative Spillover Effects to our (sampled) song will be mitigated because it did not influence many people (because relatively few people heard the poorly rated new song).

There is, however, one additional category of use in which a negative Spillover Effect may influence large groups of consumers. When a new use is particularly visible but may create negative

202. Scott Meslow, *15 Years Later, Was Gigli Really That Bad?*, GQ (Aug. 1, 2018), https://www.gq.com/story/was-gigli-really-that-bad [perma.cc/BT5X-W6YQ].

associations for a segment of the population, negative spillovers are likely. For example, if Politician Doe uses my music in a widely disseminated television advertisement, that use could create negative associations to my music among individuals who find that politician distasteful. In this instance, the negative associations to Politician Doe do not necessarily mean that ad's reuse of my song will be a commercial failure that very few people see. Further, it is of note that a use of this variety may simultaneously create *positive* Spillover Effects among supporters of Politician Doe.

Lastly, it is notable (if logically apparent from the above) that new uses that are considered high quality are likely to bring about significant positive Spillover Effects. A new, high-quality work (that uses another's earlier work) is relatively more likely to be a commercial success, which means it is exposed to many consumers. In turn, this large group of consumers can be influenced (via the positive Spillover Effect) to positively view the old work that was integrated in to the new, high-quality work.

### *C. Future Research*

Although our studies give new theoretical and empirical insights into Market Effects under the fair use analysis, we note that there is still much more work necessary to fully understand the nuances of the Market Effect consideration. This Section lays out four areas of further empirical research that scholars should begin to explore.

First, as explained above, the Usage Effect that we measured in this Article is not the only effect that exists when a copyrighted expression is reused. Previous work has shown that there are advertising effects that generally have positive economic outcomes to underlying copyrighted work.[203] If this is the case, then the true total Market Effects of using a copyrighted work is best described as comprising any market harms, the advertising effect, and the Usage Effect (which in turn is the sum of the Mere Use Effect and Spillover Effect). This makes the Market Effect more complicated. How do the advertising effect and Usage Effect interact? It could be the case that the advertising effect overpowers any negative Spillover Effect, and the aggregate Market Effect is positive. Or, at times the Spillover Effect could overpower both the Mere Use and advertising effects. In short, future work needs to quantify each effect (positive and negative) at the same time and come up with a set of metrics to determine the full Market Effect. This will help determinations of payments and licenses in all the ways described in Section IV.A.

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203. For a discussion of the advertising effect, see *supra* Section II.B. *See generally* Schuster, *supra* note 38.

Second, although our studies do not find strong Mere Use Effects, we cannot take the lack of evidence as evidence of a lack of existence. As the Mere Use Effect is predicted in psychology theory, it is very possible that our studies here have just not captured the Mere Use Effect.[204] Future work should think creatively about how to demonstrate the existence of the Mere Use Effect, which will of course give more insights to the total Market Effects of using copyrighted material. Subsequent scholarship should look at different songs, contexts, and forms of surveys to help demonstrate the Mere Use Effect.[205] Moreover, duration plays a large role in consumer behavior research. While we surveyed respondents right after they were exposed to the stimuli, we can imagine that the effects we found would change over time. As such, future research should seek to evaluate how long and to what extent these effects last into the future.

Third, there are ample ways that reuse of a copyrighted work may harm or help the original. For example, even if a song that samples an underlying copyrighted work is successful, if the underlying work is used in a different genre or by a controversial artist, there would likely be some market effect on the underlying copyrighted work. For example, if a classical song is sampled in a rap song, it could be the case that the market for the classical song may be influenced—listeners may now associate rap music with the classical song.[206]

Lastly, our studies looked at only one context of reuse of copyrighted works: music sampling. Future research should explore various other contexts in which copyrighted material is utilized in subsequent works.[207] Changing the context may show larger or smaller

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204. Indeed, as discussed above, a Mere Exposure Effect could theoretically be brought about by repeat exposure, which we were unable to proxy for here.

205. One survey form that could be useful in this context is a discrete choice-based survey. These so-called "conjoint surveys" allow respondents to pick a product, service, items, etc. rather than rate that thing based on several characteristics. In the music context, a conjoint survey could be created to measure how likely a respondent is to choose to listen to a song based upon characteristics like length of song, genre, how many times it was sampled, etc.. This kind of survey could show an effect when a Likert-based response may not. For more information on conjoint-based surveys, see generally Paul E. Green & V. Srinivasan, *Conjoint Analysis in Consumer Research: Issues and Outlook*, 5 J. CONSUMER RSCH. 103 (1978); Paul E. Green, Abba M. Krieger & Yoram (Jerry) Wind, *Thirty Years of Conjoint Analysis: Reflections and Prospects*, 31 INTERFACES S56 (2001).

206. This effect would be similar to a trademark tarnishment effect where perceptions of a brand are harmed by its association with something perverse. For a discussion of that effect, see Suneal Bedi & David Reibstein, *Measuring Trademark Dilution by Tarnishment*, 95 IND. L.J. 683 (2020).

207. As an example, future work could look into whether unsavory (as opposed to low quality) works harm the market value of a work. *See, e.g.*, Christopher Buccafusco, Paul J. Heald & Wen Bu, *Testing Tarnishment in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works*, 94 WASH. U.

Usage Effects. In addition, respondents may be sensitive to reuse and using underlying copyright differently depending on what medium is used. Maybe quoting or using large parts of a speech or book do not actually affect how consumers view that speech. Alternatively, if the speech is used in another speech by someone the consumer likes, then this new use might even bolster the perceptions of the original speech.[208]

## CONCLUSION

Fair use doctrine in copyright law is an arena of empirical effects that is not completely explored. What is the total true effect of using copyrighted material in a subsequent work? Although the doctrinal determinations of fair use require an understanding of these Market Effects, little work has sought to systematically measure them.

This Article is the first to take a nuanced look into Market Effects and isolate one effect—the Usage Effect—as it has been understood in psychology literature. We divided this effect into both a Mere Use Effect and Spillover Effect. Building from this expanded theory, our novel experimental studies found that the Mere Use Effect is not as robust as predicted in the music sampling context, but that the negative Spillover Effect can create economic harms to underlying copyrighted material. The Market Effects prong of a fair use determination is likely best understood ex post, which requires more creative ways to structure licenses and generate the data needed to conduct a fair use analysis.

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L. REV. 341, 388 (2017) (finding little evidence of negative market effects on an original movie when a pornographic version of the movie also exists).

208. Take, for example, the speech of former First Lady Melania Trump that was argued to be plagiarized from a 2008 speech of former First Lady Michelle Obama. This use seemed to help the perceptions of the Obama speech even though Melania Trump arguably was a controversial figure in the political landscape. The lifting of the passages in the speech drew attention to the original underlying speech (advertising effect) and did not seem to have any negative spillovers to the original. This would be an interesting context to study the Use Effect. For a discussion of the speeches, see Maggie Haberman & Michael Barbaro, *How Melania Trump's Speech Veered Off Course and Caused an Uproar*, N.Y. TIMES (July 19, 2016), https://www.nytimes.com/2016/07/20/us/politics/melania-trump-convention-speech.html.