United States Federal Copyright Law
June 12, 14, 19 & 21
Professor Jessica Litman
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The Congress shall have the power . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

—United States Constitution

You don’t need a detailed understanding of copyright law to read this book: a brief overview should give you enough to get by. The Statute of Anne, enacted by the British Parliament in 1710, is generally considered to be the world’s first copyright law. The United States passed its first copyright statute in 1790. Early U.S. copyright laws required compliance with a variety of formalities (registration, copyright notice, renewal) as a condition of copyright protection. Recent laws have dropped requirements for copyright notice, registration, or renewal, and have abandoned conditions limiting copyright to publicly distributed works. Today, copyright protection is automatic.

Copyright laws in the United States and elsewhere begin with the principle that neither the creator of a new work of authorship nor the general public ought to be able to appropriate all of the benefits that flow from the creation of a new, original work of authorship. If creators can’t gain some benefit from their creations, they may not bother to make new works. If distributors can’t earn money from the works, they may not bother to disseminate them. But all authors use raw material from elsewhere to build their works. Novelists, composers, sculptors, and programmers all incorporate into their works ideas, language, building blocks, and expressive details they first encountered elsewhere. If creators were given control over every element and use of the works they created, there would be little raw material left for later authors. Thus, both as a matter of fairness and as a matter of promoting learning by encouraging authors to create works and the
public to consume them, copyright has always divided up the possible rights in and uses of a work, and given control over some of those rights to the creators and distributors and control over others to the general public.

When you buy a book today, you pay a flat fee to some bookseller rather than agreeing to be billed by the glance. You may read and reread the book, or any part of it. You may learn the stuff that’s in it. You may talk about the book with your friends. You may loan your copy of the book to any friend who wants it. When you’ve finished with the book, you may resell it to a used bookstore or donate it to the local library, which may loan it out to anyone with a library card. You don’t need the copyright owner’s permission to do any of these things.

When you buy a musical recording on compact disc, you again pay some amount of money to own the thing. You have no further obligation to pay for each listen. The law permits you to make a tape of the recording for your car. You may resell the CD, or loan it out, even to friends who want to use it to make tapes for their cars. What you can’t do without the copyright owners’ permission is rent the CD out commercially, or broadcast it over the radio, or play it at a concert or in your restaurant, bar, or store.

When your child needs to consult an encyclopedia for a report on hive-building insects, you don’t have to buy one; you can send her to the public library to look the stuff up. When she writes her report, she doesn’t have to pay the encyclopedia company to use what she learned. When you see a building, you can snap a picture without paying the architect. When you go to a bookstore, you may skim the first chapter of a book before you buy it. When you turn on your car radio, you needn’t pay the composers of the music you hear, or the artists who perform it. But you know at some level that in the process of writing music and delivering it to your ears, someone at some point has paid them something.

When you turn on your computer, you needn’t pay a royalty to Microsoft® or Apple® for the use of the operating-systems program that makes the computer work. We take this for granted, but it isn’t natural law. It is the result of a complicated legal bargain that allocates the different benefits that flow from works of authorship to writers, to publishers, and to the public at large in a way intended to promote the progress of science and useful arts. There’s no particular reason why we had to choose this system. We could have relied on the patronage system that gave us Shakespeare. We could have decreed that authors who create works of authorship have exclusive control over every use of their works for a year, or a decade, or a life, or forever.
Instead, we came up with a system designed to give some market-based financial compensation to people who create works, and to people who distribute them, without giving them extensive rights to prevent the use and reuse of those works by the public and by the authors of the future. The system is premised on the assumption that we can give authors and their publishers rights to control some ways of exploiting their works, and reserve the rest of the value of the works to the public at large.

Under the current copyright statute, copyright vests automatically in original works of authorship as soon as they are “fixed in tangible form,” i.e., embodied in a permanent, tangible object. No notice or registration is required. The copyright in this book came into being as I typed the words that you are reading. The copyright in a song exists from the moment the song is first written down or recorded on tape, disc, or microchip. The copyright will belong either to the individual who created it (in which case it will last until seventy years after that person’s death), or, if the work is created within the course of employment, to that individual’s employer (in which case it will last for ninety-five years from its first public distribution). It will give the copyright owner rights over the material the author added, but not over any preexisting material appropriated from elsewhere. The copyright will protect the expression in the work from being copied without permission, but will give no protection whatsoever to the underlying ideas, facts, systems, procedures, methods of operation, principles, or discoveries. It may seem paradoxical that copyright fails to protect what for many works are their most valuable features, but that balance is a longstanding one; it derives, the U.S. Supreme Court tells us, from copyright’s constitutional foundation. The chief purpose of copyright is to promote learning, and learning would be frustrated if facts and ideas could not be freely used and reused.

United States copyright law gives authors a number of broad rights: the right to reproduce the work in fixed, tangible copies; the right to create adaptations; the right to distribute copies to the public; and the rights to perform publicly and display publicly. These rights are made subject in the statute to a variety of exceptions.

Some of the exceptions are broad: under the “first sale doctrine,” for example, the copyright owner has no right to control the distribution of a copy of a work after she has sold that copy. The buyer can keep it, loan it, rent it, display it, or resell it to others. Another exception covers useful articles: If a protected photograph, painting, or sculpture embodies or depicts
a useful article, anyone can reproduce the useful article, which is not itself subject to copyright protection. In other words, copyright protects a painting or photograph of an automobile, but gives no protection to the automobile itself. Under the fair use privilege, a variety of otherwise infringing acts are excused for policy reasons. (Common fair uses include quotations, parodies, photocopies for classroom use, and home videotaping of television programs.)

Most of the exceptions, though, are narrow and specific. Broadcasting organizations, for example, licensed to broadcast a musical recording, are allowed to make a copy of the work to facilitate the broadcast. Libraries may make photocopies so long as they comply with a long list of conditions and limitations. Cable television operators can retransmit broadcasts without the permission of the owners of the copyrights in the works being broadcast, so long as they pay a statutory license fee. A small restaurant may play radio or television broadcasts for its customers, but may not play prerecorded music. A church may play religious music during services.

The presence of detailed exceptions shouldn’t obscure the fact that some uses of copyrighted works are simply not subject to copyright owners’ control at all. Copyright owners are given no control, for example, over private performance or display. Watching a videotape in your living room, showing the sculpture you just purchased to your cousin, or singing the latest Metallica hit to your friend over the telephone are simply not among the uses that the copyright owner has any right to prohibit or permit. They have no power to prevent the owners of copies of their works from loaning them repeatedly. More fundamentally, copyright does not protect ideas, no matter how original, brilliant, or unique they may be. is in the public domain. Nor may copyright give owners legal rights over the functional or factual elements of their works. The design used for the onramps to the Triborough Bridge is not protected by copyright. The facts reported in a biography of San Francisco Jewish families belong to no one. Copyright owners do not own any of the ideas expressed in their works. They have no ownership of the functional or factual aspects of their works. They have no claim to any compensation when their readers learn and use their teachings.

All of this has worked more or less invisibly to the general public, because traditionally, copyright owners have had control over the sorts of uses typically made by commercial and institutional actors and little con-
trol over the consumptive uses made by individuals. That has permitted the copyright law to be drawn as a complex, internally inconsistent, wordy, and arcane code, since the only folks who really needed to know it were folks for whom copyright lawyers were an item of essential overhead. Most copyright infringement suits proceeded against businesses and institutions.

A law intended to be enforced against individual consumers would have needed to be structured differently; the current setup would strike many individuals as unfair. Under the current statute, anyone who invades the copyright owner’s exclusive rights without a license or statutory privilege can be held liable for infringement. The law has never required that an infringer be aware that she is violating another’s copyright. It is copyright infringement to copy a protected work subconsciously and unknowingly; it is also copyright infringement to perform or distribute copies of a work in the mistaken belief that one’s use is licensed. Successful plaintiffs in copyright-infringement suits can recover substantial damages without needing to prove any actual harm to the market for their works.

In addition, courts routinely order defendants to stop infringing activity, to surrender or destroy infringing copies, and to pay plaintiffs’ lawyer bills.

Digital technology changed the marketplace. It’s a cliché that digital technology permits everyone to become a publisher. If you’re a conventional publisher, though, that cliché doesn’t sound so attractive. If you’re a record company, the last thing you want is a world in which musicians and listeners can eliminate the middleman. But can you stop it, or at least delay it? Is the copyright law one tool that might help you do so?

NOTES

2. Until 1909, one secured copyright through registration. The copyright lasted for a fixed term, and could be renewed for an additional term if the copyright owner complied with renewal procedures. The 1909 act provided that one could secure copyright in some works by registering them, and in others by publishing them with the prescribed copyright notice. Registration was in any event necessary in order to apply for the renewal term. In either case, distributing copies to the public without the statutory notice forfeited the copyright. See Robert A. Gorman and Jane C. Ginsburg, Copyright: Cases and Materials 4–9, 339–43, 383–97 (5th ed., Lexis Law Publishing, 1999).
3. The current statute was enacted in 1976 and has been amended periodi-
DIGITAL COPYRIGHT

cally in the years since then. It is codified at 17 U.S.C. §§ 101-1332 (2000).


9. 17 U.S.C. § 109. There are two narrow exceptions. Owners of copyrights in sound recordings and computer programs have the right to prohibit rental, but not loan, gift or resale of copies of sound recordings or computer programs. Ibid.


14. 17 U.S.C. § 111. Federal Communications Commission regulations impose other restrictions that limit the ability to transmit particular works, and some of those regulations may constrain cable operators in ways that echo copyright limitations. See 47 U.S.C. § 325(b).


17. In Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, 866 F.2d 278 (9th Cir. 1989), for example, motion picture studios sued a resort hotel that rented videodiscs for its guests to play on the large-screen TVs in their rooms. The court held that there was no public performance and therefore no infringement.

18. 17 U.S.C. § 102(b). See Baker v. Selden, 101 U.S. 99 (1879). Charles Selden devised a novel bookkeeping system that permitted accountants to condense six pages of accounts onto only two. Selden published several copyrighted manuals about his system, and hired an agent to travel through the country seeking to license the system and the ledger forms Selden had designed to go with it. An Ohio accountant, impressed with the Selden system but unable to pay Selden’s price, adopted it anyway, and later peddled his version to other accountants. The United States Supreme court dismissed Selden’s copyright infringement suit:

The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.

101 U.S. at 103.


20. See Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989).
Excerpts from Title 17, United States Code:

§ 101. Definitions

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.
“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work “publicly” means —

1. to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

2. to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

A “work made for hire” is —

1. a work prepared by an employee within the scope of his or her employment; or

2. a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendices, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.
FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE CO., INC.


O'CONNOR, J.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical directory, which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings — compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.

Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose "to extend its monopoly in telephone service to a monopoly in yellow pages advertising." Rural Telephone Service Co. v. Feist Publications, Inc., 737 F. Supp. 610, 622 (Kan. 1990).

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. App. 54 (P 15-16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the
scope of copyright protection. The District Court granted summary judgment to Rural, explaining that "courts have consistently held that telephone directories are copyrightable" and citing a string of lower court decisions. 663 F. Supp. 214, 218 (1987). In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed "for substantially the reasons given by the district court." App. to Pet. for Cert. 4a, judg. order reported at 916 F. 2d 718 (1990). We granted certiorari, 498 U.S. 808 (1990), to determine whether the copyright in Rural's directory protects the names, towns, and telephone numbers copied by Feist.

II

A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that "no author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985). Rural wisely concedes this point, noting in its brief that "facts and discoveries, of course, are not themselves subject to copyright protection." At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data — i. e., wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.

The key to resolving the tension lies in understanding why facts are not copyrightable. The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. See Harper & Row, supra, at 547-549. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Id., §1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49, 54 (CA2 1936).

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secure for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century — The Trade-Mark Cases, 100 U.S. 82 (1879); and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) — this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

In The Trade-Mark Cases, the Court addressed the constitutional scope of "writings." For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." 100 U.S., at 94. The Court explained that originality requires independent creation plus a modicum of creativity: "While the word writings may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like." Ibid. (emphasis in original).
In *Burrow-Giles*, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." 111 U.S., at 58 (internal quotation marks omitted). As in *The Trade-Mark Cases*, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," 111 U.S., at 58, and stressed the importance of requiring an author who accuses another of infringement to prove "the existence of those facts of originality, of intellectual production, of thought, and conception." *Id.*, at 59-60.


It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." *Id.*, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." 111 U.S., at 58. "The discoverer merely finds and records." Nimmer § 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum. L. Rev. 516, 525 (1981) (hereinafter Denicola). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. Nimmer § 2.03[E]. The same is true of all facts — scientific, historical, biographical, and news of the day. "They may not be copyrighted and are part of the public domain available to every person." *Miller, supra*, at 1369.

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer §§ 2.11[D], 3.03; Denicola 523, n. 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See *Harper & Row*, 471 U.S., at 547. Accord, Nimmer § 3.03.

This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Patterson & Joyce 800-802; Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 Colum. L. Rev. 1865, 1868, and n. 12 (1990) (hereinafter Ginsburg). Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In *Harper & Row*, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, see 471 U.S., at 556-557, but that he could prevent others from copying his "subjective descriptions and portraits of public figures." *Id.*, at 563. Where the compilation author adds no written
expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable), 12 Com. & Law 37, 64 (Dec. 1990) (hereinafter Patry). No matter how original the format, however, the facts themselves do not become original through association. See Patterson & Joyce 776.

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "No matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking. . . . The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." Ginsburg 1868.

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." Harper & Row, 471 U.S., at 589 (dissenting opinion). It is, rather, "the essence of copyright," ibid., and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. Harper & Row, supra, at 556-557. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." Baker v. Selden, 101 U.S. 99, 103 (1880). . . .

This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.
Excerpts from Title 17, United States Code:

17 U.S.C. § 201. Ownership of copyright

(a) Initial Ownership. — Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owner of copyright in the work.

(b) Works Made for Hire. — In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works. — Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership. —

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer. — When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.2

17 U.S.C. § 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

...
JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

In this case, an artist and the organization that hired him to produce a sculpture contest the ownership of the copyright in that work. To resolve this dispute, we must construe the "work made for hire" provisions of the Copyright Act of 1976 (Act or 1976 Act), 17 U. S. C. §§ 101 and 201(b), and in particular, the provision in § 101, which defines as a "work made for hire" a "work prepared by an employee within the scope of his or her employment" (hereinafter §101(1)).

I

Petitioners are the Community for Creative Non-Violence (CCNV), a nonprofit unincorporated association dedicated to eliminating homelessness in America, and Mitch Snyder, a member and trustee of CCNV. In the fall of 1985, CCNV decided to participate in the annual Christmastime Pageant of Peace in Washington, D. C., by sponsoring a display to dramatize the plight of the homeless. As the District Court recounted:

"Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform 'pedestal,' or base, within which special-effects equipment would be enclosed to emit simulated 'steam' through the grid to swirl about the figures. They also settled upon a title for the work — 'Third World America' — and a legend for the pedestal: 'and still there is no room at the inn.'" 652 F. Supp. 1453, 1454 (DC 1987).

Snyder made inquiries to locate an artist to produce the sculpture. He was referred to respondent James Earl Reid, a Baltimore, Maryland, sculptor. In the course of two telephone calls, Reid agreed to sculpt the three human figures. CCNV agreed to make the steam grate and pedestal for the statue. Reid proposed that the work be cast in bronze, at a total cost of approximately $100,000 and taking six to eight months to complete. Snyder rejected that proposal because CCNV did not have sufficient funds, and because the statue had to be completed by December 12 to be included in the pageant. Reid then suggested, and Snyder agreed, that the sculpture would be made of a material known as "Design Cast 62," a synthetic substance that could meet CCNV’s monetary and time constraints, could be tinted to resemble bronze, and could withstand the elements. The parties agreed that the project would cost no more than $15,000, not including Reid's services, which he offered to donate. The parties did not sign a written agreement. Neither party mentioned copyright.
After Reid received an advance of $3,000, he made several sketches of figures in various poses. At Snyder's request, Reid sent CCNV a sketch of a proposed sculpture showing the family in a crechelike setting: the mother seated, cradling a baby in her lap; the father standing behind her, bending over her shoulder to touch the baby's foot. Reid testified that Snyder asked for the sketch to use in raising funds for the sculpture. Snyder testified that it was also for his approval. Reid sought a black family to serve as a model for the sculpture. Upon Snyder's suggestion, Reid visited a family living at CCNV's Washington shelter but decided that only their newly born child was a suitable model. While Reid was in Washington, Snyder took him to see homeless people living on the streets. Snyder pointed out that they tended to recline on steam grates, rather than sit or stand, in order to warm their bodies. From that time on, Reid's sketches contained only reclining figures.

Throughout November and the first two weeks of December 1985, Reid worked exclusively on the statue, assisted at various times by a dozen different people who were paid with funds provided in installments by CCNV. On a number of occasions, CCNV members visited Reid to check on his progress and to coordinate CCNV's construction of the base. CCNV rejected Reid's proposal to use suitcases or shopping bags to hold the family's personal belongings, insisting instead on a shopping cart. Reid and CCNV members did not discuss copyright ownership on any of these visits.

On December 24, 1985, 12 days after the agreed-upon date, Reid delivered the completed statue to Washington. There it was joined to the steam grate and pedestal prepared by CCNV and placed on display near the site of the pageant. Snyder paid Reid the final installment of the $15,000. The statue remained on display for a month. In late January 1986, CCNV members returned it to Reid's studio in Baltimore for minor repairs. Several weeks later, Snyder began making plans to take the statue on a tour of several cities to raise money for the homeless. Reid objected, contending that the Design Cast 62 material was not strong enough to withstand the ambitious itinerary. He urged CCNV to cast the statue in bronze at a cost of $35,000, or to create a master mold at a cost of $5,000. Snyder declined to spend more of CCNV's money on the project.

In March 1986, Snyder asked Reid to return the sculpture. Reid refused. He then filed a certificate of copyright registration for "Third World America" in his name and announced plans to take the sculpture on a more modest tour than the one CCNV had proposed. Snyder, acting in his capacity as CCNV's trustee, immediately filed a competing certificate of copyright registration.

Snyder and CCNV then commenced this action against Reid and his photographer, Ronald Purtee, seeking return of the sculpture and a determination of copyright ownership. The District Court granted a preliminary injunction, ordering the sculpture's return. After a 2-day bench trial, the District Court declared that "Third World America" was a "work made for hire" under §101 of the Copyright Act and that Snyder, as trustee for CCNV, was the exclusive owner of the copyright in the sculpture. 652 F. Supp., at 1457. The court reasoned that Reid had been an "employee" of CCNV within the meaning of §101(1) because CCNV was the motivating force in the statute's production. Snyder and other CCNV members, the court explained, "conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season," and "directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted." Id., at 1456.

The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that Reid owned the copyright because "Third World America" was not a work for hire. 270 U.S. App. D. C. 26, 35, 846 F. 2d 1485, 1494 (1988). Adopting what it termed the "literal interpretation" of the Act . . . , the court read §101 as creating "a simple dichotomy in fact between employees and independent contractors." Because, under agency law, Reid was an independent contractor, the court concluded that the work was not "prepared by an employee" under §101(1). Nor was the sculpture a "work made for hire" under the second subsection of §101 (hereinafter §101(2)): sculpture is not one of the nine categories of works enumerated in that subsection, and the parties had not agreed in writing that the sculpture would be a work for hire. The court suggested that the sculpture nevertheless may have
been jointly authored by CCNV and Reid, and remanded for a determination whether the sculpture is indeed a joint work under the Act.

We granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provisions of the Act. We now affirm.

II

A

The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." 17 U. S. C. § 201(a). As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. § 102. The Act carves out an important exception, however, for "works made for hire." If the work is for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary. § 201(b). Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright's duration, § 302(c), and the owners' renewal rights, § 304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, § 601(b)(1). .... The contours of the work for hire doctrine therefore carry profound significance for freelance creators — including artists, writers, photographers, designers, composers, and computer programmers — and for the publishing, advertising, music, and other industries which commission their works.

Section 101 of the 1976 Act provides that a work is "for hire" under two sets of circumstances:

"(1) a work prepared by an employee within the scope of his or her employment; or
(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

Petitioners do not claim that the statue satisfies the terms of § 101(2). Quite clearly, it does not. Sculpture does not fit within any of the nine categories of "specially ordered or commissioned" works enumerated in that subsection, and no written agreement between the parties establishes "Third World America" as a work for hire.

The dispositive inquiry in this case therefore is whether "Third World America" is "a work prepared by an employee within the scope of his or her employment" under § 101(1). The Act does not define these terms. In the absence of such guidance, four interpretations have emerged.

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3 We use the phrase "work for hire" interchangeably with the more cumbersome statutory phrase "work made for hire."

4 As of 1955, approximately 40 percent of all copyright registrations were for works for hire, according to a Copyright Office study. See Varner, Works Made for Hire and On Commission, in Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 13, 86th Cong., 2d Sess., 139, n. 49 (Comm. Print 1960) (hereinafter Varner, Works Made for Hire). The Copyright Office does not keep more recent statistics on the number of work for hire registrations.

5 Section 101 of the Act defines each of the nine categories of "specially ordered or commissioned" works.
The first holds that a work is prepared by an employee whenever the hiring party retains the right to control the product. See Peregrine v. Lauren Corp., 601 F. Supp. 828, 829 (Colo. 1985); Clarkstown v. Reeder, 566 F. Supp. 137, 142 (SDNY 1983). Petitioners take this view. Brief for Petitioners 15; Tr. of Oral Arg. 12. A second, and closely related, view is that a work is prepared by an employee under § 101(1) when the hiring party has actually wielded control with respect to the creation of a particular work. This approach was formulated by the Court of Appeals for the Second Circuit, Aldon Accessories Ltd. v. Spiegel, Inc., 738 F. 2d 548, cert. denied, 469 U.S. 982 (1984), and adopted by the Fourth Circuit, Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co., 810 F. 2d 410 (1987), the Seventh Circuit, Evans Newton, Inc. v. Chicago Systems Software, 793 F. 2d 889, cert. denied, 479 U.S. 949 (1986), and, at times, by petitioners, Brief for Petitioners 17. A third view is that the term "employee" within § 101(1) carries its common-law agency law meaning. This view was endorsed by the Fifth Circuit in Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises, 815 F. 2d 323 (1987), and by the Court of Appeals below. Finally, respondent and numerous amici curiae contend that the term "employee" only refers to "formal, salaried" employees. See, e.g., Brief for Respondent 23-24; Brief for Register of Copyrights as Amicus Curiae 7. The Court of Appeals for the Ninth Circuit recently adopted this view. See Dumas v. Gommerman, 865 F. 2d 1093 (1989).

The starting point for our interpretation of a statute is always its language. The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. Nothing in the text of the work for hire provisions indicates that Congress used the words "employee" and "employment" to describe anything other than "the conventional relation of employer and employee." On the contrary, Congress' intent to incorporate the agency law definition is suggested by § 101(1)'s use of the term, "scope of employment," a widely used term of art in agency law. See Restatement (Second) of Agency § 228 (1958) (hereinafter Restatement).

In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation. See 17 U. S. C. § 301(a). We thus agree with the Court of Appeals that the term "employee" should be understood in light of the general common law of agency.

In contrast, neither test proposed by petitioners is consistent with the text of the Act. The exclusive focus of the right to control the product test on the relationship between the hiring party and the product clashes with the language of § 101(1), which focuses on the relationship between the hired and hiring parties. The right to control the product test also would distort the meaning of the ensuing subsection, § 101(2). Section 101 plainly creates two distinct ways in which a work can be deemed for hire: one for works prepared by employees, the other for those specially ordered or commissioned works which fall within one of the nine enumerated categories and are

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6 By "hiring party," we mean to refer to the party who claims ownership of the copyright by virtue of the work for hire doctrine.
the subject of a written agreement. The right to control the product test ignores this dichotomy by transforming into a work for hire under § 101(1) any "specially ordered or commissioned" work that is subject to the supervision and control of the hiring party. Because a party who hires a "specially ordered or commissioned" work by definition has a right to specify the characteristics of the product desired, at the time the commission is accepted, and frequently until it is completed, the right to control the product test would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1). Petitioners' interpretation is particularly hard to square with § 101(2)'s enumeration of the nine specific categories of specially ordered or commissioned works eligible to be works for hire, e. g., "a contribution to a collective work," "a part of a motion picture," and "answer material for a test." The unifying feature of these works is that they are usually prepared at the instance, direction, and risk of a publisher or producer. By their very nature, therefore, these types of works would be works by an employee under petitioners' right to control the product test.

... We therefore conclude that the language and structure of § 101 of the Act do not support either the right to control the product or the actual control approaches. The structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.

This reading of the undefined statutory terms finds considerable support in the Act's legislative history. The Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress. See Mills Music, Inc. v. Snyder, 469 U.S. 153, 159 (1985); Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857, 862 (1987). Despite the lengthy history of negotiation and compromise which ultimately produced the Act, two things remained constant. First, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term "employee," the parties and Congress meant to refer to a hired party in a conventional employment relationship. These factors militate in favor of the reading we have found appropriate.

... Thus, the legislative history of the Act is significant for several reasons. First, [it] demonstrates that Congress intended to provide two mutually exclusive ways for works to acquire work for hire status: one for employees and the other for independent contractors. Second, the legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status. The hiring party's right to control the product simply is not determinative. See Note, The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976, 62 N. Y. U. L. Rev. 373, 388 (1987). Indeed, importing a test based on a hiring party's right to control, or actual control of, a product would unravel the "carefully worked out compromise aimed at balancing legitimate interests on both sides." H. R. Rep. No. 2237, [89th Cong., 2d Sess., 114 (1966)], at 114....

... In sum, we must reject petitioners' argument. Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions. To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or
an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101.

B

We turn, finally, to an application of § 101 to Reid's production of "Third World America." In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. See Restatement § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). 1 No one of these factors is determinative. See Ward, 362 U.S., at 400; Hilton Int'l Co. v. NLRB, 690 F. 2d 318, 321 (CA2 1982).

Examining the circumstances of this case in light of these factors, we agree with the Court of Appeals that Reid was not an employee of CCNV but an independent contractor. 270 U.S. App. D. C., at 35, n. 11, 846 F. 2d, at 1494, n. 11. True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. 652 F. Supp., at 1456. But the extent of control the hiring party exercises over the details of the product is not dispositive. Indeed, all the other circumstances weigh heavily against finding an employment relationship. Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid $15,000, a sum dependent on "completion of a specific job, a method by which independent contractors are often compensated." Holt v. Winpisinger, 258 U.S. App. D. C. 343, 351, 811 F. 2d 1532, 1540 (1987). Reid had total discretion in hiring and paying assistants. "Creating sculptures was hardly 'regular business' for CCNV." 270 U.S. App. D. C., at 35, n. 11, 846 F. 2d, at 1494, n. 11. Indeed, CCNV is not a business at all. Finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

Because Reid was an independent contractor, whether "Third World America" is a work for hire depends on whether it satisfies the terms of § 101(2). This petitioners concede it cannot do. Thus, CCNV is not the author of "Third World America" by virtue of the work for hire provisions of the Act. However, as the Court of Appeals made clear, CCNV nevertheless may be a joint author of the sculpture if, on remand, the District Court determines that CCNV and Reid prepared the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U. S. C. § 101. 2 In that case, CCNV and Reid would be co-owners of the copyright in the work. See § 201(a).

For the aforesaid reasons, we affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

It is so ordered.
MEMORANDUM*

Plaintiff Monica Jou brought this action against Defendants Accurate Research, Inc., and its owners Eric Ho and Cathy Wang Ho, alleging copyright infringement and various claims under state law. The district court granted summary judgment to Defendants on the ground that Plaintiff did not own valid copyrights to the software that Defendants allegedly infringed. Reviewing de novo, Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999), we affirm.

A. Works for Hire

Plaintiff claimed sole ownership of the copyrights in the software as works made for hire. 17 U.S.C. §§ 101, 201(b). Applying the factors from Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989), we agree with the district court that the creators of the work were independent contractors, not Plaintiff's employees. Therefore, Plaintiff cannot establish ownership of the software as works made for hire.

Plaintiff's staffers were highly-skilled computer programmers. The record does not show that Plaintiff retained the right to control the manner or means by which the programmers performed their work. During the last quarter of 1995, Plaintiff had an office, but most of the time Plaintiff and her staff worked out of Plaintiff's home. Plaintiff provided the computers on which the programmers worked, but often programmers worked from their own homes on their own equipment. Typically, Plaintiff hired people for short periods of time and for discrete projects. Plaintiff characterized the hours that the programmers worked as "flexible." Most compellingly, Plaintiff did not treat the programmers as "employees" for tax purposes. Except for a brief period in 1995, she did not withhold any taxes from the staffers' pay. Nor did she provide any employee benefits. Indeed, the record is unclear as to how Plaintiff paid the contributors; some staffers were not paid at all.

On this record, there remains no genuine issue of material fact.

B. Joint Authorship

On appeal, Plaintiff alleges joint authorship of the software as an alternative ground for reversal. Liberally construing an oblique reference at oral argument on the summary judgment motion as sufficient to raise the issue below, we reject the argument on the merits.

Plaintiff claimed that she was the "sole author" or the "exclusive owner" of the software. In the copyright registrations, she noted that her exclusive authorship vested in the works as "works made for hire." By contrast, joint authorship requires that "putative coauthors make objective manifestations of a shared intent to be coauthors." Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000). In the face of Plaintiff's repeated claims of exclusivity, she cannot demonstrate that she possessed a shared intent to be a coauthor. The record simply contains no such evidence.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
This appeal raises several copyright and contract issues relating primarily to dances choreographed by the late Martha Graham, widely regarded as the founder of modern dance. The primary issue is whether the work-for-hire doctrine applies to works created by the principal employee of a corporation that was, in the Appellants' view, "created to serve the creative endeavors of an artistic genius." This and other issues arise on an appeal by Ronald Protas and The Martha Graham School and Dance Foundation, Inc. (collectively "Plaintiffs" or "Appellants") from the November 4, 2002, judgment of the District Court for the Southern District of New York (Miriam Goldman Cedarbaum, District Judge). The Court's principal ruling was that copyrights in most of the 70 dances in dispute belong to Defendants-Appellees Martha Graham Center of Contemporary Dance, Inc. ("the Center") and Martha Graham School of Contemporary Dance, Inc. ("the School") and that the copyright in only one dance belongs to Protas, who is Graham's sole beneficiary under her will.

On the primary issue, we agree with the District Court that the work-for-hire doctrine was properly applied to dances created after 1966. On certain other aspects of the Court's judgment we conclude that a partial reversal or remand is required. We therefore affirm in part, reverse in part, vacate in part, and remand.

Background

The Center and the School. Martha Graham's celebrated career as a dancer, dance instructor, and dance choreographer began in the first third of the twentieth century. In the 1920s, she started a dance company and a dance school, running them as sole Proprietorships, and choreographed works for commissions. Graham was very successful, but by the 1940s, for tax reasons and because she wanted to extricate herself from funding and legal matters, she began relying on non-profit corporations, which she led, to support her work.

Eventually, Graham completed her work exclusively through two corporations — the Center and the School. The Center was incorporated in 1948. Initially known as the Martha Graham Foundation for Contemporary Dance, Inc., the corporation was renamed the Martha Graham Center of Contemporary Dance, Inc. in 1968. Graham operated her school as a sole proprietorship until 1956 when she sold it to the Martha Graham School of Contemporary Dance, Inc., which was incorporated in that year. The District Court treated the Center and the School as a single entity for purposes of determining copyright ownership. See Graham II, 224 F. Supp. 2d at 587-92.

Protas. Around 1967, Graham, then in her 70s, became acquainted with Ronald Protas, then a 26-year-old freelance photographer. Protas and Graham became friends, and although Protas had no previous dance background, Graham increasingly trusted him to represent her in both personal and professional matters. Graham installed him as the Center's General Director.

In her last will, signed in 1989, two years before her death, Graham named Protas her executor and, significant to this case, bequeathed to him, in addition to her personal property, her residuary estate, including any rights or interests in "dance works, musical scores, scenery sets, [Graham's] personal papers and the use of [Graham's] name." The will did not identify what these interests might be.

[The school and center ran into budget problems and closed for a time.]

The pending lawsuit. In 2001, after, receiving substantial funding, the Center and the School reopened. Protas then initiated this lawsuit to enjoin the Center and the School from using the Martha Graham trademark, teaching the Martha Graham Technique, and performing 70 of Graham's dances....
The Defendants asserted ownership of the disputed copyrights. They argued that the dances, sets, and costumes at issue belonged to the Center either by virtue of the work-for-hire doctrine or Graham's assignments. As such, the Defendants contended, they were not in Graham's residuary estate, and Protas did not inherit them. The Center's position was supported by Intervenor-Defendant Eliot Spitzer, Attorney General of the State of New York.

**District Court's decision.** In a thorough opinion after a bench trial that considered issues concerning the dance copyrights and ownership of theatrical properties (sets, costumes, and jewelry), the District Court found largely in favor of the Defendants. The Court concluded that the 34 dances that Graham had created during the years she was employed by the School or the Center (1956-1991) were works for hire, and that Graham had assigned to the Center many of the dances that were not works for hire. See Graham II, 224 F. Supp. 2d at 587-93, 597.

....

**Discussion**

....

II. Application of Work-for-Hire Principles

The District Court ruled that nineteen of Graham's dances...were for hire under the 1909 Act, and fifteen...were for hire under the 1976 Act....

**Graham's pre-1956 dances.** It is clear, as the District Court indicated, that Graham's 36 dances created before 1956 were not made for hire. Prior to 1956, Graham was not an employee of either the School or the Center. The School did not exist until 1956. The Center, then called the Martha Graham Foundation for Contemporary Dance, Inc., did exist, having been incorporated in 1948. However, although the Center supported Graham's work by promoting and disseminating her technique and by raising and managing funds for performances of the Martha Graham Dance Company, the Center did not hire Graham prior to 1956 in any capacity, either as a traditional employee or as an independent contractor. Dances created by Graham prior to 1956 were therefore not works for hire, and, as far as the record discloses, the copyrights in them originally belonged to Graham until they entered the public domain for lack of renewal or unless she assigned them to the Center....

**Graham's dances created from 1956 through 1965.** Graham choreographed ten dances from 1956 through 1965. The District Court found that all ten of these were works for hire under the 1909 Act. For the following reasons, we conclude that in this respect the District Court erred.

Although Graham was an employee of the School from 1956 through 1965, she was only a part-time employee, and, more significantly, we see no evidence that the scope of her employment included choreography. After the transfer of Graham's school to the corporation formed in 1956 for the purposes of teaching, researching, promoting, and creating dance through composition, commission, and performance, the newly incorporated School engaged Graham as its Program Director. Her salary was $15,000 per year for a term of ten years (from 1956 to 1966) for which she was obligated to give the School approximately one-third of her professional time each year. Although part of the School's purpose was the creation of dances, Graham's employment, per her contract, was only to teach and supervise the School's educational program, and not to choreograph. Indeed, during these ten years, Graham continued to receive income from other organizations for her dance teaching and choreography.

Graham's regular employment duties did not oblige her to create dances from 1956 through 1965, and there is no evidence that the School (her part-time employer) or the Center commissioned her to create these dances at their instance or "as a special job assignment, outside the line of [her] regular duties." Although the Defendants contend that the Center suggested dances for Graham to create during the period of her employment, each of their references to the evidence concerns events occurring after 1965. It may well be that the resources of the Center—notably, its rehearsal space and the dancers enrolled at the School—significantly aided Graham in her choreography, thereby arguably satisfying the
"expense" component of the "instance and expense" test, but no dances were proved to have been created before 1966 at the "instance" of the Center.

Apparently having assumed that Graham's employment contract prior to 1966 included creation of choreography, the District Court determined copyright, ownership for the ten dances Graham choreographed from 1956 through 1965 by considering the publication status of these dances. Three of the dances had been published. The District Court found that neither side had established ownership for two of them, Clytemnra and Circe, because it was insufficiently proved that these dances had been published with the required statutory notice of copyright. One dance, Acrobats of God, was the only one of the three with the required statutory notice. Id. We agree with the District Court's findings with respect to publication and notice.

Our disagreement with the District Court's work-for-hire ruling with respect to the ten dances created during Graham's part-time employment with the Center and our general agreement with the Court's publication and notice rulings as to the three of those dances that were published leads to the following disposition. We vacate the District Court's judgment with respect to the seven works, listed in the margin, created from 1956 through 1965 that were unpublished, and remand for the District Court to determine whether Graham assigned any of these seven works to the Center, or whether they passed to Protas through Graham's residuary estate. We affirm the judgment with respect to Clytemnra and Circe. We reverse the judgment with respect to Acrobats of God.

**Graham's dances created from 1966 through 1977.** The District Court found that the copyrights in all nine works created by Graham from 1966 through 1977 were made for hire and initially belonged to the Center. Before considering the Appellants' challenge to this ruling, we set forth more of the facts concerning Graham's status as a full-time employee after 1966.

After Graham's initial ten-year contract with the School expired, she was rehired for another ten-year term from 1966 to 1976. Rather than renew her former contract with the School, Graham signed a new contract with the Center that altered both the nature and extent of her employment from part-time dance instructor to full-time choreographer. Her new contract was renewed indefinitely in 1976.

As reflected in the change of Graham's title from Program Director of the School to Artistic Director of the Center, Graham's duties became focused on choreography, rather than on teaching. The Center's Board of Directors urged Graham to complete "as many [new dances] as possible," and "teach[] [only] when permitted by schedule." The Board even suggested possible themes for new dances for Graham to choreograph. Graham's employment also shifted from part-time to full-time, with a substantial increase in salary. We see nothing in the record to indicate that after 1966 Graham choreographed dances on commission for third parties. Graham remained the Center's Artistic Director, as well as Chief Executive, until her death in 1991.

Graham's status as an employee of the Center with contractual duties to create dances gives rise to the principal issue on this appeal: whether the dances she created from 1966 through 1977 (and, as we discuss in the next section, from 1978 through 1991) were works for hire belonging to the Center under traditional doctrine or whether, as the Appellants contend, the work-for-hire doctrine is inapplicable in view of Graham's central role with that entity. The Appellants argue that she was not an employee within the scope of the 1909 Act. Even if Graham was technically a salaried employee of the Center, and even if she undeniably choreographed dances at the Center's expense, the Appellants contend that she choreographed at no one's instance but her own. The Amici Curiae put the argument even more strongly, contending that "the better result would be to apply the work-for-hire doctrine only cautiously, if at all, in situations where the putative 'employer' is a not-for-profit corporation formed for the purpose of encouraging and supporting authors in their creative endeavors."

The argument of the Appellants and the Amici is not without some appeal, at least as a matter of creative arts policy. We understand their point that where a corporation is formed for the purpose of
fostering a supportive environment in which an employed artist will have the opportunity to create new works, the default rule should leave the copyrights in the new works with the employee, and place on the employer the burden of pursuing a contract to obtain her copyrights. Whatever the intrinsic merit of such an approach, we conclude that its adoption is a matter of legislative choice for Congress in the future, not statutory interpretation for a court at present. We turn then to an assessment of Graham's role under prevailing work-for-hire principles.

No doubt Graham was a self-motivator, and perhaps she would have choreographed her dances without the salary of Artistic Director, without the Center's support and encouragement, and without the existence of the Center at all, but all that is beside the point. The fact is that the Center did employ her to do the work, and she did the work in the course of her regular employment with the Center. Where an artist has entered into an explicit employment agreement to create works, works that she creates under that agreement cannot be exempted from the work-for-hire doctrine on speculation about what she would have accomplished if she had not been so employed.

It is true that as the revered doyenne, Graham held remarkable sway over the Center's Board of Directors. However, Graham went to great lengths to become an employee of the Center so that she could insulate herself from the legal and financial aspects of her work. As an employee, Graham could have been discharged by the Center, even though that prospect was unlikely, and, for her part, Graham could have relinquished the support of a regular salary by electing to leave the Center.

The Appellants contend that Graham's role with the Center is more distant from a work-for-hire relationship than that of the monk whose writings and religious lecturers the Ninth Circuit ruled were not works for hire under the 1909 Act, even though at the time of their creation the monk was supported by the church that he had founded. See Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 206 F.3d 1322 (9th Cir. 2000) ("SRF Church"). Whether or not we would agree with SRF Church, we view it, as did the Ninth Circuit, as involving a person with much less of a connection to his "employer" church than would obtain in a "traditional [employment] relationship." Id. at 1326-27. The monk was a religious leader who lived under a vow of poverty in quarters provided by the church that he founded and headed. He received a small monthly stipend, having renounced in writing any claim for compensation. See id. at 1324-25. In contrast, Graham received a salary specifically to create the intellectual property at issue in this litigation. After 1966, the Center paid Graham to be its Artistic Director, and her primary duty was to choreograph new dances.

In arguing that Graham's dances were not created at the "instance" of the Center, the Appellants endeavor to give that word a more particularized meaning than is appropriate for the context in which the "instance and expense" test applies. There is no need for the employer to be the precipitating force behind each work created by a salaried employee, acting within the scope of her regular employment. Many talented people, whether creative artists or leaders of major corporations, are expected by their employers to produce the sort of work for which they were hired, without any need for the employer to suggest any particular project. "Instance" is not a term of exclusion as applied to specific works created within the scope of regular employment. It may have more significance in determining whether an employee's work somewhat beyond such scope has been created at the employer's behest or to serve the employer's interests, see Avtec Systems, Inc. v. Peiffer, 21 F.3d 568, 572-74 (4th Cir. 1994) (remanding for reconsideration of whether employee's creation of computer program was motivated by desire to further employer's corporate goals)....

Of course, the presumption that, under the 1909 Act, Graham's post-1966 dances were made for hire may be rebutted by sufficient proof, for example, evidence that Graham personally received royalties for her dances. The Plaintiffs offered some evidence to prove that Graham received royalties for dances created after 1966, but the District Court, with ample justification, declined to credit such evidence.

We agree with the District Court that the dances created from 1966 through 1977 are works for hire.
Graham's dances created from 1978 through 1991. Dances created by Graham from 1978 through 1991 are subject to the 1976 Act. Applying the teachings of CCNV, the District Court made findings as to Graham's status as an employee that are fully supported by the record, and we agree with the Court's conclusion that under the factors listed in the Restatement (Second) of Agency, Graham's dances created from 1978 through 1991 were for hire.

Several factors, including ones to which we have accorded particular significance, weigh in favor of finding an employment relation between Graham and the Center. During the entire interval from 1978 to 1991, Graham continued as the Center's Artistic Director. She received employee benefits and reimbursement for personal expenses, travel, and medical benefits, and a regular salary to make dances. The Center routinely withheld income and social security taxes from her salary. Graham created her dances on the Center's premises and with the Center's resources. Graham's choreography was also the regular activity of the Center. All these factors weigh in favor of finding an employment relation between Graham and the Center.

It is true that the Center did not exercise much control over Graham, but the absence of a hiring party's exercise of control does not mean that an artist is not an employee where other factors weigh in favor of finding an employment relationship. In Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 85-88 (2d Cir. 1995), we ruled that an elaborate sculpture was a work for hire under the 1976 Act despite the fact that the artists "had complete artistic freedom with respect to every aspect of the sculpture's creation," id. at 86.

The fact that Graham was extremely talented understandably explains the Center's disinclination to exercise control over the details of her work, but does not preclude the sort of employee relationship that results in a work for hire. The Restatement (Second) of Agency notes that there are many occupations in which the employer would not normally exercise control over the details of the employee's work. The "control or right to control needed to establish the relation of master and servant may be very attenuated." Restatement (Second) of Agency § 220(1) cmt. d (1958). The Restatement offers the example of a "full-time cook" over whose culinary activity "it is understood that the employer will exercise no control." Id. The Restatement further notes that "ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them." Id. § 220(1) cmt. a.

Our reasons for rejecting the Appellants' argument that Graham's artistic talent and the Center's purpose to promote her art do not exempt her dances from the work-for-hire principles of the 1909 Act apply equally to the status of her dances governed by the 1976 Act. Graham's fifteen dances created in 1980 through 1991 were properly found to be works for hire.

Having found that these fifteen dances were works for hire, the District Court determined whether the Center was entitled to a declaration of ownership by considering whether they were published and, if so, whether they were published with required notice. The Court found that five dances, listed in the margin, were published, but that four of these had not been shown to have been published with notice, and that one, Maple Leaf Rag, did not require notice under the BCIA because it was published in 1991. The Court therefore ruled that the ten unpublished dances, listed in the margin, and Maple Leaf Rag were within the group that belonged to the Center. We affirm that ruling.

....
Effects Associates, Inc v. Cohen
908 F.2d 555 (9th Cir 1990)

KOZINSKI, CIRCUIT JUDGE.

What we have here is a failure to compensate. Larry Cohen, a low-budget horror movie mogul, paid less than the agreed price for special effects footage he had commissioned from Effects Associates. Cohen then used this footage without first obtaining a written license or assignment of the copyright; Effects sued for copyright infringement. We consider whether a transfer of copyright without a written agreement, an arrangement apparently not uncommon in the motion picture industry, conforms with the requirements of the Copyright Act.

Facts

This started out as a run-of-the-mill Hollywood squabble. Defendant Larry Cohen wrote, directed and executive produced "The Stuff," a horror movie with a dash of social satire: Earth is invaded by an alien life form that looks (and tastes) like frozen yogurt but, alas, has some unfortunate side effects - it's addictive and takes over the mind of anyone who eats it. Marketed by an unscrupulous entrepreneur, the Stuff becomes a big hit. An industrial spy hired by ice cream manufacturers eventually uncovers the terrible truth; he alerts the American people and blows up the yogurt factory, making the world safe once again for lovers of frozen confections.

In cooking up this gustatory melodrama, Cohen asked Effects Associates, a small special effects company, to create footage to enhance certain action sequences in the film. In a short letter dated October 29, 1984, Effects offered to prepare seven shots, the most dramatic of which would depict the climactic explosion of the Stuff factory. Cohen agreed to the deal orally, but no one said anything about who would own the copyright in the footage.

Cohen was unhappy with the factory explosion Effects created, and he expressed his dissatisfaction by paying Effects only half the promised amount for that shot. Effects made several demands for the rest of the money (a little over $8,000), but Cohen refused. Nevertheless, Cohen incorporated Effects's footage into the film and turned it over to New World Entertainment for distribution. Effects then brought this copyright infringement action, claiming that Cohen (along with his production company and New World) had no right to use the special effects footage unless he paid Effects the full contract price.

Discussion

A. Transfer of Copyright Ownership

The law couldn't be clearer: The copyright owner of "a motion picture or other audiovisual work" has the exclusive rights to copy, distribute or display the copyrighted work publicly. 17 U.S.C. §106 (1988). While the copyright owner can sell or license his rights to someone else, section 204 of the Copyright Act invalidates a purported transfer of ownership unless it is in writing. 17 U.S.C. § 204(a) (1988). Here, no one disputes that Effects is the copyright owner of the special effects footage used in "The Stuff," and that defendants copied, distributed and publicly displayed this footage without written authorization.

Cohen suggests that section 204's writing requirement does not apply to this situation, advancing an argument that might be summarized, tongue in cheek, as: Moviemakers do lunch, not contracts. Cohen concedes that "in the best of all possible legal worlds" parties would obey the writing requirement, but contends that moviemakers are too absorbed in developing "joint creative
endeavors" to "focus upon the legal niceties of copyright licenses." Thus, Cohen suggests that we hold section 204's writing requirement inapplicable here because "it is customary in the motion picture industry . . . not to have written licenses." To the extent that Cohen's argument amounts to a plea to exempt moviemakers from the normal operation of section 204 by making implied transfers of copyrights "the rule, not the exception," we reject his argument.

Common sense tells us that agreements should routinely be put in writing. This simple practice prevents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it's harder to backtrack on a written contract than on an oral one. Copyright law dovetails nicely with common sense by requiring that a transfer of copyright ownership be in writing. Section 204 ensures that the creator of a work will not give away his copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price. Cf. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (describing purpose of writing requirement for works made for hire). Most importantly, section 204 enhances predictability and certainty of copyright ownership.... Rather than look to the courts every time they disagree as to whether a particular use of the work violates their mutual understanding, parties need only look to the writing that sets out their respective rights.

Section 204's writing requirement is not unduly burdensome; it necessitates neither protracted negotiations nor substantial expense. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so.

...  

B. Nonexclusive Licenses

Although we reject any suggestion that moviemakers are immune to section 204, we note that there is a narrow exception to the writing requirement that may apply here. Section 204 provides that all transfers of copyright ownership must be in writing; section 101 defines transfers of ownership broadly, but expressly removes from the scope of section 204 a "nonexclusive license." See note 2 supra. The sole issue that remains, then, is whether Cohen had a nonexclusive license to use plaintiff's special effects footage.

The leading treatise on copyright law states that "[a] nonexclusive license may be granted orally, or may even be implied from conduct." 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 10.03[A], at 10-36 (1989). Cohen relies on the latter proposition; he insists that, although Effects never gave him a written or oral license, Effects's conduct created an implied license to use the footage in "The Stuff." ....

Effects created a work at defendant's request and handed it over, intending that defendant copy and distribute it. To hold that Effects did not at the same time convey a license to use the footage in "The Stuff" would mean that plaintiff's contribution to the film was "of minimal value," a conclusion that can't be squared with the fact that Cohen paid Effects almost $ 56,000 for this footage. Accordingly, we conclude that Effects impliedly granted nonexclusive licenses to Cohen and his production company to incorporate the special effects footage into "The Stuff" and to New World Entertainment to distribute the film.

Conclusion
We affirm the district court's grant of summary judgment in favor of Cohen and the other defendants. We note, however, that plaintiff doesn't leave this court empty-handed. Copyright ownership is comprised of a bundle of rights; in granting a nonexclusive license to Cohen, Effects has given up only one stick from that bundle — the right to sue Cohen for copyright infringement. It retains the right to sue him in state court on a variety of other grounds, including breach of contract. Additionally, Effects may license, sell or give away for nothing its remaining rights in the special effects footage. Those rights may not be particularly valuable, of course: "The Stuff" was something less than a blockbuster, and it remains to be seen whether there's a market for shots featuring great gobs of alien yogurt oozing out of a defunct factory. . . . In any event, whatever Effects chooses to do with the footage, Cohen will have no basis for complaining. And that's an important lesson that licensees of more versatile film properties may want to take to heart.

Excerpts from Title 17, United States Code:

17 USC § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 USC § 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State,
and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

....
D.W. NELSON, CIRCUIT JUDGE:

I. BACKGROUND

The Isley Brothers, one of this country's most well-known rhythm and blues groups, have been inducted into the Rock and Roll Hall of Fame. They helped define the soul sound of the 1960s with songs such as "Shout," "Twist and Shout," and "This Old Heart of Mine," and they mastered the funky beats of the 1970s with songs such as "Who's That Lady," "Fight the Power," and "It's Your Thing." In 1964, the Isley Brothers wrote and recorded "Love is a Wonderful Thing" for United Artists. The Isley Brothers received a copyright for "Love is a Wonderful Thing" from the Register of Copyrights on February 6, 1964. The following year, they switched to the famous Motown label and had three top-100 hits including "This Old Heart of Mine."

Hoping to benefit from the Isley Brothers' Motown success, United Artists released "Love is a Wonderful Thing" in 1966. The song was not released on an album, only on a 45-record as a single. Several industry publications predicted that "Love is a Wonderful Thing" would be a hit - "Cash Box" on August 27, 1966, "Gavin Report" on August 26, 1966, and "Billboard" on September 10, 1966. On September 17, 1966, Billboard listed "Love is a Wonderful Thing" at number 110 in a chart titled "Bubbling Under the Hot 100." The song was never listed on any other Top 100 charts. In 1991, the Isley Brothers' "Love is a Wonderful Thing" was released on compact disc. See Isley Brothers, The Isley Brothers - The Complete UA Sessions, (EMI 1991).

Michael Bolton is a singer/songwriter who gained popularity in the late 1980s and early 1990s by reviving the soul sound of the 1960s. Bolton has orchestrated this soul-music revival in part by covering old songs such as Percy Sledge's "When a Man Love a Woman" and Otis Redding's "(Sittin' on the) Dock of the Bay." Bolton also has written his own hit songs. In early 1990, Bolton and Goldmark wrote a song called "Love Is a Wonderful Thing." Bolton released it as a single in April 1991, and as part of Bolton's album, "Time, Love and Tenderness." Bolton's "Love Is a Wonderful Thing" finished 1991 at number 49 on Billboard's year-end pop chart.

On February 24, 1992, Three Boys Music Corporation filed a copyright infringement action for damages against the appellants under 17 U.S.C. §§ 101 et seq. (1988). …[T]he jury determined that the appellants had infringed the Isley Brothers' copyright. …In the final judgment entered against the appellants, the district court ordered Sony Music to pay $ 4,218,838; Bolton to pay $ 932,924; Goldmark to pay $ 220,785; and their music publishing companies to pay $ 75,900. They timely appealed.

II. DISCUSSION

Proof of copyright infringement is often highly circumstantial, particularly in cases involving music. A copyright plaintiff must prove (1) ownership of the copyright; and (2) infringement - that the defendant copied protected elements of the plaintiff's work. See Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996). Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had "access" to the plaintiff's work and that the two works are "substantially similar." Id.

Given the difficulty of proving access and substantial similarity, appellate courts have been reluctant to reverse jury verdicts in music cases. See, e.g., id. at 1221 (affirming a jury's verdict for the defendants in a copyright infringement case involving Michael Jackson and other musicians); Gaste v. Kaiserman, 863 F.2d 1061, 1071 (2d Cir. 1988) (affirming a jury's damages award against a
defendant in a music copyright infringement case). Judge Newman's opinion in Gaste nicely articulated the proper role for an appeals court in reviewing a jury verdict:

The guiding principle in deciding whether to overturn a jury verdict for insufficiency of the evidence is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.

*Id.* at 1066 (internal quotations omitted). In *Arnstein v. Porter*, the seminal case about musical copyright infringement, Judge Jerome Frank wrote:

Each of these two issues - copying and improper appropriation - is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts - of the judge if he sat without a jury, or of the jury if there was a jury trial - bind this court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions.

*Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946).

As a general matter, the standard for reviewing jury verdicts is whether they are supported by "substantial evidence" - that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.

We affirm the jury's verdict in this case in light of the standard of review and copyright law's "guiding principles." Although we will address each of the appellant's arguments in turn, we focus on access because it is the most difficult issue in this case. Our decision is predicated on judicial deference - finding that the law has been properly applied in this case, viewing the facts most favorably to the appellees, and not substituting our judgment for that of the jury.

A. Access

Proof of access requires "an opportunity to view or to copy plaintiff's work." *Sid and Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977). This is often described as providing a "reasonable opportunity" or "reasonable possibility" of viewing the plaintiff's work. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.02[A], at 13-19 (1999); *Jason v. Fonda*, 526 F. Supp. 774, 775 (C.D. Cal. 1981), aff'd, 698 F.2d 966 (9th Cir. 1983).

We have defined reasonable access as "more than a 'bare possibility.'" *Jason*, 698 F.2d at 967. Nimmer has elaborated on our definition: "Of course, reasonable opportunity as here used, does not encompass any bare possibility in the sense that anything is possible. Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing the plaintiff's work - not a bare possibility." 4 Nimmer, § 13.02[A], at 13-19. "At times, distinguishing a 'bare' possibility from a 'reasonable' possibility will present a close question." *Id.* at 13-20.

Circumstantial evidence of reasonable access is proven in one of two ways: (1) a particular chain of events is established between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company), or (2) the plaintiff's work has been widely disseminated. See 4 Nimmer, § 13.02[A], at 13-20-13-21; 2 Paul Goldstein, *Copyright: Principles, Law, and Practice* § 8.3.1.1., at 90-91 (1989). Goldstein remarks that in music cases the "typically more successful route to proving access requires the plaintiff to show that its work was widely disseminated through sales of sheet music, records, and radio performances." 2 Goldstein, § 8.3.1.1, at 91. Nimmer, however, cautioned that "concrete cases will pose difficult judgments as to where along the access spectrum a given exploitation falls." 4 Nimmer, § 13.02[A], at 13-22.
Proof of widespread dissemination is sometimes accompanied by a theory that copyright infringement of a popular song was subconscious. Subconscious copying has been accepted since Learned Hand embraced it in a 1924 music infringement case: "Everything registers somewhere in our memories, and no one can tell what may evoke it . . . . Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick." Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147-48 (S.D.N.Y. 1924). In Fred Fisher, Judge Hand found that the similarities between the songs "amounted to identity" and that the infringement had occurred "probably unconsciously, what he had certainly often heard only a short time before." Id. at 147.

In modern cases, however, the theory of subconscious copying has been applied to songs that are more remote in time. ABKCO Music, Inc v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983) is the most prominent example. In ABKCO, the Second Circuit affirmed a jury's verdict that former Beatle George Harrison, in writing the song "My Sweet Lord," subconsciously copied The Chiffons' "He's So Fine," which was released six years earlier. See id. at 997, 999. Harrison admitted hearing "He's So Fine" in 1963, when it was number one on the Billboard charts in the United States for five weeks and one of the top 30 hits in England for seven weeks. See id. at 998. The court found: "the evidence, standing alone, 'by no means compels the conclusion that there was access . . . . it does not compel the conclusion that there was not.'" Id. (quoting Heim v. Universal Pictures Co., 154 F.2d 480, 487 (2d Cir. 1946)). In ABKCO, however, the court found that "the similarity was so striking and where access was found, the remoteness of that access provides no basis for reversal." Id. Furthermore, "the mere lapse of a considerable period of time between the moment of access and the creation of defendant's work does not preclude a finding of copying." 4 Nimmer, § 13.02[A], at 13-20 (citing ABKCO, 722 F.2d at 997-98).

The Isley Brothers' access argument was based on a theory of widespread dissemination and subconscious copying. They presented evidence supporting four principal ways that Bolton and Goldmark could have had access to the Isley Brothers' "Love is a Wonderful Thing":

(1) Bolton grew up listening to groups such as the Isley Brothers and singing their songs. In 1966, Bolton and Goldmark were 13 and 15, respectively, growing up in Connecticut. Bolton testified that he had been listening to rhythm and blues music by black singers since he was 10 or 11, "appreciated a lot of Black singers," and as a youth was the lead singer in a band that performed "covers" of popular songs by black singers. Bolton also testified that his brother had a "pretty good record collection."

(2) Three disk jockeys testified that the Isley Brothers' song was widely disseminated on radio and television stations where Bolton and Goldmark grew up. First, Jerry Blavitt testified that the Isley Brothers' "Love is a Wonderful Thing" was played five or six times during a 13-week period on the television show, "The Discophonic Scene," which he said aired in Philadelphia, New York, and Hartford-New Haven. Blavitt also testified that he played the song two to three times a week as a disk jockey in Philadelphia and that the station is still playing the song today. Second, Earl Rodney Jones testified that he played the song a minimum of four times a day during an eight to 14 to 24 week period on WVON radio in Chicago, and that the station is still playing the song today. Finally, Jerry Bledsoe testified that he played the song on WUFO radio in Buffalo, and WWRL radio in New York was playing the song in New York in 1967 when he went there. Bledsoe also testified that he played the song twice on a television show, "Soul," which aired in New York and probably in New Haven, Connecticut, where Bolton lived.

(3) Bolton confessed to being a huge fan of the Isley Brothers and a collector of their music. Ronald Isley testified that when Bolton saw Isley at the Lou Rawls United Negro College Fund Benefit concert in 1988, Bolton said, "I know this guy. I go back with him. I have all his stuff." Angela Winbush, Isley's wife, testified about that meeting that Bolton said, "This man needs no
introduction. I know everything he's done."

(4) Bolton wondered if he and Goldmark were copying a song by another famous soul singer. Bolton produced a work tape attempting to show that he and Goldmark independently created their version of "Love Is a Wonderful Thing." On that tape of their recording session, Bolton asked Goldmark if the song they were composing was Marvin Gaye's "Some Kind of Wonderful."

The appellants contend that the Isley Brothers' theory of access amounts to a "twenty-five-years-after-the-fact-subconscious copying claim." Indeed, this is a more attenuated case of reasonable access and subconscious copying than [ABKCO]. In this case, the appellants never admitted hearing the Isley Brothers' "Love is a Wonderful Thing." That song never topped the Billboard charts or even made the top 100 for a single week. The song was not released on an album or compact disc until 1991, a year after Bolton and Goldmark wrote their song. Nor did the Isley Brothers ever claim that Bolton's and Goldmark's song is so "strikingly similar" to the Isley Brothers' that proof of access is presumed and need not be proven.

Despite the weaknesses of the Isley Brothers' theory of reasonable access, the appellants had a full opportunity to present their case to the jury. Three rhythm and blues experts (including legendary Motown songwriter Lamont Dozier of Holland-Dozier-Holland fame) testified that they never heard of the Isley Brothers' "Love is a Wonderful Thing." Furthermore, Bolton produced copies of "TV Guide" from 1966 suggesting that the television shows playing the song never aired in Connecticut. Bolton also pointed out that 129 songs called "Love is a Wonderful Thing" are registered with the Copyright Office, 85 of them before 1964.

The Isley Brothers' reasonable access arguments are not without merit. Teenagers are generally avid music listeners. It is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later. Furthermore, Ronald Isley testified that when they met, Bolton said, "I have all his stuff." Finally, as the district court pointed out, Bolton's remark about Marvin Gaye and "Some Kind of Wonderful" indicates that Bolton believed he may have been copying someone else's song.

Finally, with regard to access, we are mindful of Judge Frank's words of caution in [Arnstein v. Porter]: "The judge characterized plaintiff's story as 'fantastic'; and in the light of the references in his opinion to defendant's deposition, the judge obviously accepted the defendant's denial of access and copying . . . Yet plaintiff's credibility, even as to those improbabilities, should be left to the jury." [Arnstein], 154 F.2d at 469. In this case, Judge Baird heeded Judge Frank's admonition:

This Court is not in a position to find that the only conclusion that a reasonable jury could have reached is that Defendants did not have access to Plaintiff's song. One must remember that the issue this Court must address is not whether Plaintiff has proven access by a preponderance of evidence, but whether reasonable minds could find that Defendants had a reasonable opportunity to have heard Plaintiff's song before they created their own song.

Although we might not reach the same conclusion as the jury regarding access, we find that the jury's conclusion about access is supported by substantial evidence. We are not establishing a new standard for access in copyright cases; we are merely saying that we will not disturb the jury's factual and credibility determinations on this issue.

B. Substantial Similarity

...
1. Evidence of Substantial Similarity

Bolton and Goldmark argue that there was insufficient evidence of substantial similarity because the Isley Brothers' expert musicologist, Dr. Gerald Eskelin, failed to show that there was copying of a combination of unprotectible elements. On the contrary, Eskelin testified that the two songs shared a combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending. Although the appellants presented testimony from their own expert musicologist, Anthony Ricigliano, he conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the Isley Brothers' song "anywhere in the prior art." The jury heard testimony from both of these experts and "found infringement based on a unique compilation of those elements." We refuse to interfere with the jury's credibility determination, nor do we find that the jury's finding of substantial similarity was clearly erroneous.

2. Independent Creation

Bolton and Goldmark also contend that their witnesses rebutted the Isley Brothers' prima facie case of copyright infringement with evidence of independent creation. By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying. The burden shifts to the defendant to rebut that presumption through proof of independent creation. See Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976).

The appellants' case of independent creation hinges on three factors: the work tape demonstrating how Bolton and Goldmark created their song, Bolton and Goldmark's history of songwriting, and testimony that their arranger, Walter Afanasieff, contributed two of five unprotectible elements that they allegedly copied. The jury, however, heard the testimony of Bolton, Goldmark, Afanasieff, and Ricigliano about independent creation. The work tape revealed evidence that Bolton may have subconsciously copied a song that he believed to be written by Marvin Gaye. Bolton and Goldmark's history of songwriting presents no direct evidence about this case. And Afanasieff's contributions to Bolton and Goldmark's song were described by the appellants' own expert as "very common." Once again, we refuse to disturb the jury's determination about independent creation. The substantial evidence of copying based on access and substantial similarity was such that a reasonable juror could reject this defense.

... 

AFFIRMED.

FUNKY FILMS, INC. v. TIME WARNER ENTERTAINMENT CO.

462 F.3d 1072 (9th Cir 2006)

B. FLETCHER, CIRCUIT JUDGE:

Gwen O'Donnell and Funky Films, Inc. (collectively, "appellants"), creators of the screenplay "The Funk Parlor," appeal the district court's summary judgment to Time Warner Entertainment Company and Home Box Office (collectively, "HBO"), creators of the award-winning television mini-series "Six Feet Under," for copyright infringement. Appellants assert that the district court erred in concluding that "The Funk Parlor" and "Six Feet Under" are not substantially similar. They also appeal the district court's denial of a request for additional discovery. For the reasons set forth below, we affirm the judgment of the district court.

I
Between October 1997 and July 1999, Gwen O'Donnell drafted "The Funk Parlor," a screenplay tracing the lives of a small, family-run funeral parlor in Connecticut. Sometime in 1998, O'Donnell was injured in an automobile accident and sought treatment from Stacey Smith, a chiropractor. During these appointments, the two discussed O'Donnell's screenplay; eventually, Smith took an interest in the script and asked O'Donnell if she would like him to give a copy to his friend and client Chris Albrecht, the President of Original Programming at HBO. O'Donnell agreed and gave Smith a copy of "The Funk Parlor." Three months later, Carolyn Strauss, Albrecht's top lieutenant, solicited Alan Ball to develop "Six Feet Under" for HBO. Appellants allege that "The Funk Parlor" and "Six Feet Under" are substantially similar and that HBO unlawfully infringed upon appellants' copyrighted work. "As a determination of substantial similarity requires a detailed examination of the works themselves," Williams v. Crichton, 84 F.3d 581, 583 (2d Cir. 1996) (internal citation and quotation marks omitted), we begin with a discussion of the works at issue.

A

"The Funk Parlor" takes place in a small, family-run funeral home in Connecticut. John Funk Sr., the patriarch, has committed suicide, and the deteriorating funeral parlor has been handed down to his two sons, John Jr. and Tom. John, the older brother who had moved away to start his own business promoting nightclubs in Los Angeles, reluctantly decides to remain in Connecticut after his father's death to help out with the struggling venture. Applying his business acumen, John revives it, all the while staving off an attempted take over by a larger competitor. Meanwhile, he attracts the attention of Sophie, a neighbor and longtime acquaintance, and the two become romantically involved. Sophie repeatedly talks of entering a convent to become a nun, although in actuality she is a psychopathic murderer whose killing sprees breathe new life (as it were) into the Funk business. John and Sophie intend to marry, but John eventually figures out that he is Sophie's next target and that he must kill her (which he does) to spare his own life.

Tom, who had been running the funeral home during John's absence and who expresses an interest in Sophie as well, is murdered midway through the play. After Tom's death, John continues operating the business to bring it out of debt. After Sophie's death, John sells the business, moves to New York, and returns to the nightclub business.

Like "The Funk Parlor," "Six Feet Under" takes place in a funeral home and begins with the death of the patriarch, Nathaniel Fisher, and return of the "prodigal son," Nate, who receives an equal share of the business along with his younger brother, David. Nate decides to stay and help David maintain the business, which, like the Funk business, struggles against a larger competitor. The story traces the interpersonal relationships and romantic lives of each of the Fisher sons. It also revolves around the lives of the mother, Ruth, and sister, Claire, as well as other characters who come into contact with members of the Fisher family. The father, though deceased, reemerges throughout the drama. He continues to interact with each remaining character of the Fisher family, often helping them piece together problems that seemed irresolvable during his lifetime.

At the beginning of the drama, Nate begins a relationship with Brenda Chenowith, a massage therapist he meets on an airplane. David, who is gay, struggles with his sexuality and begins a relationship with Keith, a police officer he meets at church.

B

The district court conducted an independent analysis of the "The Funk Parlor" and the first three episodes of "Six Feet Under," comparing the two works for their setting, plot, char- acters, theme, mood, pace, dialogue, and sequence of events. The court determined that the works' few similarities operate at a general, abstract level and that no jury could reasonably find substantial similarities between the two works. Accord- ingly, the court granted HBO's motion for summary judgment.

37
II

A

A plaintiff bringing a claim for copyright infringement must demonstrate "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). Appellants' ownership in the copyright is undisputed; they need only demonstrate a triable issue of fact whether HBO "cop[ied] anything that was 'original' to" their work. *Id.* Absent evidence of direct copying, "proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.'" *See, e.g., Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). Because the district court assumed, without deciding, appellees' access to "The Funk Parlor," we must decide whether the two works are substantially similar.

C

Appellants allege a number of similarities between "The Funk Parlor" and "Six Feet Under." According to appellants, both works concern "a narrative about a small funeral home, and the lives of the family members who operate it"; plot- lines involving "the death of the father . . . [who] has for decades run the business"; a father whose death is "unexpected and not attributable to natural causes" (suicide in "The Funk Parlor" and a car accident in "Six Feet Under"); and the presence of "two sons" who receive equal shares of the business, with the "older son . . . liv[ing] in a distant city, working outside the funeral industry." In both works, the older son initially "has no interest in becoming involved with the funeral business"; moreover, "[t]he family business is financially fragile, and in both works the funeral home is pointedly shown to be in debt and operating out of a substandard facility with obsolete equipment and a hearse that stalls." Both works also contain an attempt by a "rival funeral home," spear-headed by "the female principal of the rival business" to "take[] advantage of their vulnerable financial condition," "bluntly mak[ing] a lowball offer" and "approaching one of the brothers at the father's funeral with a proposal to buy the family business." In both works, the older brother initially "expresses his desire to sell" but "changes his mind and commits himself to help his brother keep the business afloat." Finally, appellants point out the older brother's creativity, which stands in "pointed contrast to the leaden conservatism of the younger brother"; that the funeral home in both works is used as a "site for musical entertainment"; that the "younger brother . . . change[s] his church affiliation in order to increase their client base" in both works; and that "the rival's takeover attempt does not succeed."

D

At first blush, these apparent similarities in plot appear significant; however, an actual reading of the two works reveals greater, more significant differences and few real similarities at the levels of plot, characters, themes, mood, pace, dialogue, or sequence of events.

1. *Plot*

Both "Six Feet Under" and "The Funk Parlor" commence with the death of the father and return of the "prodigal son." Aside from that rather uneventful similarity, the plots of the two stories develop quite differently. The father's suicide in "The Funk Parlor" sets the stage for a series of additional murders, including several of the central characters in the play. The story revolves around the life of the older brother, John, who rehabilitates the fledgling business, falls in love with Sophie, proposes to her and then, upon discovering that she is a serial murderer, kills her in an effort to spare his own life.
"Six Feet Under," unlike "The Funk Parlor," is not a murder mystery, nor does it revolve around any plot-line in particular. Rather, "Six Feet Under" explores the intimate lives of each member of the Fisher family by examining each character's complex psyche and his or her interpersonal interactions and emotional attachments. "Six Feet Under" develops separate plot-lines around each member of the Fisher family, including the mother and daughter, for whom there are no comparable characters in "The Funk Parlor." "Six Feet Under" is not so much a story about death as it is about the way the characters struggle with life in the wake of the cataclysmic death of the father.

2. Characters

Although appellants attempt to link up the various characters of the two works, there are very few real similarities between any of them. John Funk, Sr., is a minor character who vanishes at the start of "The Funk Parlor" and does not reappear except during one quick flashback scene; his relationships with the other characters are not consciously explored. Nathaniel Fisher, Sr., by contrast, appears throughout the drama and continues to interact with each character separately. In that regard, "Six Feet Under" traces each character's unique set of relationships with the deceased father, exploring issues that were apparently not resolvable during life.

The "prodigal son" characters of the two works, while similar at the abstract level, are markedly different in the two scripts. Nate Fisher's search for meaning originally led him away from the family business; prior to his return home, he remained somewhat adrift in Seattle. Although he reluctantly agrees to remain in Los Angeles to help his brother David run the business, he shows little interest or skill. John Funk, Jr., by contrast, is a talented and creative business person whose efforts quickly restore the moribund business. Unlike Nate, John graduated from mortuary school and took on an active role in the business before decamping for Los Angeles to become a club promoter.

The characters of David Fisher and Tom Funk, both younger brothers, are remarkably different. Tom's role in "The Funk Parlor" is less developed (in part because he is killed roughly midway through the story), though he is clearly less skilled than his brother at maintaining the family business. Although Tom is rumored to be gay, his homosexuality remains a matter of speculation and is never pursued through any relationship or meaningful dialogue. David, by contrast, is deeply enmeshed in a struggle with sexual identity, which he hides from his family and explores privately. His coming-out process and his relationship with Keith occupy a central plot-line of the story. The complexity of David's character has no equivalent in "The Funk Parlor."

Appellants equate Sophie Zemlaskas with Brenda Chenowith, both of whom are romantically involved with the older brother in each story. However, the two have little in common. Sophie, a devout and obsessive Catholic who plans to enter the convent, is a psychopathic killer. Unlike Sophie, Brenda is not homicidal. Brenda, a massage therapist, is psychologically astute and expresses no interest in religion. While Sophie expresses deep conflict over her sexuality, Brenda engages in an apparently conflict-free sexual life with Nate (and others).

Appellants also try to draw connections between Jamie, a twelve- or thirteen-year-old cousin who works at the funeral home, and Claire Fisher, the younger sister in "Six Feet Under." But Jamie is a very minor character; Claire, by contrast, is a central character who develops relationships of her own. Her struggle to define herself within the family, while rejecting any place within the family business, is a recurring theme in "Six Feet Under."

Completely missing from "The Funk Parlor" is any character similar to Ruth Fisher, the mother and one of the central characters of "Six Feet Under." Ruth is presented as a strong-willed woman who struggles to overcome her lingering maternal instincts over her now-grown children. Her own romantic attachments and relationships form an important part of the plot-line as well.

Additional characters within "Six Feet Under" that have no counterpart in "The Funk Parlor" are
Fredrico Diaz, an employee of the Fisher business who eventually becomes a partner, and Keith Charles, David's boyfriend who struggles to remain in the relationship despite David's conflicts in coming to terms with his sexuality.

3. Themes

Although both works explore themes of death, relationships, and sex, they do so in very different ways. "The Funk Parlor," a murder mystery, is driven by a series of murders, which catalyze the salvation of the business. The use of death in "Six Feet Under" is quite different: there, death provides the focal point for exploring relationships and existential meaning. As noted by the district court, the general theme of "Six Feet Under" is that sex and death provide focal points for relationships," while the predominant theme of "The Funk Parlor" is that "sex and religion don't mix."

In addition to the numerous murders that take place, "The Funk Parlor" traces a number of religious themes (tension between members of the Protestant and Catholic communities, religious conversion, and a general fear of God). Much of the story takes place at the Polish deli owned by Sophie's family, and several of the deaths take place at "Overlook Point." Characters continually brush up against law-enforcement officials investigating the series of murders. Meanwhile, the religious themes serve as a conscious moral structure against the backdrop of the mass killings that take place. The characters must come to grips with religious expectations, agonizing that they will "burn in Hell" and that "God is punishing us." John Funk considers religious conversion and seeks confession as a source of absolution. Sophie, meanwhile, is obsessed with religion and, for much of the story, appears ready to enter the convent to become a nun.

"Six Feet Under," by contrast, is a neo-realistic, postmodern account of family and romantic relationships, without any overarching religious themes or overtones. Themes of love, romance, death, and sexuality are explored entirely through the characters' complex interactions. The story focuses on the characters' longing for connection, their insecurities, and their complaints. Unlike "The Funk Parlor," none of the main characters are murderers or murder victims.

4. Setting, Mood, and Pace

Although both works take place in a contemporary, family-run funeral home, the similarities in setting end there. "Six Feet Under" takes place in a well-maintained funeral home in Los Angeles. Although the business struggles against a competitor and is, at times, somewhat sluggish, "The Funk Parlor," located in Connecticut, is in shambles. The moods of the two works are drastically different as well. "The Funk Parlor" is a farcical mystery, while "Six Feet Under" is serious, dramatic, and introspective. "The Funk Parlor" moves at a rapid clip, while "Six Feet Under" evolves slowly and often irrepetitive fashion. Beyond the basic premise of a family-run funeral home, there are no similarities in the setting, mood or pace of the two works.

5. Dialogue

The encounters explored in "The Funk Parlor" are at times pedestrian, and the dialogue, at times, rather trite. The characters play beer-drinking games like "I never" and express concern about "burning in hell" and that "God is punishing us." "Six Feet Under," by contrast, is full of complex and subtle dialogue, including ironic turns of phrases that heighten the already-fraught interactions among the characters.

6. Sequence of Events

The sequence of events in the two works are different as well. "The Funk Parlor" opens with a younger John Funk attempting to seduce Jennifer Angeli at "Overlook Point." Their automobile
crashes; John is blamed for the death; he leaves home; and returns only later at the death of his father. "Six Feet Under" begins with a montage of different scenes depicting each character's reaction to the death of Nathaniel Sr., who is killed in an automobile accident on the way to pick up Nate Jr. at the airport. Minutes before finding out, Nate engages in a sexual encounter with Brenda in an airport broom closet; Claire smokes crystal methamphetamine with a group of friends; and Ruth broods over dinner and Nate's favorite breakfast cereal. Shortly after these scenes, the Fisher children are reunited with their mother at the hospital to identify their father's body, thus beginning the exploration of their complex relationships. While "The Funk Parlor" unfolds in a straight, linear trajectory, "Six Feet Under" employs repetition, dreams, and flashbacks to intensify certain scenes and conflate the real with the unreal.

E

At a very high level of generality, both works share certain plot similarities: the family-run funeral home, the father's death, and the return of the "prodigal son," who assists his brother in maintaining the family business. But "[g]eneral plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind." See Berkic, 761 F.2d at 1293. See also Cavalier, 297 F.3d at 824 ("basic plot ideas, such as this one, are not protected by copyright law"); Shaw, 919 F.2d at 1356 ("Copyright law protects an author's expression; facts and ideas within a work are not protected."). Beyond that, "[t]he stories do not share any detailed sequence of events." Cavalier, 297 F.3d at 824. See Berkic, 761 F.2d at 1293 ("Both deal with criminal organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ trans- plants. To some extent, both works take their general story from the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization. But this degree of similarity between the basic plots of two works cannot sustain a plaintiff's claim that the works are 'substantially similar.'"). The similarities recounted throughout appellants' brief rely heavily on scenes A faire — not concrete renderings specific to "The Funk Parlor" — and are, at best, coincidental. Consequently, the two works are not substantially similar.

III

For the reasons stated above, the district court's summary judgment in appellees' favor is AFFIRMED.
WOOD, Circuit Judge. Meet Pull My Finger® Fred. He is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fred is a plush doll and when one squeezes Fred's extended finger on his right hand, he farts. He also makes somewhat crude, somewhat funny statements about the bodily noises he emits, such as "Did somebody step on a duck?" or "Silent but deadly."

Fartman could be Fred's twin. Fartman, also a plush doll, is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fartman (as his name suggests) also farts when one squeezes his extended finger; he too cracks jokes about the bodily function. Two of Fartman's seven jokes are the same as two of the 10 spoken by Fred. Needless to say, Tekky Toys, which manufactures Fred, was not happy when Novelty, Inc., began producing Fartman, nor about Novelty's production of a farting Santa doll sold under the name Pull-My-Finger Santa.

....

I

Somewhat to our surprise, it turns out that there is a niche market for farting dolls, and it is quite lucrative. Tekky Toys, an Illinois corporation, designs and sells a whole line of them. Fred was just the beginning. Fred's creators, Jamie Wirt and Geoff Bevington, began working on Fred in 1997, and had a finished doll in 1999. They applied for a copyright registration on Fred as a "plush toy with sound," and received a certificate of copyright on February 5, 2001; later, they assigned the certificate to Tekky. In the meantime, Tekky sent out its first Fred dolls to distributors in 1999. By the time this case arose, in addition to Fred, Tekky's line of farting plush toys had expanded to Pull My Finger (R) Frankie (Fred's blonde, motorcycle-riding cousin), Santa, Freddy Jr., Count Fartula (purple, like the Count on Sesame Street), and Fat Bastard (character licensed from New Line Cinema's "Austin Powers" movies), among others. By March 2004, Tekky had sold more than 400,000 farting dolls.

Novelty, a privately held Indiana corporation, is owned by Todd Green, its president. Green testified in his deposition, "any time we'd create an item, okay, we try to copy—or try to think of some relevant ideas." Novelty personnel go to trade shows and take pictures of other companies' products, seeking "ideas" for their own. In early 2001, Green visited the Hong Kong showroom of TL Toys, a manufacturer of Tekky's Fred doll, and he spotted Fred. In his deposition, Green testified that he might have photographed Fred since "[i]t wouldn't be unusual for us to photograph everything we see." Green admits that his idea for Fartman was based on Fred and that he described his idea to Mary Burkhart, Novelty's art director, who prepared a drawing based on Green's description. According to Burkhart, Green wanted "a plush doll that would . . . fart and shake. . . . And make a sound . . . a hillbilly-type guy, sitting in a chair that would fart and be activated by actually pulling his finger."
Typically, Novelty would assign the job of drawing a new product to an artist, such as Burkhart, and the artist would then take her drawing to Green for his approval. That was the procedure it followed for Fartman. Novelty began to manufacture plush farting dolls around October 8, 2001; the first doll it released was the one it called Pull-My-Finger Santa. Fartman hit the stores one month later, on November 5, 2001.

II

A

We begin with the district court's finding that Novelty violated Tekky's copyright when it created Fartman. As with any grant of summary judgment, partial or otherwise, we review the district court's decision de novo, viewing the facts in the light most favorable to the nonmoving party. See Valentine v. City of Chicago, 452 F.3d 670, 677 (7th Cir. 2006).

To establish copyright infringement, one must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). What is required for copyright protection is "some minimal degree of creativity," or "the existence of . . . intellectual production, of thought, and conception." Id. at 362 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60, 4 S. Ct. 279, 28 L. Ed. 349, 1884 Dec. Comm'r Pat. 186 (1884)). Generally, copyright protection begins at the moment of creation of "original works of authorship fixed in any tangible medium of expression," including "pictorial, graphic, and sculptural" works and sound recordings. 17 U.S.C. § 102(a). A work is "fixed" in a tangible medium of expression "when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. See Toney v. L'Oreal USA, Inc., 406 F.3d 905, 909 (7th Cir. 2005). The owner of a copyright may obtain a certificate of copyright, which is " prima facie evidence" of its validity. 17 U.S.C. § 410(c). See Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 507 (7th Cir. 1994).

Once it is established that a party has a valid copyright, whether registered or not, the next question is whether another person has copied the protected work. Copying may be proven by direct evidence, but that is often hard to come by. In the alternative, copying may be inferred "where the defendant had access to the copyrighted work and the accused work is substantially similar to the copyrighted work." Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries, 272 F.3d 441, 450 (7th Cir. 2001) (quoting Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982)). See also Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169-70 (7th Cir. 1997). ...If the inference of copying is drawn from proof of access and substantial similarity, it can be rebutted if the alleged copier can show that she instead "independently created" the allegedly infringing work. Susan Wakeen Doll Co., 272 F.3d at 450. "A defendant independently created a work if it created its own work without copying anything or if it copied something other than the plaintiff's copyrighted work." Id. (citing 3 MÉLVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §12.11[D], at 12-175 (2001)).

Novelty contends that the district court protected too much of Tekky's toy—not just the expression but the idea or common elements known as scènes a faire, which we defined in Atari as "incidents, characters or settings which are as a practical matter indispensable or at least standard, in the treatment of a given topic." 672 F.2d at 616. Novelty also takes issue with the district court's finding that it had access to Fred, that Burkhart copied rather than independently created Fartman, and that Fred and Fartman were substantially similar. As we explain below, we are unpersuaded. Tekky had a valid copyright in Fred, Novelty (the company) indisputably did have access to Fred, and the
two dolls are so similar that the inference of copying even without access is irresistible.

Novelty does not argue that Tekky lacks a valid copyright in Fred or that Fred is so lacking in creativity that a copyright could not attach. Indeed, Fred is a far cry from a noncreative compilation of facts such as the telephone book in *Feist*. Here, we have a creative doll and a valid copyright registration. There is no doubt that there is a valid copyright. How much creativity Fred reflects and what ideas he embodies (as opposed to the way he expresses those ideas) merely help us to decide whether we can infer copying from substantial similarity.

It is notable that Green, Novelty's president, admits that he saw and perhaps photographed Fred, and that Fred gave him the idea for Fartman. While Burkhart denies having seen Fred or even a picture of him, she drew the model for Fartman at Green's direction. Moreover, Fred was already on the market in the United States at the time Fartman was created. …

Even if access existed, Tekky had to show substantial similarity between the two items in order to support an inference of copying. The test for substantial similarity is an objective one. See *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005) (noting that we look at "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value"). We look at the dolls themselves to determine substantial similarity…. The …similarities between Fred and Fartman go far beyond the fact that both are plush dolls of middle-aged men sitting in armchairs that fart and tell jokes. Both have crooked smiles that show their teeth, balding heads with a fringe of black hair, a rather large protruding nose, blue pants that are identical colors, and white tank tops. On the other hand, Fartman has his name emblazoned in red across his chest, his shoes are a different color from Fred's, as is his chair, and Fartman wears a hat. In the end, despite the small cosmetic differences, the two dolls give off more than a similar air. The problem is not that both Fred and Fartman have black hair or white tank tops or any other single detail; the problem is that the execution and combination of features on both dolls would lead an objective observer to think they were the same. See *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 136-37 (2d Cir. 2004). We conclude that no objective person would find these dolls to be more than minimally distinguishable. To the contrary, they are substantially similar. That, in combination with Green's access, compels an inference of copying. Indeed, the dolls are so similar that an inference of copying could be drawn even without the evidence of access. See *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 926 (7th Cir. 2003).

Novelty contends that rather than copy, it merely made a similar doll based on the same comic archetype, that of "a typical man wearing jeans and a T-shirt in a chair doing the 'pull my finger' joke." That, Novelty argues, is the idea, not the expression, and the reason that the two dolls are similar is they are both based on that idea. …It is, of course, a fundamental tenet of copyright law that the idea is not protected, but the original expression of the idea is. See *Feist*, 499 U.S. at 348-49. Although it is not always easy to distinguish idea from expression, by the same token the task is not always hard. Novelty urges that the similarity of the two dolls reflects the fact that Fred himself is only minimally creative, representing a combination of elements that were in the public domain or were *scenes a faire*. The problem with this argument is that the very combination of these elements as well as the expression that is Fred himself are creative.

Novelty wants us to take the entity that is Fred, subtract each element that it contends is common, and then consider whether Novelty copied whatever leftover components are creative. But this ignores the fact that the details—such as the appearance of Fred's face or even his chair—represent creative expression. It is not the idea of a farting, crude man that is protected, but this particular embodiment of that concept. Novelty could have created another plush doll of a middle-aged farting man that would seem nothing like Fred. He could, for example, have a blond mullet and wear flannel,
have a nose that is drawn on rather than protruding substantially from the rest of the head, be standing rather than ensconced in an armchair, and be wearing shorts rather than blue pants. To see how easy this would be, one need look no further than Tekky's Frankie doll, which is also a plush doll, but differs in numerous details: he is not sitting, and he has blond hair, a tattoo, and a red-and-white striped tank. Frankie is not a copy of Fred. Fartman is. We have no trouble concluding that the district court properly granted partial summary judgment to Tekky on the issue of liability for copyright infringement.

....

We AFFIRM the judgment of the district court.

METRO-GOLDWYN-MAYER STUDIOS, INC., v. GROKSTER, LTD.,
545 U.S. 913 (2005)

JUSTICE SOUTER DELIVERED THE OPINION OF THE COURT.

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

I

A

Respondents, Grokster, Ltd., and StreamCast Networks, Inc., defendants in the trial court, distribute free software products that allow computer users to share electronic files through peer-to-peer networks, so called because users' computers communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.¹

Other users of peer-to-peer networks include individual recipients of Grokster's and StreamCast's software, and although the networks that they enjoy through using the software can

¹ Peer-to-peer networks have disadvantages as well. Searches on peer-to-peer networks may not reach and uncover all available files because search requests may not be transmitted to every computer on the network. There may be redundant copies of popular files. The creator of the software has no incentive to minimize storage or bandwidth consumption, the costs of which are borne by every user of the network. Most relevant here, it is more difficult to control the content of files available for retrieval and the behavior of users.
be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization. A group of copyright holders (MGM for short, but including motion picture studios, recording companies, songwriters, and music publishers) sued Grokster and StreamCast for their users' copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act, 17 U.S.C. § 101 et seq. (2000 ed. and Supp. II). MGM sought damages and an injunction.

...Grokster and StreamCast use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction.

Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches. MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works. Grokster and StreamCast dispute this figure, raising methodological problems and arguing that free copying even of copyrighted works may be authorized by the rightholders. They also argue that potential noninfringing uses of their software are significant in kind, even if infrequent in practice. Some musical performers, for example, have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks, and some distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an example. Indeed, StreamCast has given Morpheus users the opportunity to download the briefs in this very case, though their popularity has not been quantified.

As for quantification, the parties' anecdotal and statistical evidence entered thus far to show the content available on the FastTrack and Gnutella networks does not say much about which files are actually downloaded by users, and no one can say how often the software is used to obtain copies of unprotected material. But MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering.

Grokster and StreamCast concede the infringement in most downloads, and it is uncontested that they are aware that users employ their software primarily to download copyrighted files, even if the decentralized FastTrack and Gnutella networks fail to reveal which files are being copied, and when. From time to time, moreover, the companies have learned about their users' infringement directly, as from users who have sent e-mail to each company with questions about playing copyrighted movies they had downloaded, to whom the companies have responded with guidance. And MGM notified the companies of 8 million copyrighted files that could be obtained using their software.

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use. The record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.

After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (ND Cal. 2000), aff'd in part, rev'd in part, 239 F.3d 1004 (CA9 2001), StreamCast gave away a software program of a kind known as OpenNap, designed as compatible with the Napster
program and open to Napster users for downloading files from other Napster and OpenNap users' computers. Evidence indicates that "[i]t was always [StreamCast's] intent to use [its OpenNap network] to be able to capture email addresses of [its] initial target market so that [it] could promote [its] StreamCast Morpheus interface to them"; indeed, the OpenNap program was engineered "to leverage Napster's 50 million user base."

Thus, StreamCast developed promotional materials to market its service as the best Napster alternative. …

The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for "Napster" or "[f]ree filesharing" would be directed to the Grokster Web site, where they could download the Grokster software. And Grokster's name is an apparent derivative of Napster.

…

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more.

While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Finally, there is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files. Although Grokster appears to have sent e-mails warning users about infringing content when it received threatening notice from the copyright holders, it never blocked anyone from continuing to use its software to share copyrighted files StreamCast not only rejected another company's offer of help to monitor infringement, but blocked the Internet Protocol addresses of entities it believed were trying to engage in such monitoring on its networks.

B

After discovery, the parties on each side of the case cross-moved for summary judgment. The District Court limited its consideration to the asserted liability of Grokster and StreamCast for distributing the current versions of their software, leaving aside whether either was liable "for damages arising from past versions of their software, or from other past activities." The District Court held that those who used the Grokster and Morpheus software to download copyrighted media files directly infringed MGM's copyrights, a conclusion not contested on appeal, but the court nonetheless granted summary judgment in favor of Grokster and StreamCast as to any liability arising from distribution of the then current versions of their software. Distributing that software gave rise to no liability in the court's view, because its use did not provide the distributors with actual knowledge of specific acts of infringement.

The Court of Appeals affirmed. In the court's analysis, a defendant was liable as a contributory infringer when it had knowledge of direct infringement and materially contributed to the infringement. But the court read Sony Corp. of America v. Universal City Studios, Inc., 464
U.S. 417 (1984), as holding that distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The fact that the software was capable of substantial noninfringing uses in the Ninth Circuit's view meant that Grokster and StreamCast were not liable, because they had no such actual knowledge, owing to the decentralized architecture of their software. The court also held that Grokster and StreamCast did not materially contribute to their users' infringement because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.

The Ninth Circuit also considered whether Grokster and StreamCast could be liable under a theory of vicarious infringement. The court held against liability because the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. We granted certiorari.

II

A

MGM and many of the amici fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff. See Sony Corp. v. Universal City Studios, supra, at 442; see generally Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 Colum. L. Rev. 1613 (2001); Lichtman & Landes, Indirect Liability for Copyright Infringement: An Economic Perspective, 16 Harv. J. L. & Tech. 395 (2003).

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the debate over copyright policy, Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 705-717 (2004) (address by Register of Copyrights), and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection, Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 724-726 (2003). As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies....

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See In re Aimster Copyright Litigation, 334 F.3d 643, 645-646 (CA7 2003).

One infringes contributorily by intentionally inducing or encouraging direct infringement, see Gershwin Pub. Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (CA2 1971),
and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307 (CA2 1963). Although "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another," Sony Corp. v. Universal City Studios, 464 U.S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law, id., at 486 (Blackmun, J., dissenting); Kalem Co. v. Harper Brothers, 222 U.S. 55, 62-63 (1911); Gershwin Pub. Corp. v. Columbia Artists Management, supra, at 1162.

B

Despite the currency of these principles of secondary liability, this Court has dealt with secondary copyright infringement in only one recent case, and because MGM has tailored its principal claim to our opinion there, a look at our earlier holding is in order. In Sony Corp. v. Universal City Studios, supra, this Court addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, the product, novel at the time, was what we know today as the videocassette recorder or VCR. Copyright holders sued Sony as the manufacturer, claiming it was contributory liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur. At the trial on the merits, the evidence showed that the principal use of the VCR was for "§ 'time-shifting,'" or taping a program for later viewing at a more convenient time, which the Court found to be a fair, not an infringing, use. Id., at 423-424. There was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. Id., at 438. Although Sony's advertisements urged consumers to buy the VCR to "record favorite shows" or "build a library" of recorded programs, id., at 459 (Blackmun, J., dissenting), neither of these uses was necessarily infringing, id., at 424, 454-455.

On those facts, with no evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability was on a theory of contributory infringement arising from its sale of VCRs to consumers with knowledge that some would use them to infringe. Id., at 439. But because the VCR was "capable of commercially significant noninfringing uses," we held the manufacturer could not be faulted solely on the basis of its distribution.

....

C

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in Sony requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law. Sony Corp. v. Universal City Studios, supra, 464 U.S., at 439 ("If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge" of the potential for infringement). Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, Sony's staple-article rule will not preclude liability.

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant who "not only expected but invoked [infringing use] by advertisement" was liable for
infringement "on principles recognized in every part of the law." Kalem Co. v. Harper Brothers, 222 U.S., at 62-63 (copyright infringement). See also Henry v. A. B. Dick Co., 224 U.S., at 48-49 (contributory liability for patent infringement may be found where a good's "most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement" of the infringing use); Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co., 75 F. 1005, 1007-1008, (CA2 1896) (relying on advertisements and displays to find defendant's "willingness . . . to aid other persons in any attempts which they may be disposed to make towards [patent] infringement"); Rumford Chemical Works v. Hecker, 20 F. Cas. 1342, 1346 (CC NJ 1876) (demonstrations of infringing activity along with "avowals of the [infringing] purpose and use for which it was made" supported liability for patent infringement).

The rule on inducement of infringement as developed in the early cases is no different today. Evidence of "active steps . . . taken to encourage direct infringement," Oak Industries, Inc. v. Zenith Electronics Corp., 697 F. Supp. 988, 992 (ND Ill. 1988), such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use….  

For the same reasons that Sony took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as Sony did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U.S., at 439, n. 19, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

III

A

The only apparent question about treating MGM's evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM's part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files. Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for
infringing downloads; that would also have been the understanding of anyone offered Grokster's suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

In StreamCast's case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users ("When the lights went off at Napster...where did the users go?" (ellipsis in original)). Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). See supra, at 935 - 937. Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed. Here, the summary judgment record is replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in Sony, acted with a purpose to cause copyright violations by use of software suitable for illegal use. See supra, at 924 - 927.

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast's internal documents made constant reference to Napster, it initially distributed its Morpheus software through an OpenNap program compatible with Napster, it advertised its OpenNap program to Napster users, and its Morpheus software functions as Napster did except that it could be used to distribute more kinds of files, including copyrighted movies and software programs. Grokster's name is apparently derived from Napster, it too initially offered an OpenNap program, its software's function is likewise comparable to Napster's, and it attempted to divert queries for Napster onto its own Web site. Grokster and StreamCast's efforts to supply services to former Napster users, deprived of a mechanism to copy and distribute what were overwhelmingly infringing files, indicate a principal, if not exclusive, intent on the part of each to bring about infringement.

Second, this evidence of unlawful objective is given added significance by MGM's showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants' failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.\(^\text{12}\)

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing. This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

\(^\text{12}\) Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the Sony safe harbor.
The unlawful objective is unmistakable.

B

In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case. As the account of the facts indicates, there is evidence of infringement on a gigantic scale, and there is no serious issue of the adequacy of MGM's showing on this point in order to survive the companies' summary judgment requests. Although an exact calculation of infringing use, as a basis for a claim of damages, is subject to dispute, there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages and equitable relief.

* * *

In sum, this case is significantly different from Sony and reliance on that case to rule in favor of StreamCast and Grokster was error. Sony dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course. The case struck a balance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others.

MGM's evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement. If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was.

There is substantial evidence in MGM's favor on all elements of inducement, and summary judgment in favor of Grokster and StreamCast was error. On remand, reconsideration of MGM's motion for summary judgment will be in order.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
17 U.S.C. § 107  Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
JUSTICE SOUTER delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. § 107 (1988 ed. and Supp. IV). Although the District Court granted summary judgment for 2 Live Crew, the Court of Appeals reversed, holding the defense of fair use barred by the song's commercial character and excessive borrowing. Because we hold that a parody's commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand.

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc. See Appendix A, infra, at 594. Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work . . . ." On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew's song. See Appendix B, infra, at 595. Acuff-Rose's agent refused permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" Nonetheless, in June or July 1989, 2 Live Crew released records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs entitled "As Clean As They Wanna Be." The albums and compact discs identify the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose.

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement. The District Court granted summary judgment for 2 Live Crew, reasoning that the commercial purpose of 2 Live Crew's song was no bar to fair use; that 2 Live Crew's version was a parody, which "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song is; that 2 Live Crew had taken no more than was necessary to "conjure up" the original in order to parody it; and that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." The District Court weighed these factors and held that 2 Live Crew's song made fair use of Orbison's original.

The Court of Appeals for the Sixth Circuit reversed and remanded. Although it assumed for the purpose of its opinion that 2 Live Crew's song was a parody of the Orbison original, the Court of Appeals thought the District Court had put too little emphasis on the fact that "every

1 Rap has been defined as a "style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment." The Norton/Grove Concise Encyclopedia of Music 613 (1988). 2 Live Crew plays "bass music," a regional, hip-hop style of rap from the Liberty City area of Miami, Florida. Brief for Petitioners 34.
commercial use . . . is presumptively . . . unfair," Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984), and it held that "the admittedly commercial nature" of the parody "requires the conclusion" that the first of four factors relevant under the statute weighs against a finding of fair use. Next, the Court of Appeals determined that, by "taking the heart of the original and making it the heart of a new work," 2 Live Crew had, qualitatively, taken too much. Finally, after noting that the effect on the potential market for the original (and the market for derivative works) is "undoubtedly the single most important element of fair use," Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566 (1985), the Court of Appeals faulted the District Court for "refusing to indulge the presumption" that "harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses." In sum, the court concluded that its "blatantly commercial purpose . . . prevents this parody from being a fair use." We granted certiorari, 507 U.S. 1003 (1993), to determine whether 2 Live Crew's commercial parody could be a fair use.

II

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, 17 U.S.C. § 106 (1988 ed. and Supp. IV), but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "to promote the Progress of Science and useful Arts . . . ." U.S. Const., Art. I, § 8, cl. 8. For as Justice Story explained, "in truth, in literature, in science and in art, there are, and can be, few, if any, things which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science." Carey v. Kearsley, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K. B. 1803). In copyright cases brought under the Statute of Anne of 1710, n6 English

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4 Section 106 provides in part:

"Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . ."

A derivative work is defined as one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

2 Live Crew concedes that it is not entitled to a compulsory license under § 115 because its arrangement changes "the basic melody or fundamental character" of the original. § 115(a)(2).

courts held that in some instances "fair abridgements" would not infringe an author's rights, see W. Patry, The Fair Use Privilege in Copyright Law 6-17 (1985) (hereinafter Patry); Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990) (hereinafter Leval), and although the First Congress enacted our initial copyright statute, Act of May 31, 1790, 1 Stat. 124, without any explicit reference to "fair use," as it later came to be known, the doctrine was recognized by the American courts nonetheless.

The fair use doctrine ... "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Stewart v. Abend, 495 U.S. 207, 236 (1990).

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms "including" and "such as" in the preamble paragraph to indicate the "illustrative and not limitative" function of the examples given, § 101; which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright....

A

The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1).

The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation..., or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

....

The germ of parody lies in the definition of the Greek parodeia, quoted in Judge Nelson's Court of Appeals dissent, as "a song sung alongside another." 972 F.2d at 1440, quoting 7 Encyclopedia Britannica 768 (15th ed. 1975). Modern dictionaries accordingly describe a parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule," or as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous." For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. ...

If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination ...
The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair. … The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

Here, the District Court held, and the Court of Appeals assumed, that 2 Live Crew's "Pretty Woman" contains parody, commenting on and criticizing the original work, whatever it may have to say about society at large. As the District Court remarked, the words of 2 Live Crew's song copy the original's first line, but then "quickly degenerate into a play on words, substituting predictable lyrics with shocking ones . . . [that] derisively demonstrate how bland and banal the Orbison song seems to them." Judge Nelson, dissenting below, came to the same conclusion, that the 2 Live Crew song "was clearly intended to ridicule the white-bread original" and "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses." Although the majority below had difficulty discerning any criticism of the original in 2 Live Crew's song, it assumed for purposes of its opinion that there was some.

We have less difficulty in finding that critical element in 2 Live Crew's song than the Court of Appeals did, although having found it we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (circus posters have copyright protection.

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from Sony, that "every commercial use of copyrighted material is presumptively . . . unfair . . . ." Sony, 464 U.S. at 451. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

The language of the statute makes clear that the commercial or nonprofit educational purpose
of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." As we explained in Harper & Row, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." Harper & Row, supra, at 592 (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inerferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "no man but a blockhead ever wrote, except for money." 3 Boswell's Life of Johnson 19 (G. Hill ed. 1934).

Sony itself called for no hard evidentiary presumption. There, we emphasized the need for a "sensitive balancing of interests, noted that Congress had "eschewed a rigid, bright-line approach to fair use," and stated that the commercial or nonprofit educational character of a work is "not conclusive," but rather a fact to be "weighed along with other[s] in fair use decisions." The Court of Appeals's elevation of one sentence from Sony to a per se rule thus runs as much counter to Sony itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in Harper & Row, Sony stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school.

B

The second statutory factor, "the nature of the copyrighted work," § 107(2), … calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, e.g., Stewart v. Abend, 495 U.S. at 237-238 (contrasting fictional short story with factual works); Harper & Row, 471 U.S. at 563-564 (contrasting soon-to-be-published memoir with published speech); Sony, 464 U.S. at 455, n.40 (contrasting motion pictures with news broadcasts); Feist, 499 U.S. at 348-351 (contrasting creative works with bare factual compilations).… We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," § 107(3) … are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. See Sony, supra, at 449-450 (reproduction of entire work "does not have its ordinary
effect of militating against a finding of fair use " as to home videotaping of television programs); Harper & Row, supra, at 564 ("Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir). The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives. …

The District Court considered the song's parodic purpose in finding that 2 Live Crew had not helped themselves overmuch. The Court of Appeals disagreed, stating that "while it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. . . . We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original."

The Court of Appeals is of course correct that this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In Harper & Row, for example, the Nation had taken only some 300 words out of President Ford's memoirs, but we signaled the significance of the quotations in finding them to amount to "the heart of the book," the part most likely to be news-worthy and important in licensing serialization. We also agree with the Court of Appeals that whether "a substantial portion of the infringing work was copied verbatim" from the copyrighted work is a relevant question, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Where we part company with the court below is in applying these guides to parody, and in particular to parody in the song before us. Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable…. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled 2 Live Crew's use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through. …

This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, see Harper & Row, supra, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing
"scraper" noise, overlaying the music with solos in different keys, and altering the drum beat. See 754 F. Supp. at 1155. This is not a case, then, where "a substantial portion" of the parody itself is composed of a "verbatim" copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that "no more was taken than necessary," but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's "heart." As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

D

The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original. … The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." Harper & Row, supra, at 568.

Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets. …

No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. Sony's discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of Sony itself (home copying of television programming). In the former circumstances, what Sony said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects," Folsom v. Marsh, supra, at 348, of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. Sony, supra, at 451. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it ("superseding [its] objects").

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," B. Kaplan, An Unhurried View of Copyright 69 (1967), the role of the courts is to distinguish between "biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it. " Fisher v. Dees, 794 F.2d at 438.

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from
the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise." S. Maugham, Of Human Bondage 241 (Penguin ed. 1992). Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of "Oh, Pretty Woman," the court erred.

In explaining why the law recognizes no derivative market for critical works, including parody, we have, of course, been speaking of the later work as if it had nothing but a critical aspect (i.e., "parody pure and simple."). But the later work may have a more complex character, with effects not only in the arena of criticism but also in protectible markets for derivative works, too. In that sort of case, the law looks beyond the criticism to the other elements of the work, as it does here. 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry…. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals. See 17 U.S.C. § 106(2) (copyright owner has rights to derivative works). Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.

....

III

It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

"Oh, Pretty Woman" by Roy Orbison and William Dees

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you
Mercy

Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?

Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty Woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight

Pretty Woman, don't walk on by,
Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,
Hey, O. K.
If that's the way it must be, O. K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman

APPENDIX B TO OPINION OF THE COURT

"Pretty Woman" as Recorded by 2 Live Crew

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman

Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit 'Cause
you look like 'Cousin It'
Big hairy woman

Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could
look nice
Bald headed woman first you got to roll it with rice

Bald headed woman here, let me get this hunk of
biz for ya
Ya know what I'm saying you look better than
rice a roni
Oh bald headed woman

Big hairy woman come on in
And don't forget your bald headed friend
Hey pretty woman let the boys
Jump in

Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind
Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

BILL GRAHAM ARCHIVES v. DORLING KINDERSLEY LTD.
448 F.3d 605 (2d Cir. 2006)

RESTANI, JUDGE:

This appeal concerns the scope of copyright protection afforded artistic concert posters reproduced in reduced size in a biography of the musical group the Grateful Dead. Asserted copyright holder Bill Graham Archives, LLC ("BGA" or "Appellant") appeals from a judgment of the District Court for the Southern District of New York dismissing, on motion for summary judgment, its copyright infringement action against Dorling Kindersley Limited, Dorling Kindersley Publishing, Inc., and R.R. Donnelley & Sons Company (collectively "DK" or "Appellees"). We review the district court's grant of summary judgment de novo, and we agree with the court that DK's reproduction of BGA's images is protected by the fair use exception to copyright infringement.

BACKGROUND

In October of 2003, DK published GRATEFUL DEAD: THE ILLUSTRATED TRIP ("ILLUSTRATED TRIP"), in collaboration with Grateful Dead Productions, intended as a cultural history of the Grateful Dead. The
resulting 480-page coffee table book tells the story of the Grateful Dead along a timeline running continuously through the book, chronologically combining over 2000 images representing dates in the Grateful Dead's history with explanatory text. A typical page of the book features a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader. Plaintiff BGA claims to own the copyright to seven images displayed in ILLUSTRATED TRIP, which DK reproduced without BGA's permission.

Initially, DK sought permission from BGA to reproduce the images. In May of 2003, the CEO of Grateful Dead Productions sent a letter to BGA seeking permission for DK to publish the images. BGA responded by offering permission in exchange for Grateful Dead Productions' grant of permission to BGA to make CDs and DVDs out of concert footage in BGA's archives. Next, DK directly contacted BGA seeking to negotiate a license agreement, but the parties disagreed as to an appropriate license fee. Nevertheless, DK proceeded with publication of ILLUSTRATED TRIP without entering a license fee agreement with BGA. Specifically, DK reproduced seven artistic images originally depicted on Grateful Dead event posters and tickets. BGA's seven images are displayed in significantly reduced form and are accompanied by captions describing the concerts they represent.

When DK refused to meet BGA's post-publication license fee demands, BGA filed suit for copyright infringement. BGA sought to enjoin further publication of ILLUSTRATED TRIP, the destruction of all unsold books, and actual and statutory damages. The parties cross-moved for summary judgment, with the primary issue before the district court being whether DK's use of BGA's images constituted fair use under the Copyright Act of 1976, 17 U.S.C. § 101 et seq. ("Copyright Act"). After applying the statutory fair use balancing test, the district court determined that DK's reproduction of the images was fair use and granted DK's motion for summary judgment.

DISCUSSION

Section 106 of the Copyright Act grants copyright holders a bundle of exclusive rights, including the right to "reproduce the copyrighted work in copies," and the right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106. For purposes of the motion, the district court assumed plaintiff possessed these rights in the contested images and there is no dispute that copying the images was not authorized by plaintiff. The issue before us on appeal, as it was in the district court, is whether DK's unauthorized use of BGA's copyrighted images is fair use.

The fair use doctrine is a statutory exception to copyright infringement. Section 107 of the Copyright Act permits the unauthorized use or reproduction of copyrighted work if it is "for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research." 17 U.S.C. §107. Whether such "fair use" exists involves a case-by-case determination using four non-exclusive, statutorily provided factors in light of the purposes of copyright. The factors are: (1) "the purpose and character of the use;" (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." 17 U.S.C. § 107. "The ultimate test of fair use . . . is whether the copyright law's goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it." Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132, 141 (2d Cir. 1998).

1 The disputed images appear as follows: (1) on page 76, a concert poster for the Grateful Dead, Jefferson Airplane, and Big Brother and the Holding Company playing at the Hollywood Bowl; (2) on page 103, a concert poster for the Grateful Dead, Jefferson Airplane, and Sons of Champlin playing at the Winterland Arena; (3) on page 130, a picture of the front and back of a concert ticket for a show at the Fillmore Theatre, reused for a Grateful Dead concert at the Winterland Arena; (4) on page 254, a concert poster for Grateful Dead shows at the Warfield Theatre; (5) on page 361, a concert poster for a Grateful Dead show at the Oakland Coliseum; (6) on page 397, a concert poster for a Grateful Dead show on New Year's Eve; and (7) on page 421, a fake in-house poster for a New Year's Eve 1993 concert.
I. Purpose and Character of Use

We first address "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). Most important to the court's analysis of the first factor is the "transformative" nature of the work. ... The question is "whether the new work merely supersedes[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

Here, the district court determined that ILLUSTRATED TRIP is a biographical work, and the original images are not, and therefore accorded a strong presumption in favor of DK's use. In particular, the district court concluded that DK's use of images placed in chronological order on a timeline is transformatively different from the mere expressive use of images on concert posters or tickets. Because the works are displayed to commemorate historic events, arranged in a creative fashion, and displayed in significantly reduced form, the district court held that the first fair use factor weighs heavily in favor of DK.

... 

In the instant case, DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of BGA's images fulfilled the dual purposes of artistic expression and promotion. The posters were apparently widely distributed to generate public interest in the Grateful Dead and to convey information to a large number of people about the band's forthcoming concerts. In contrast, DK used each of BGA's images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on ILLUSTRATED TRIP's timeline.

In some instances, it is readily apparent that DK's image display enhances the reader's understanding of the biographical text. In other instances, the link between image and text is less obvious; nevertheless, the images still serve as historical artifacts graphically representing the fact of significant Grateful Dead concert events selected by the ILLUSTRATED TRIP's author for inclusion in the book's timeline. We conclude that both types of uses fulfill DK's transformative purpose of enhancing the biographical information in ILLUSTRATED TRIP, a purpose separate and distinct from the original artistic and promotional purpose for which the images were created. ... In sum, because DK's use of the disputed images is transformative both when accompanied by referencing commentary and when standing alone, we agree with the district court that DK was not required to discuss the artistic merits of the images to satisfy this first factor of fair use analysis.

This conclusion is strengthened by the manner in which DK displayed the images. First, DK significantly reduced the size of the reproductions. See Kelly v. Arriba Soft Corp., 336 F.3d 811, 818-20 (9th Cir. 2003) (finding online search engine's use of thumbnail-sized images to be highly transformative). While the small size is sufficient to permit readers to recognize the historical significance of the posters, it is inadequate to offer more than a glimpse of their expressive value. In short, DK used the minimal image size necessary to accomplish its transformative purpose.

Second, DK minimized the expressive value of the reproduced images by combining them with a prominent timeline, textual material, and original graphical artwork, to create a collage of text and images on each page of the book. To further this collage effect, the images are displayed at angles and the original graphical artwork is designed to blend with the images and text. Overall, DK's layout ensures that the images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork for commercial gain.

Third, BGA's images constitute an inconsequential portion of ILLUSTRATED TRIP. The extent to which unlicensed material is used in the challenged work can be a factor in determining whether a biographer's use of original materials has been sufficiently transformative to constitute fair use....

In the instant case, the book is 480 pages long, while the BGA images appear on only seven pages.
Although the original posters range in size from 13" x 19" to more than 19" x 27," the largest reproduction of a BGA image in ILLUSTRATED TRIP is less than 3" x 4 ," less than 1/20 the size of the original. And no BGA image takes up more than one-eighth of a page in a book or is given more prominence than any other image on the page. In total, the images account for less than one-fifth of one percent of the book. . . . [W]e are aware of no case where such an insignificant taking was found to be an unfair use of original materials.

Finally, as to this first factor, we briefly address the commercial nature of ILLUSTRATED TRIP. Even though ILLUSTRATED TRIP is a commercial venture, we recognize that "nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . are generally conducted for profit . . . ." Campbell, 510 U.S. at 562. Moreover, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Harper & Row v. Nation Enterprises], 471 U.S. at 562. Here, ILLUSTRATED TRIP does not exploit the use of BGA's images as such for commercial gain. Significantly, DK has not used any of BGA's images in its commercial advertising or in any other way to promote the sale of the book. ILLUSTRATED TRIP merely uses pictures and text to describe the life of the Grateful Dead. By design, the use of BGA's images is incidental to the commercial biographical value of the book.

Accordingly, we conclude that the first fair use factor weighs in favor of DK because DK's use of BGA's images is transformatively different from the images' original expressive purpose and DK does not seek to exploit the images' expressive value for commercial gain.

II. Nature of the Copyrighted Work

The second factor in a fair use determination is "the nature of the copyrighted work." 17 U.S.C. § 107(2). To resolve this inquiry the court considers "the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage." [C]reative expression for public dissemination falls within the core of the copyright's protective purposes." Campbell, 510 U.S. at 586.

The district court determined that the second factor weighs against DK because the images are creative artworks, which are traditionally the core of intended copyright protection. Nevertheless, the court limited the weight it placed on this factor because the posters have been published extensively. Appellant agrees that the district court properly weighed the second factor against DK, although it questions the lesser protection given to published works. Appellees counter that because the images are mixed factual and creative works and have been long and extensively published, the second factor tilts toward fair use.

We agree with the district court that the creative nature of artistic images typically weighs in favor of the copyright holder. We recognize, however, that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose. See Campbell, 510 U.S. at 586 (stating that the second factor is not "likely to help much in separating the fair use sheep from the infringing goats" in cases involving transformative copying of "publicly known, expressive works")...... Here, we conclude that DK is using BGA's images for the transformative purpose of enhancing the biographical information provided in ILLUSTRATED TRIP. Accordingly, we hold that even though BGA's images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK's use was to emphasize the images' historical rather than creative value.

III. Amount and Substantiality of the Portion Used

The third fair use factor asks the court to examine "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). We review this factor with reference to the copyrighted work, not the infringing work. The court must examine the quantitative and qualitative aspects of the portion of the copyrighted material taken.

The district court determined that even though the images are reproduced in their entirety, the third fair use factor weighs in favor of DK because the images are displayed in reduced size and scattered among
many other images and texts. In faulting this conclusion, Appellant contends that the amount used is substantial because the images are copied in their entirety. Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work favors fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image. …Adopting this reasoning, we conclude that the third-factor inquiry must take into account that the "the extent of permissible copying varies with the purpose and character of the use." Campbell, 510 U.S. at 586-87.

Here, DK used BGA's images because the posters and tickets were historical artifacts that could document Grateful Dead concert events and provide a visual context for the accompanying text. To accomplish this use, DK displayed reduced versions of the original images and intermingled these visuals with text and original graphic art. As a consequence, even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size. We conclude that such use by DK is tailored to further its transformative purpose because DK's reduced size reproductions of BGA's images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events. Accordingly, the third fair use factor does not weigh against fair use.

IV. Effect of the Use upon the Market for or Value of the Original

The fourth factor is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). The court looks to not only the market harm caused by the particular infringement, but also to whether, if the challenged use becomes widespread, it will adversely affect the potential market for the copyrighted work.…..

In the instant case, the parties agree that DK's use of the images did not impact BGA's primary market for the sale of the poster images. Instead, we look to whether DK's unauthorized use usurps BGA's potential to develop a derivative market. Appellant argues that DK interfered with the market for licensing its images for use in books. Appellant contends that there is an established market for licensing its images and it suffered both the loss of royalty revenue directly from DK and the opportunity to obtain royalties from others.

[W]e hold that DK's use of BGA's images is transformatively different from their original expressive purpose. In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely "by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work." Castle Rock, 150 F.3d at 146 n.11. "[C]opyright owners may not preempt exploitation of transformative markets . . . ." Id. Moreover, a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images. … Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.

V. Balance of Factors

On balance, we conclude, as the district court did, that the fair use factors weigh in favor of DK's use. For the first factor, we conclude that DK's use of concert posters and tickets as historical artifacts of Grateful Dead performances is transformatively different from the original expressive purpose of BGA's copyrighted images. While the second factor favors BGA because of the creative nature of the images, its weight is limited because DK did not exploit the expressive value of the images. Although BGA's images are copied in their entirety, the third factor does not weigh against fair use because the reduced size of the images is consistent with the author's transformative purpose. Finally, we conclude that DK's use does not harm the market for BGA's sale of its copyrighted artwork, and we do not find market harm based on BGA's hypothetical loss of license revenue from DK's transformative market.
CONCLUSION

For the foregoing reasons, we conclude that DK's use of BGA's copyrighted images in its book ILLUSTRATED TRIP is fair use. Accordingly, we AFFIRM.

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WALL DATA INC. v. LOS ANGELES COUNTY SHERIFF
447 F.3d 769 (9th Cir. 2006)

PREGERSON, CIRCUIT JUDGE:

The Los Angeles County Sheriff's Department purchased 3,663 licenses to Wall Data's computer software, but installed the software onto 6,007 computers. We are asked to determine whether the Sheriff's Department's conduct constituted copyright infringement. The wrinkle in this otherwise smooth question is that, although the software was installed onto 6,007 computers, the computers were configured such that the total number of workstations able to access the installed software did not exceed the total number of licenses the Sheriff's Department purchased. We have jurisdiction under 28 U.S.C. §1291 and hold that such copying constitutes copyright infringement despite the Sheriff's Department's configuration. We therefore affirm the district court.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff-Appellee Wall Data Incorporated develops, markets, and sells a line of copyrighted computer terminal emulation software products including RUMBA Office and RUMBA Mainframe. Both RUMBA products allow personal computers that use one operating system to access data stored on computers that use a different operating system. RUMBA Office is the more expensive and more powerful computer program.

Between December 1996 and February 1999, the Appellants-Defendants, the Los Angeles County Sheriff's Department and the County of Los Angeles (collectively, "Sheriff's Department"), purchased both of Wall Data's RUMBA software products through an approved vendor. In December 1996, the Sheriff's Department purchased eight "units" of Wall Data's RUMBA Office program. Each of the eight units contained a RUMBA Office CD-ROM (compact disc read-only-memory) and a volume license booklet. Each volume license booklet granted the Sheriff's Department 250 licenses to RUMBA Office. In total, the Sheriff's Department paid $175,220 for 2,000 RUMBA Office licenses, at a reduced price of $87.61 per license.

Between November 1997 and February 1999, the Sheriff's Department purchased 1,628 licenses to the lower-cost RUMBA Mainframe program. In all, the Sheriff's Department purchased 2,035 licenses to RUMBA Office and 1,628 licenses to RUMBA Mainframe, for a total of 3,663 licenses.

At first, the Sheriff's Department installed RUMBA Office manually, one computer at a time, onto approximately 750 computers in the Sheriff's Department's new detention facility — the Twin Towers Correctional Facility ("Twin Towers"). The Sheriff's Department soon realized that this process was too time consuming and would delay opening the Twin Towers. In addition, it was not clear where those employees who would need to use RUMBA programs would be assigned to work. To speed up the process of installation and to ensure that employees would be able to use the RUMBA software regardless of where they were assigned, the Sheriff's Department decided to install a "baseline" of software applications onto the hard drives of the remaining computers in its new detention facility. This was done by simultaneously copying the entire contents of a single "master" hard drive containing the baseline of software applications onto the hard drives of other computers. This method is known as "hard disk imaging," and saved the Sheriff's Department from having to install the software manually onto each computer.

By the time the Sheriff's Department finished hard disk imaging in mid-2001, RUMBA Office
was loaded onto 6,007 computers in the Twin Towers, far in excess of the 3,663 RUMBA licenses the Sheriff's Department had purchased. Although RUMBA Office was installed onto nearly all of the computers in the Twin Towers, the Sheriff's Department configured those computers using a password-based security system such that the number of users who could access RUMBA Office was limited. The Sheriff's Department claims that, at all times, the number of those who could access the software was limited to the number of licenses it had.3

Shortly thereafter, Wall Data discovered that the number of computers in the Twin Towers that had RUMBA Office installed exceeded the number of licenses held by the Sheriff's Department. As a result, Wall Data claimed that the Sheriff's Department violated the terms of its licenses because the Sheriff's Department was licensed, at most, to install RUMBA software onto only 3,663 computers.

On January 11, 2002, Wall Data filed suit against the Sheriff's Department. Although Wall Data raised several claims in its complaint, the only claim that went to trial (and the only claim at issue here) was copyright infringement. Wall Data alleged that the Sheriff's Department "over-installed" RUMBA Office onto computers in the Twin Towers and violated the terms of Wall Data's shrink-wrap license, click-through license, and volume license booklets.

In response, the Sheriff's Department contended that it had not violated the terms of Wall Data's licenses and that it was entitled … a "fair use" defense under 17 U.S.C. §107. As described above, the Sheriff's Department argued that, even though it had installed RUMBA Office onto 6,007 workstations, it had configured the software so that the software could only be accessed by 3,663 workstations at a time. The Sheriff's Department argued that this constituted a fair use under 17 U.S.C. §107 because the number of "useable" copies of the software did not exceed the number of licenses held by the Sheriff's Department. …

II. ANALYSIS

The 1976 Copyright Act defines a "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. §101. We have long held that a computer program is copyrightable as a "tangible medium of expression." Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 524-25 (9th Cir. 1984).

As the owner of a copyright, Wall Data has exclusive rights in its copyrighted work. See 17 U.S.C. §106. Exemptions, compulsory licenses, and defenses found in the Copyright Act narrow Wall Data's rights as a copyright owner. See id. at §§107-122.

A. The Sheriff's Department Is Not Entitled to a §107 Fair Use Defense

For more than a century, courts have excused certain otherwise infringing uses of copyrighted works under the fair use doctrine. See Folsom v. Marsh, 9 F. Cas. 342, F. Cas. No. 4901 (C.C.D. Mass. 1841). The Copyright Act codified the fair use defense and identified six examples of fair uses: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. §107.

The fair use defense buttresses the basic goal of copyright law: to put copyrighted works to their

3 Specifically, a Sheriff's Department computer network administrator would limit user access to the RUMBA Office program by assigning "logical units" to each computer workstation. These logical units were unique identification numbers that the workstation electronically presented to the host computer. The host computer would then determine whether the electronic identification number matched one of the workstations authorized to communicate with the host computer through the RUMBA software. If the workstation was not on the list of assigned logical units, the installed copy of the RUMBA software would remain installed, but unused, in the hard drive of that workstation. Hard drive imaging ensured that employees could access RUMBA software on any workstation in the facility, so long as that workstation had been assigned a logical unit by the network administrator.
most beneficial use so that "the public good fully coincides . . . with the claims of individuals." The Federalist No. 43, at 267 (J. Madison) (New American Library ed. 1961) (1788); see also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 480 n.33 (1984) ("We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."); Mattel, Inc. v. Walking Mountain Prod., 353 F.3d 792, 799 (9th Cir. 2003) ("At its core, the Act seeks to promote the progress of science and art by protecting artistic and scientific works while encouraging the development and evolution of new works."); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1399 (9th Cir. 1997) (holding that fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster").

....

1. The Four Fair Use Factors

To determine whether the Sheriff's Department's use was fair, we must balance four factors. These 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; (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. See Dr. Seuss, 109 F.3d at 1399-1404.

Not all of the four factors must favor the Sheriff's Department. See Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522 (9th Cir. 1992). As we balance these factors, we bear in mind that fair use is appropriate where a "reasonable copyright owner" would have consented to the use, i.e., where the "custom or public policy" at the time would have defined the use as reasonable. …

2. Balancing of the Four Fair Use Factors

The Sheriff's Department claims that it is entitled to a fair use defense, because it has done nothing more than apply technology to make the broadest authorized use of its licenses. We are mindful that fair use is a tool for adapting copyright law to brisk technological advances and for tempering the over-technical application of copyright law. Nonetheless, in re-weighing the four fair use factors on appeal, "in light of the purposes of copyright," Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994), we conclude that the Sheriff's Department is not entitled to the fair use defense.

a. First Fair Use Factor: Purpose and Character of the Allegedly Infringing Use

We first consider the nature of the work: whether the new work is transformative or simply supplants the original work, and whether the work is commercial in nature. See Campbell, 510 U.S. at 579.

Of primary concern is whether the Sheriff's Department's use was transformative; the more "transformative the new work, the less will be the significance of the other factors." Id. A use is considered transformative only where a defendant changes a plaintiff's copyrighted work or uses the plaintiff's copyrighted work in a different context such that the plaintiff's work is transformed into a new creation. See, e.g., id. at 578-79. The Sheriff's Department created exact copies of RUMBA's software. It then put those copies to the identical purpose as the original software. Such a use cannot be considered transformative. …

Finally, the Sheriff's Department use was commercial in nature. The Sheriff's Department alleges that its use was "commercially insignificant" because not all of the copies of Wall Data's computer
software were actually used, and because the Sheriff's Department is a government agency that does not compete with Wall Data. We disagree. As we explained in *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000), "repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use." A commercial use "is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); see also *Worldwide Church of God*, 227 F.3d at 1118 (concluding that a user is "commercial" where the infringer profited from its infringement because "it gained an 'advantage' or 'benefit' from its distribution and use of [the plaintiff's product] without having to account to the copyright holder").

The terms of Wall Data's RUMBA license clearly restricted the Sheriff's Department's use to a "single designated computer" and prohibited the Sheriff's Department from using "the Software in any other multiple computer or multiple user arrangement." Despite this condition, the Sheriff's Department loaded an entire suite of software, including RUMBA Office, onto nearly all of the computers in the Twin Towers. By using hard drive imaging, the Sheriff's Department saved man-hours and eliminated possible errors associated with separately installing the individual software packages onto each computer in the Twin Tower facility. Hard drive imaging also ensured that those users who needed to use RUMBA would be able to access the software at whatever computer they were assigned to work. Such flexibility could only have been achieved by purchasing licenses for each of the computers on which the software was loaded, or by negotiating with Wall Data for a less restrictive license. Accordingly, we conclude that "the purpose and character" of the Sheriff's Department's use was commercial, because the copies "were made to save the expense of purchasing authorized copies," *Napster*, 239 F.3d at 1015, or at least the expense of purchasing a more flexible license. Thus, the district court did not err when it decided that the Sheriff's Department's use was not "for a legitimate, essentially non-exploitative purpose," and that the commercial aspect of the Sheriff's Department's use was not "of minimal significance." *Sega*, 977 F.2d at 1522-23.

The Sheriff's Department's installation of the RUMBA Office software onto nearly all of its computers in the Twin Towers was not transformative, did not promote an advancement of the arts, and was commercial in nature. The first factor therefore weighs against a finding of fair use.

**b. Second Fair Use Factor: Nature of the Copyrighted Work**

In analyzing the second fair use factor, we look at the nature of the copyrighted work, creative works being "closer to the core of intended copyright protection' than informational and functional works." *Dr. Seuss*, 109 F.3d at 1402.... Although the RUMBA software products are not purely creative works, copyright law nonetheless protects computer software........ In addition, Wall Data presented undisputed evidence that RUMBA software products were developed over several years, and required a multi-million dollar investment on Wall Data's part. We therefore conclude that the nature of the copyrighted work weighs against a finding of fair use.

**c. Third Fair Use Factor: Amount and Substantiality of the Portion Used**

Next, we consider whether the "amount and substantiality of the portion used in relation to the copyright work as a whole," 17 U.S.C. §107(3), is "reasonable in relation to the purpose of copying." *Dr. Seuss*, 109 F.3d at 1402. The Sheriff's Department copied RUMBA Office in its entirety to ensure that all of the computers in the Twin Towers had identical copies of the software. And although "entire verbatim reproductions are justifiable where the purpose of the work differs from the original," *Mattel*, 353 F.3d at 804, the Sheriff's Department put its copies to the exact purpose for which the original software licenses were purchased. Consequently, the Sheriff Department's "verbatim" copying of the entire copyrighted work also weighs against a finding of fair use. See *Worldwide Church of God*, 227 F.3d at 1118 ("While wholesale copying does not preclude fair use
per se, copying an entire work militates against a finding of fair use.

**d. Fourth Fair Use Factor: Effect of the Use Upon the Potential Market**

In addressing the final fair use factor, we focus on "the normal market for the copyrighted work" and whether the allegedly infringing use threatens the potential market for, or value of, a copyrighted work.

The Sheriff's Department contends that its copying was solely an attempt to use efficiently its licensed copies of the RUMBA software products, and accordingly, there was no negative impact on Wall Data's market. It points to its own statements that it would not have purchased additional copies of the license had it known that its configuration went beyond its license. We are not persuaded.

The Sheriff's Department bought a few licenses and found a way to install the program onto all of its computers without paying the fee required for each installation. The Sheriff's Department could have bargained for the flexibility it desired, but it did not. Whenever a user puts copyrighted software to uses beyond the uses it bargained for, it affects the legitimate market for the product. Thus, although hard drive imaging might be an efficient and effective way to install computer software, we conclude that "unrestricted and widespread conduct of the sort engaged in by the defendant" would nonetheless lead to over-use of the software. *Campbell*, 510 U.S. at 590.

In considering the four fair use factors — the purpose and character of the work, the nature of the use, the amount and substantiality of the portion used, and the effect on the plaintiffs' market — none militate in favor of the Sheriff's Department's fair use defense. We therefore hold that the Sheriff's Department is not entitled to a fair use defense, and we affirm the district court's order granting summary judgment on the Sheriff's Department's fair use defense.

**III. CONCLUSION**

For the foregoing reasons, we AFFIRM the district court's orders entering final judgment following a jury trial against the Sheriff's Department and awarding Wall Data attorneys' fees and costs.
EASTERBROOK, Circuit Judge.

Last June the Supreme Court held in MGM Studios, Inc. v. Grokster, Ltd., 162 L. Ed. 2d 781, 125 S. Ct. 2764 (2005), that a distributed file-sharing system is engaged in contributory copyright infringement when its principal object is the dissemination of copyrighted material. The foundation of this holding is a belief that people who post or download music files are primary infringers. In re Aimerst Copyright Litigation, 334 F.3d 643, 645 (7th Cir. 2003), which anticipated Grokster, made the same assumption. In this appeal Cecilia Gonzalez, who downloaded copyrighted music through the KaZaA file-sharing network, denies the premise of Grokster and Aimster. She contends that her activities were fair use rather than infringement. The district court disagreed and granted summary judgment for the copyright proprietors (to which we refer collectively as BMG Music). The court enjoined Gonzalez from further infringement and awarded $22,500 in damages under 17 U.S.C. §504(c).

A "fair use" of copyrighted material is not infringement. Gonzalez insists that she was engaged in fair use under the terms of 17 U.S.C. §107—or at least that a material dispute entitles her to a trial. It is undisputed, however, that she downloaded more than 1,370 copyrighted songs during a few weeks and kept them on her computer until she was caught. Her position is that she was just sampling music to determine what she liked enough to buy at retail. Because this suit was resolved on summary judgment, we must assume that Gonzalez is telling the truth when she says that she owned compact discs containing some of the songs before she downloaded them and that she purchased others later. She concedes, however, that she has never owned legitimate copies of 30 songs that she downloaded. (How many of the remainder she owned is disputed.)

Instead of erasing songs that she decided not to buy, she retained them. It is these 30 songs about which there is no dispute concerning ownership that formed the basis of the damages award. This is not a form of time-shifting, along the lines of Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417 (1984) (Betamax). A copy downloaded, played, and retained on one's hard drive for future use is a direct substitute for a purchased copy—and without the benefit of the license fee paid to the broadcaster. The premise of Betamax is that the broadcast was licensed for one transmission and thus one viewing. Betamax held that shifting the time of this single viewing is fair use. The files that Gonzalez obtained, by contrast, were posted in violation of copyright law; there was no license covering a single transmission or hearing—and, to repeat, Gonzalez kept the copies. Time-shifting by an authorized recipient this is not.

Section 107 provides that when considering a defense of fair use the court must take into account "(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." Gonzalez was not engaged in a nonprofit use; she downloaded (and kept) whole copyrighted songs (for which, as with poetry, copying of more than a couplet or two is deemed excessive); and she did this despite the fact that these works often are sold per song as well as per album. This leads her to concentrate on the fourth consideration: "the effect of the use upon the potential market for or value of the copyrighted work."

As she tells the tale, downloading on a try-before-you-buy basis is good advertising for copyright proprietors, expanding the value of their inventory. The Supreme Court thought otherwise in Grokster, with considerable empirical support. As file sharing has increased over the last four years, the sales of recorded music have dropped by approximately 30%. Perhaps other economic factors contributed, but the events likely are related. Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals. That is exactly what Gonzalez did for at least 30 songs. It is no surprise, therefore, that the only appellate decision on point has held that
downloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014-19 (9th Cir. 2001). See also UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y.2000) (holding that downloads are not fair use even if the downloader already owns one purchased copy).

Although BMG Music sought damages for only the 30 songs that Gonzalez concedes she has never purchased, all 1,000+ of her downloads violated the statute. All created copies of an entire work. All undermined the means by which authors seek to profit. Gonzalez proceeds as if the authors' only interest were in selling compact discs containing collections of works. Not so; there is also a market in ways to introduce potential consumers to music.

Think of radio. Authors and publishers collect royalties on the broadcast of recorded music, even though these broadcasts may boost sales. Downloads from peer-to-peer networks such as KaZaA compete with licensed broadcasts and hence undermine the income available to authors. This is true even if a particular person never buys recorded media. Many radio stations stream their content over the Internet, paying a fee for the right to do so. Gonzalez could have listened to this streaming music to sample songs for purchase; had she done so, the authors would have received royalties from the broadcasters (and reduced the risk that files saved to disk would diminish the urge to pay for the music in the end).

Licensed Internet sellers, such as the iTunes Music Store, offer samples—but again they pay authors a fee for the right to do so, and the teasers are just a portion of the original. Other intermediaries (not only Yahoo! Music Unlimited and Real Rhapsody but also the revived Napster, with a new business model) offer licensed access to large collections of music; customers may rent the whole library by the month or year, sample them all, and purchase any songs they want to keep. New technologies, such as SNOCAP, enable authorized trials over peer-to-peer systems.

Authorized previews share the feature of evanescence: if a listener decides not to buy (or stops paying the rental fee), no copy remains behind. With all of these means available to consumers who want to choose where to spend their money, downloading full copies of copyrighted material without compensation to authors cannot be deemed "fair use." Copyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying "fair use" if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute. Nor can she defend by observing that other persons were greater offenders; Gonzalez's theme that she obtained "only 30" (or "only 1,300") copyrighted songs is no more relevant than a thief's contention that he shoplifted "only 30" compact discs, planning to listen to them at home and pay later for any he liked.

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AFFIRMED