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Why do All Casinos Seem to be the Same? A Glance Into Casino Games, Gambling Machines and the Doctrine of Fair Use

Eric D. Gorman

WHY DO ALL CASINOS SEEM TO BE THE SAME? A GLANCE INTO CASINO GAMES, GAMBLING MACHINES AND THE DOCTRINE OF FAIR USE

ERIC D. GORMAN*

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*J.D., The John Marshall Law School. B.S., Mechanical Engineering, Michigan State University. Eric has both intellectual property educational background, including Gaming Law, and work experience in Beijing, People's Republic of China, Chicago, Illinois, and Detroit, Michigan, United States of America. Special thanks to my dad, mom, sister, and Dean for their words of encouragement. Thank you to my friends and colleagues for their helpful comments and insight. Finally, as always, I would like to thank Katina for her continuous support. eric.d.gorman@gmail.com.

I. INTRODUCTION

Card tables, slot machines, the massive bar with live music, the cashier, all the sounds and lights. This is typical of the interior layout of a classic casino, but doesn't it seem like all casinos are the same? Don't all casinos have to be different, otherwise it would be unfair and against the law to "copy" something from another . . . right?! Casino equipment, such as slot machines and card games, cannot be copied from its creator unless it is fair to use the product. At the same time, casinos seem so similar to one another. In order to have a unique casino, there must be protection of original and innovative casino games and machines for the creators and owners. The only way to achieve this originality in gambling equipment and innovations is by implementing proper law as guidance for casinos to follow and abide by.

This article examines what it should take for casino games and machines to be protected by the doctrine of fair use and how this defense might be altered to potentially allow more protection for creators/inventors of casino games and machines. The background of this article defines the aspects to the doctrine of fair use and copyright infringement. The analysis discusses how to obtain the defense of "fair use" when one casino uses the

same gambling game and/or machine as another casino. The proposal discusses possible alternatives and solutions to help copyrighted gambling games and machines become distinct in certain casinos. In order to give each casino a special appeal with copyrighted gambling games and machines, there needs to be a protection from one another to minimize, and hopefully eliminate, the copying of gambling ideas and concepts by creating more rigid elements to the doctrine of fair use, with the goal that this defense cannot be used so "easily." Finally, the conclusion suggests possible solutions on how to protect gambling games and machines in one casino from being wrongfully copied by other casinos. These suggestions are merely guidelines to follow if the gaming industry ever wanted to explore the idea of protection for specific casino games and machines.

Overall, this article examines what it takes to be considered "fair use" when it comes to casinos' intellectual property for gambling games and machines. Without the doctrine of fair use, no two casinos would be able to have the same technology, machinery, and overall interior. "In most betting shops you will see three windows marked 'Bet Here,' but only one window with the legend 'Pay Out,'"[1] and the only way each casino can have that very same setting is through fair use. Original casino games and machines, however, should be allowed to exist freely, if desired by the creator/inventor, without the concern of copying by other casinos.

II. BACKGROUND

This section discusses the elements of copyright infringement and the four factors of the doctrine of fair use. An in-depth explanation is given for each fair use factor and how that particular part pertains to copyright infringement.

A. HIT OR BUST—JUST BORROWING OR COPYRIGHT INFRINGEMENT

To examine casino technology, such as card games and slot machines, in the context of the doctrine of fair use, one must first understand what some of the terms mean. In order to argue whether the defense of fair use is relevant for gambling technology, a casino must first prove it has something worthy of protection.[2] Violation of any of the exclusive rights of the copy-

1. Jeffrey Bernard, *Quotations about Gambling*, QUOTE GARDEN, http://www.quotegarden.com/gambling.html (last modified Sept. 9, 2010).

2. Michael J. Thompson, *Give Me $25 on Red and Derek Jeter for $26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW J. 21, 42 (2001).

right owner constitutes infringement.[3] These exclusive rights include the right to reproduce the work, the right to prepare derivative works based on the work, the right to distribute copies of the work to the public, and the right to display the work publicly.[4] Thus, some "exclusive rights" relating to casinos can pertain to items such as card shufflers, slot machines, and unique poker games, just to name a few.

To establish copyright infringement, a party must show he or she had valid ownership of a copyright for his or her original work and the constituent elements of the work that are original were copied by another party.[5] Furthermore, a plaintiff with a valid copyright must demonstrate the defendant has actually copied the plaintiff's work *and* the copying is illegal because a substantial similarity exists between the defendant's work and the plaintiff's protectable elements.[6] In addition to these elements, a party must demonstrate the defendant's copying of protected elements of the original copyrighted work occurred for his or her use.[7] Each element, along with a brief history of copyright law, is set forth below.

1. *Copyright Protection*

The United States Constitution grants copyright protection.[8] The Constitution gives Congress the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries . . . ."[9] The primary purpose of copyright law is "to secure 'the general benefits derived by the public from the labors of authors,'"[10] while its secondary purpose may motivate authors and inventors by giving

3. 17 U.S.C. § 501(a) (2006).

4. *Id.* § 106(1)-(3), (5).

5. S. Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985).

6. Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 122-23 (2d Cir. 1994).

7. *See* Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1217 (9th Cir. 1997).

8. U.S. CONST. art. I, § 8, cl. 8; Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1270 (1992).

9. U.S. CONST. art. I, § 8, cl. 8; *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02 (2007) [hereinafter NIMMER ON COPYRIGHT] (citing U.S. CONST., art. I, § 8, cl. 18, the Necessary and Proper Clause, to show that the Copyright Clause could have been created at a later time for copyrights and patents); Percifull, *supra* note 8, at 1270; John Schietinger, Note, Bridgeport Music, Inc. v. Dimension Films: *How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 216 (2005).

10. NIMMER ON COPYRIGHT, *supra* note 9, § 1.03[A] (quoting New York Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting)).

them a reward.[11] The Copyright Act of 1790 was the first federal copyright act instituted in the United States.[12] Today, the Copyright Act of 1976 is the most recent enactment by Congress.[13] The Copyright Act gives legal protection to the authors of original works that are "fixed in any tangible medium of expression."[14] Furthermore, the Copyright Act preempts state law and any conflicting state law is considered invalid.[15]

2. *Original Ownership*

To qualify for copyright protection, a work must be original to a party.[16] Original, as the term is used in copyright, means only that the work was independently created and that it possesses at least some minimal degree of creativity.[17] To be original, the requisite level of creativity is extremely low; even a slight amount will suffice, no matter how crude, humble, or obvious it might be.[18] A work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.[19] However, copyright law protects an author's or artist's

11. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Mazer v. Stein, 347 U.S. 201, 219 (1954) (discussing how the Copyright Clause encourages individuals by rewarding them through economic personal gain, which then advances the public welfare); Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) (stating the Copyright Act's purpose is to promote creativity, which will in turn benefit the artist and the public); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991) (holding "sweat of the brow" from one's labor does not provide copyright protection); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 521 (2006) (discussing how Congress enacted the Copyright Amendment to promote creativity and reward artists for their labor by granting them copyright ownership); Percifull, *supra* note 8, at 1270 (discussing how the primary benefit of a copyright owner obtaining a copyright are for economic reasons because artists are granted a limited monopoly for their work, which leads to artists continuing their creativity to create a public good); Schietinger, *supra* note 9, at 216 (discussing how the two main purposes of copyright law are to encourage people to create art for society and to protect the artist's work from theft).

12. NIMMER ON COPYRIGHT, *supra* note 9, app. 7-41.

13. 17 U.S.C. §§ 101-1332 (2006); *see* Percifull, *supra* note 8, at 1271.

14. 17 U.S.C. § 102(a). Congress enacted the first copyright act in 1790, which merely granted protection to authors of maps, charts, and books for fourteen years. 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:19 (2008) [hereinafter PATRY ON COPYRIGHT]. The next copyright act was in 1909. *Id.* § 1.20.

15. 17 U.S.C. § 301(a) ("On and after January 1, 1978 . . . no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."); *see* PATRY ON COPYRIGHT, *supra* note 14, § 1:82 (discussing how preemption of state law is one of the most important aspects in the passage of the Copyright Act of 1976); *see also* Schietinger, *supra* note 9, at 216.

16. *Feist Publ'ns, Inc.*, 499 U.S. at 346.

17. *Id.*; Mid Am. Title Co. v. Kirk, 59 F.3d 719, 721 (7th Cir. 1995).

18. *Feist Publ'ns Inc.*, 499 U.S. at 346.

19. *Id.*

original expression; facts and ideas within a work are not protected.[20] For a casino, it must demonstrate that its technology is new and inventive, thus giving it protection from copying by other parties in the industry.

3. *Copying Occurred*

Absent copying, there can be no infringement of copyright.[21] Copying may be inferred where the alleged infringing party had access to the copyrighted work and the accused work is substantially similar to the copyrighted work.[22] Hence, for a casino to get protections for its products, the casino needs to show its industry technology is both original and the original item was copied.[23] But even if this protection can be granted, infringement of the protected item can still be reproduced in a similar fashion due to the doctrine of fair use.[24]

Copying can be illustrated by either direct or indirect proof.[25] Direct proof is evidenced by the defendant admitting to copying the work or through eyewitness testimony that the defendant copied the work.[26] Direct admission is not common in copyright infringement cases; the plaintiff usually must show indirect proof.[27] Indirect proof of copying is shown through circumstantial evidence that the defendant had access to the plaintiff's work,[28] the work was widely disseminated,[29] or there is a sufficient similarity between the two works.[30] Access to the plaintiff's

20. Shaw v. Lindheim, 908 F.2d 531, 533 (9th Cir. 1990).

21. Mazer v. Stein, 347 U.S. 201, 217 (1954).

22. Gentieu v. Tony Stone Images/Chi., Inc., 255 F. Supp. 2d 838, 847 (N.D. Ill. 2003).

23. *Id*. at 860.

24. 17 U.S.C. § 107 (2006) (providing a defense for an alleged infringer).

25. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (stating that copying can be found by the defendant admitting to copying or circumstantial evidence); Jarvis v. A&M Records, 827 F. Supp. 282, 289 (D.N.J. 1993); Ponte, *supra* note 11, at 526; Percifull, *supra* note 8, at 1272; Schietinger, *supra* note 9, at 218; *see* Tuff 'N' Rumble Mgmt., Inc.v. Profile Records, Inc., 42 U.S.P.Q.2d 1398, 1401 (S.D.N.Y. 1997).

26. Ponte, *supra* note 11, at 526-27; Percifull, *supra* note 8, at 1273; Schietinger, *supra* note 9, at 217; *see also* Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003) (stating the defendant conceded that the plaintiff established a prima facie case of infringement); Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1051 (S.D.N.Y. 2001) (revealing defendants admitted to using part of the plaintiffs' song); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (providing an example of how courts have found direct admission of unauthorized copying).

27. Schietinger, *supra* note 9, at 218.

28. *Id*.; *see* Percifull, *supra* note 8, at 1273.

29. *Tuff 'N' Rumble Mgmt., Inc*., 42 U.S.P.Q.2d at 1402 (discussing how access may also be found through a particular chain of events where the defendant came across the plaintiff's work); *see* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997); Bright Tunes Music v. Harrisongs Music, 420 F. Supp. 177, 179 (S.D.N.Y 1976).

30. *Tuff 'N' Rumble Mgmt., Inc*., 42 U.S.P.Q.2d at 1402.

work may involve proving the defendant viewed the work or had knowledge of the work.[31] If evidence of access and similarities exist between the two works, then it may be enough for a court or jury to find there was copying.[32]

4. *Misappropriation*

The third and final element of copyright infringement is unlawful appropriation or misappropriation.[33] Misappropriation is shown by establishing substantial similarity between the two works.[34] There are several tests used among the circuit courts to establish substantial similarity, which include, but are not limited to, the average lay observer test,[35] the recognizeability test,[36] and fragmented literal similarity.[37] Unlawful appropriation lies at the heart of proving copyright infringement.[38]

In order to prove unlawful appropriation, the plaintiff must demonstrate the use of his work by the defendant was substantial and material.[39] In order to determine whether there is unlawful use of the plaintiff's work, courts typically utilize the "substantial similarity" standard.[40] Under the

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31. *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) (discussing how, if the plaintiff presents evidence of striking similarity between the two works, it is presumed that there was copying); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402 (citing Favia v. Lyons P'ship, 1996 WL 194306, at *3 (S.D.N.Y. 1996), "[a]s proof of access, a plaintiff may show that '(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to work'"); Schietinger, *supra* note 9, at 218.

32. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *see Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401.

33. *See* Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1053 (S.D.N.Y. 2001); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402.

34. *Williams*, 60 U.S.P.Q.2d at 1053; *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402; *see* Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003); *see, e.g.*, Bright Tunes Music v. Harrisongs Music, 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976) (finding unconscious misappropriation).

35. *See Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402 (stating the test for the Second Circuit).

36. Percifull, *supra* note 8, at 1276.

37. *Id.*

38. Ponte, *supra* note 11, at 527; *see* Percifull, *supra* note 8, at 1274; Schietinger, *supra* note 9, at 217.

39. *Newton*, 349 F.3d at 594 (discussing that there will be no legal consequences for copying unless the copying is substantial); Percifull, *supra* note 12, at 1274; *see also Williams*, 60 U.S.P.Q.2d at 1053; *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402.

40. Percifull, *supra* note 8, at 1274 (discussing how the substantial similarity test is vague and presents a difficult question in copyright law); *see Newton*, 349 F.3d at 594-95; Ponte, *supra* note 11, at 528-29 (discussing how substantial similarity examines the total concept and feel of disputed works). *But see* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 397 (6th Cir. 2004) (holding that use of the substantial similarity test was not required since the owner of the sound recording had the exclusive right to sample his own recording).

substantial similarity standard, courts will determine whether the defendant's use of the plaintiff's original work is reasonably recognizable to a lay listener in the defendant's work.[41] If it is found that the copying is substantial and material, the defendant's work may infringe.[42] If the defendant's work is not found to be "substantial and material" under the substantial similarity standard, then the defendant's use is *de minimis*.[43] When the defendant's work is *de minimis*, it means the copied portion of the original work is too small and immaterial.[44] However, *de minimis* use is only one way to avoid copyright infringement. The most popular way to avoid copyright infringement is the fair use exception.

B. ALL IN—THE FAIR USE BREAKDOWN

To examine the doctrine of fair use as related to casino technology, one must first understand its definition. The doctrine of fair use permits other people to use copyrighted material,[45] without the owner's consent, in a reasonable manner for certain purposes.[46] The doctrine is important because it helps to determine if a copied work is created legally.[47]

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41. *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402; *see Newton*, 349 F.3d at 594 (citing Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986)); *see also Williams*, 60 U.S.P.Q.2d at 1053; Ponte, *supra* note 11, at 528; Percifull, *supra* note 8, at 1274; Schietinger, *supra* note 9, at 219 (referring to the average listener test instead as the "ordinary observer test").

42. Ponte, *supra* note 11, at 528; *see Newton*, 349 F.3d at 594.

43. Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997) (defining *de minimis* as a "technical violation of a right so trivial that the law will not impose legal consequences"); Schietinger, *supra* note 9, at 219-20 (stating that *de minimis* is "copying so trivial that it does not gain copyright protection"); *see Newton*, 349 F.3d at 594-95 (discussing how the legal term, *de minimis non curat* lex means that "the law does not concern itself with trifles"); *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 841, *rev'd* 383 F.3d 390 (6th Cir. 2004); *see also* Ponte, *supra* note 11, at 528.

44. *See* Percifull, *supra* note 8, at 1281.

45. 17 U.S.C. § 107 (2006) (explaining fair use is a defense to copyright infringement); *see also* 17 U.S.C. § 501(a) (stating violation of any of the exclusive rights of the copyright owner constitutes copyright infringement); *cf.* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 449 (2d ed. 1987) (1966) (defining "copyright" as "the exclusive right to make copies, license, and otherwise exploit a literary, musical, or artistic work").

46. *See, e.g.*, 17 U.S.C. § 107 ("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."); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (holding respondents' unauthorized use of quotations from a public figure's unpublished manuscript was not sanctioned by the Copyright Act's doctrine of fair use); Tiffany Design v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113, 1123 (D. Nev. 1999) (holding copyright protection gives an exclusive right to reproduce copyrighted works); *see also* HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY § 125, at 260 (1944) ("[T]he author's consent to a reasonable use of his copyrighted works [had] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts . . . .").

47. *See* 17 U.S.C. § 107 (providing the four factors for determining whether use of a work constitutes fair use).

With extensive copying or paraphrasing of the original work or physically appropriating the original research, use of copyrighted material without the owner's consent generally will not be considered reasonable.[48] Under the Copyright Act,[49] fair use prevents copyright owners from restricting distribution of their copyrighted works to the public.[50] Determination of fair use hinges upon the consideration of the following four factors:[51] (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount copied in relation to the work as a whole,

48. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (holding a narrow interpretation of fair use, with regard to insubstantial copying, does not constitute copyright infringement); Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 454 (C.D. Cal. 1979) (holding noncommercial home-use recording of broadcast material does not constitute copyright infringement); *see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) (stating "[b]y copying [plaintiff's] images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work and these specific attributes that [were] to be satirized" and held "[b]ecause the amount of defendants' copying exceeded permissible levels, summary judgment was proper" as to the copyright infringement claims).

49. 17 U.S.C. § 107.

50. *Id*. (stating fair use of a work including commentary, news reporting, criticism, or other uses does not constitute copyright infringement).

51. Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003); Percifull, *supra* note 8, at 1278; Schietinger, *supra* note 9, at 220.

and (4) the effect of the use upon the potential market.[52] These factors, however, are not exhaustive in determining fair use.[53]

The fair use exception is a defense to copyright infringement.[54] The doctrine of fair use provides that the use or reproduction of a copyrighted work is "not an infringement of copyright" if it is used "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."[55] One of the first significant copyright infringement cases in the United States was *Folsom v. Marsh*[56] in 1841.[57] In *Folsom*, the Circuit Court of Massachusetts held a concern of copyright infringement is "the degree [that] the [defendant's] use may prejudice the sale, or diminish the profits,

52. 17 U.S.C. § 107(1)-(4); On Davis v. Gap, Inc., 246 F.3d 152, 173-75 (2d Cir. 2001); *MCA Inc*., 677 F.2d at 182-83 (determining that defendants plagiarized plaintiff's copyrighted song, substituted their own lyrics, and performed it for commercial gain, thus defendants did not make fair use of plaintiff's song); Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (applying the four factors to an investigation of copyright infringement involving *The Implosion Conspiracy*, a book about the Rosenberg trial); Tiffany Design, Inc. v. Reno-Tahoe Speciality, Inc., 55 F. Supp. 2d 1113, 1123-24 (D. Nev. 1999) (applying the four factors to determine whether a computerized precursor image of Law Vegas constituted infringement); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 787-90 (N.D. Ill. 1998) (applying the four factors to a fair use inquiry regarding software and shareware); Dr. Seuss Enters., Ltd. P'ship v. Penguin Book USA, Inc., 924 F. Supp. 1559, 1566 (S.D. Cal. 1996) (applying the four factors to a copyright infringement inquiry concerning mimicked Dr. Seuss' style of O.J. Simpson trial); Horn Abbot, Ltd. v. Sarsaparilla, Ltd., 601 F. Supp. 360, 367 (N.D. Ill. 1984) (applying four factors in an inquiry revolving around the game "Trivial Pursuit"); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351, 358 (N.D. Ga. 1979) (applying the four factors to a claim alleging infringement of *Gone With the Wind*); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111-25(1990) (commenting on how the more copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding); Matt Williams, *Recent Second Circuit Opinions Indicate That Google's Library Project is Not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 311-12 (2007) (elaborating on how Google and its proponents may still convince judges in the Second Circuit that the doctrine of fair use should protect its Library Project as an innovative technological use of copyrighted material that will increase public access to information and creative expression); Percifull, *supra* note 8, at 1278; Schietinger, *supra* note 9, at 220.

53. 17 U.S.C. § 107; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact.").

54. 17 U.S.C. §§ 106-07; *see Kelly*, 336 F.3d at 817.

55. 17 U.S.C. § 107; Ty, Inc. v. Publ'ns Int'l, 292 F.3d 512, 522 (7th Cir. 2002); *Storm Impact Inc*., 13 F. Supp. 2d at 787; *see* Percifull, *supra* note 8, at 1278 (discussing how Congress's use of the words "such as" provides that the statute only has a list of examples and there may be other permitted purposes that later come to light).

56. 9 F. Cas. 342 (D. Mass. Oct. 1841).

57. This case dealt with whether the use of letters written by President Washington constituted piracy. *Id*. at 345. Three hundred fifty-three out of 866 pages of the defendant's book were identical to the plaintiff's book. *Id*. Plaintiff acquired an interest in President Washington's letters, and the court held the plaintiff owned these letters along with the exclusive copyright, which was infringed upon by the defendant. *Id*. at 345-46.

or supersede the objects, of the [plaintiff's] original work."[58] *Folsom* also held copyright infringement is found by "look[ing] to the nature and objects of the selections made, [along with] the quantity and value of the materials used."[59] Later, the *Folsom* holding was codified in the Copyright Act of 1976, 17 U.S.C. § 107.[60] Today, § 107 is known as the doctrine of fair use.[61]

The doctrine of fair use will only be applied after the court has found copyright infringement.[62] The *de minimis* defense, on the other hand, is applied at the time of examining whether copyright infringement has taken place. Therefore, the *de minimis* analysis used in an infringement case is separate from the fair use exception because *de minimis* use is found when substantial similarity has not been met.[63]

The equitable doctrine of fair use permits others to use copyrighted material without the owner's consent in a reasonable manner for certain purposes.[64] Section 107 provides an illustrative, but not exhaustive, list of factors for determining when a use is "fair."[65] Each is considered below.

1. *Purpose and Character*

When it comes to the defense of fair use with regard to the "purpose and character" of the copying, a court should examine (1) the degree to which the challenged use has transformed the original and (2) the profit or nonprofit character of the use.[66] In other words, the factor entails whether

58. *Id*. at 348.

59. *Id*.

60. 17 U.S.C. § 107; *see* Percifull, *supra* note 8, at 1278.

61. 17 U.S.C. § 107.

62. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding hip-hop group 2 Live Crew's song "Pretty Woman" was a parody that did not infringe upon the copyright of Roy Orbison's song, "Oh Pretty Woman" according to the doctrine of fair use); Kelly v. Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003) (discussing how fair use is an exception to copyright infringement and later holding the defendant's use was fair); Fisher v. Dees, 794 F.2d 432, 440 (9th Cir. 1986) (holding the works were substantially similar, but they did not infringe because the work was found to be a parody under the doctrine of fair use); Schietinger, *supra* note 13, at 220; *see* Ponte, *supra* note 11, at 528 (discussing how instances of parodies in disputes have brought out the "fair use" defense).

63. Schietinger, *supra* note 9, at 220; *see, e.g*., Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997) (showing once the *de minimis* threshold has been crossed, then a defendant's next possible defense is fair use).

64. 17 U.S.C. § 107 (stating that under § 107, the fair use of a copyrighted work is not copyright infringement, even if such use technically violates § 106).

65. *Id*.

66. Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 787-88 (N.D. Ill. 1998).

and to what extent the new work is transformative and if the transformed work is used for commercial value.[67]

a. Commercial Value

The doctrine of fair use uses the "purpose and character" factor to ask whether the original was copied in good faith to benefit the public, or primarily for the commercial interests of the infringer.[68] Therefore, in determining whether fair use exists, the question is whether the alleged infringer's use of the owner's works is of a commercial nature, or a nonprofit educational purpose.[69] In a fair use analysis, the critical question is "whether [the alleged party] stands to profit from exploitation of the [protected work]."[70]

Copies made for commercial or profit-making purposes are presumptively unfair.[71] In fair use analysis, the "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the [alleged infringer] stands to profit from exploitation of the copyrighted material without paying the customary price."[72] Thus, an alleged infringer cannot profit from exploitation of another's copyrighted material without paying a customary price for it, regardless of claims that there was no harm because there was no market for the original.[73] Knowingly exploiting copyrighted work(s) "for personal gain militates against a finding of fair use."[74] While commercial motivation and fair use can exist side-by-side, one may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain.[75] To

67. *Id*. at 788.

68. *See* 17 U.S.C. § 107 (stating fair use does not make light of the importance of commercial value); Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) (holding that copies of a sculpture created from a copyrighted photograph was made primarily for commercial benefit).

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

70. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

71. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447 (1984).

72. *Harper & Row Publishers, Inc*., 471 U.S. at 562; *On Davis*, 246 F.3d at 167 (noting the court must compare actual profits gained from infringement with potential profits defendant could have made if he or she did not infringe); *Rogers*, 960 F.2d at 309 (stating "[k]nowing exploitation of a copyrighted work for personal gain militates against a finding of fair use").

73. *Rogers*, 960 F.2d at 309, 312.

74. *Id*. at 309.

75. *See* MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981) (holding substantial similarity and the four fair use factors ruled in favor of copyright infringement); Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (holding the defendant's book might have been published for commercial gain); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307-09 (2d Cir. 1966) (finding information used in a biography of Howard Hughes constituted a fair use as it served a public interest), *cert. denied*, 385 U.S. 1009 (1967); Schuchart & Assocs., Prof'l Eng'rs, Inc. v. Solo Serv. Corp., 220 U.S.P.Q. 170, 181 (W.D. Tex. 1983) (finding

counter a showing of commercial motivation, parties who make a profit from copying original work have the burden to show their conduct falls within fair use.[76]

b. Transformative Work

A stronger consideration for determining a work's nature and purpose is whether the accused, challenged work has transformed the original into something new.[77] A transformative work supersedes the original creations, adds a different character, or adds something new to further the purpose, all while altering the first work with new expression, meaning, or message.[78] Such transformative use is not absolutely necessary for a finding of fair use.[79]

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defendants' use of plaintiffs' drawings was for commercial purposes, not for educational or non-profit use); Publ'ns Int'l, Ltd. v. Bally Mfg. Corp., 215 U.S.P.Q. 861, 862 (N.D. Ill. 1982) (holding a book giving instructions on how to win a video game was strictly commercial and non-educational, and as such, not protected by the doctrine of fair use); Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269, 1275 (S.D.N.Y. 1970) (finding distribution of the film at issue did not appear to serve the public interest).

76. Princeton Univ. Press v. Mich. Doc. Servs. Inc., 99 F.3d 1381, 1386 (6th Cir. 1996).

77. Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 788 (N.D. Ill. 1998) ("[T]he more transformative the new work, the less will be the significance of other factors which may weigh against a finding of fair use.").

78. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579-81 (1994) (holding that a parody's commercial character is only one element to consider for fair use, but that element alone does not determine whether a parody is fair use); Blanch v. Koons, 467 F.3d 244, 256, 259 (2d Cir. 2006) (affirming there is no infringement where an appropriation of the copyrighted material is "transformative" because there is neither commercial exploitation nor bad faith analysis of transformation of an original creation). For example, in *Blanch*, Koons intended his appropriation of the photograph to be "transformative" because the exhibition of the painting could not fairly be described as commercial exploitation and there was a lack of bad faith. *Blanch*, 467 F.3d at 256. Koons altered the borrowed work "with new expression, meaning, or message" by completely inverting the legs orientation, painting them to surreally dangle or float over the other elements of the painting. *Id*. at 256, 248. Koons also changed the coloring and added a heel to one of the feet, which had been completely obscured in the original photograph. *Id*. at 248; *see also* On Davis v. Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001).

"If the goal is to move the focus in the transformativeness inquiry from author to reader and then to determine how those readers interpret the works at issue—whether a discursive community has been created around a work—what evidence might courts consider?" Laura Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 456 (2008). "[T]he better test of whether a second work has contributed a 'new expression, meaning, or message' to the first is to turn to the reader, the one who 'holds together in a single field all the traces by which the written text is constituted.'" *Id*. at 448. Thus, the best way to determine whether the new work is "transformative" would be to examine evidence from the viewpoint of the reader. *Id*. at 447-51; *see also* Williams, *supra* note 52, at 314 (discussing the Supreme Court's articulation of the transformative standard).

79. *Campbell*, 510 U.S. at 579; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984) ("assum[ing] that the category of 'fair use' is rigidly circumscribed by a requirement that every such use must be 'productive'"); Williams, *supra* note 52, at 318-19.

Indeed, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."[80] Works that merely copy the original are more likely to be copyright infringement.[81] There must be an alteration or change of the original works into something new and creative.[82] Otherwise, the use of the original work is unfair because a transformative expression was not constructed.[83]

Transformation is a key ingredient to fair use.[84] Consequently, the definition of a transformative inquiry can be expanded in four ways: (1) defining transformative purpose beyond examples to include creative works; (2) considering a secondary work's expressive purpose, not just its functional purpose; (3) considering minimal aesthetic changes as sufficient for transformation; and (4) deemphasizing any market harm once transformation is found.[85] Basically, transforming a work means to give it a different meaning than the original intended.

2. *Nature of Copyrighted Work*

The second fair use factor deals with the intention of the alleged infringer when comparing the "copied" work to the original work. According to the Copyright Act, there is analysis that requires one to

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80. *Campbell*, 510 U.S. at 579; Heymann, *supra* note 78, at 451, 466.

81. *Campbell*, 510 U.S. at 579. However, "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." *Id*.

82. *See* 17 U.S.C. § 107 (2006).

83. *See id*. "[N]o copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated." Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) (citing Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936)). "[W]here substantial similarity is found [between works of different makers], small changes here and there made by the copier are unavailing." *Id*.

84. *See* 17 U.S.C. § 107 (relating to factor #1).

85. *See* Blanch v. Koons, 467 F.3d 244, 251-53 (2d Cir. 2006). By recontextualizing the image, Koons altered and "transformed" Blanch's photograph in an attempt to force viewers to see the original work and its significance differently. *Id*. at 251. Koons was using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media, rather than for purposes of making money. *Id*. at 253; *accord* Roxana Badin, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion From* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1660 (1995) (stating an artist may not assert a "fair use" defense to protect the work as publicly useful communication and criticism once the piece fails to meet the definition of a parody); *see also* Bill Graham Archives v. Dorling-Kindersley Ltd., 448 F.3d 605, 607 (2d Cir. 2006) (holding the defendants' complete reproduction of seven of the plaintiff's graphic images in a biographical book constituted fair use because all seven images were transformative in reduced size, text and placement); Jeannine M. Marques, *Fair Use in the 21st Century:* Bill Graham *and* Blanch v. Koons, 22 BERKELEY TECH. L.J. 331, 333-34 (2007) (noting the general disagreement over which factor should weigh more heavily in the fair use analysis—the transformative or productive nature of the secondary use or the economic effects on a copyright holder—while focusing on expanding the definition of transformative in four ways).

examine "the nature of the copyrighted work"[86] through recognition "that some works are closer to the core of intended copyright protection than others."[87] Where the original work is fictional rather than factual, the scope of fair use is broader,[88] meaning original, creative works have broader copyright protection compared to factual works that have limited protection. Indeed, "a use is less likely to be deemed fair when the copyrighted work is a creative product."[89]

By copying original and unique works, the very nature of the work is being taken away for the protected owner. Essentially, the work being used is at the core of intended copyright protection.[90] Therefore, the defense of fair use is difficult to establish and should not be applied when creative works are copied.[91]

3. *Amount Copied*

The third factor of fair use looks at the amount substantiality copied from the original.[92] In general, this means the less of the original work that is copied, the more likely the use will be fair.[93] The factor can be taken as a quantitative analysis.[94] An impermissible level of copying may occur when the original is copied more than necessary.[95] Additionally, this factor is interpreted to allow fragmentary copying, which is more likely to have a transformative purpose (positive fair use factor), than wholesale copying (copyright infringement).[96]

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86. 17 U.S.C. § 107(2) (stating the nature of the copyrighted work).

87. On Davis v. Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)) (stating "plaintiff's copyrighted work [was] in the nature of an artistic creation that falls close to the core of the copyright's protective purposes"); *see also* Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782 (N.D. Ill. 1998).

88. New Era Publ'ns Int'l v. Carol Publ'g Grp., 729 F. Supp. 992, 998 (S.D.N.Y. 1990).

89. Stewart v. Abend, 495 U.S. 207, 237-38 (1990) (claiming fair use is more likely to be found in factual works than in fictional works).

90. *Campbell*, 510 U.S. at 586.

91. *Id*.

92. 17 U.S.C. § 107(3) (2006).

93. Leval, *supra* note 52, at 1122.

94. *See* New Era Publ'ns Int'l v. Carol Pub. Grp., 904 F.2d 152, 158 (2d Cir. 1990) (stating the third factor has a quantitative component).

95. Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992); *see New Era Publ'ns Int'l*, 904 F.2d at 158 (discussing that courts have found use was not fair where the quoted material formed a substantial percentage of the copyrighted work); Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), *reh'g denied*, 818 F.2d 252 (2d Cir.), *cert. denied,* 484 U.S. 890 (1987).

96. 17 U.S.C. § 107(3) (stating the amount and substantiality of the portion used in relation to the copyrighted work as a whole); *Rogers*, 960 F.2d at 310-11 (stating that where the amount of copying exceeds permissible levels, summary judgment has been upheld for copyright infringement because there was no fair use); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) (upholding summary judgment motion because defendant copied more than was

Where the amount of copying exceeds permissible levels, summary judgment has been upheld for copyright infringement because there was no fair use.[97] It is not fair use when more of the original is copied than necessary.[98] However, one should not look solely at the quantitative aspect of copying; a qualitative analysis must also take place.[99] The qualitative degree of the copying is the degree of the essence of the original that is copied in relation to its whole.[100] There is not a single authority which can lend any support to the proposition wholesale copying and publication of copyrighted material can ever be fair use.[101] The key issue is the amount of the infringing work that is copied verbatim from the copyrighted work.[102] Essentially, this third factor examines whether the "heart" of the original work was taken.[103]

4. *Effect on Potential Market*

Finally, there is one more statutory factor to consider with fair use.[104] The fourth factor examines the market harm caused by the alleged infringer's copying.[105] One should measure harm by analyzing whether the

necessary to produce parody of original work); Leon v. Pac. Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937) (stating the infringer's counsel was unable to disclose a single authority, nor was the copyright owner's counsel able to find one, which lent any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use); Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113, 1124 (D. Nev. 1999) (holding defendant did not present triable issue of fact as to third factor because defendant admitted he had scanned all or most of original work); Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 447-48 (N.D. Ill. 1991) (finding the plaintiff did not demonstrate a claim for copyright infringement because the defendant established "fair use" defense due to the fact that the defendant's commercial did not borrow an impermissible amount of plaintiff's commercial).

97. *Walt Disney Prods*., 581 F.2d at 758.

98. *Salinger*, 811 F.2d at 98-99.

99. Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 73 (2d Cir. 1999).

100. *Rogers*, 960 F.2d at 308; *Salinger*, 811 F.2d at 98–99 (stating the degree can also reveal the amount of transformative character and purpose); *see New Era Publ'ns Int'l*, 904 F.2d at 159 (analyzing the quotations in the book's text, which amount to the bulk of the allegedly infringing passages, do not take essentially the heart of the original works).

101. *Leon*, 91 F.2d at 486.

102. *Salinger*, 811 F.2d at 97; NIMMER ON COPYRIGHT, *supra* note 9, § 13.03[A].

103. Dr. Seuss Enters., Ltd. P'ship v. Penguin Book USA, Inc., 924 F. Supp. 1559, 1567 (S.D. Cal. 1996); *see* Jonathan Fox, *The Fair Use Commercial Parody Defense and How to Improve It*, 46 IDEA 619, 627 (2006) (expanding a stark difference between the classic literary definition of parody and the legal definition of parody, with significant help from such cases as *Berlin v. E. C. Publications, Inc*. and *Campbell v. Acuff-Rose Music, Inc*.).

104. *See* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1373 (2d Cir. 1993) (mandating the court to consider four enumerated factors when determining if a use is fair).

105. 17 U.S.C. § 107(4) (2006) (stating the court shall consider the effect of the use upon the potential market for or value of the copyrighted work); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 789 (N.D. Ill. 1998) (claiming the fourth fair use factor

infringer's work usurps or softens the market demand of the original.[106] However, suppressing market value is allowed.[107] Fair use, therefore, is limited to an author's work, "which does not materially impair the marketability of the work which is copied."[108]

A party's use should not affect the owner's potential market or replace its demand.[109] In determining harm, not only is the potential harm to the original works considered, "but . . . harm to the market for derivative works" is considered, as well.[110] A concern exists when there is an excessively widespread dissemination of derivative works that will cause a potential harm to any work's market.[111] Hence, a balance must be struck between the benefit gained by the copyright owner when the copying is found to be an unfair use and the benefit gained by the public when the use is held to be fair.[112] If the unauthorized use becomes "widespread," then a copyright owner only needs to demonstrate it would prejudice the potential market for his work.[113] "Yet where the use is intended for commercial gain[,] some meaningful likelihood of future harm is presumed."[114] The doctrine of fair use, as a whole, helps to prevent potential market harm.[115]

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specifically examines whether the conduct of copying, if unrestricted and widespread, would adversely affect the copyright owner's potential market).

106. Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 448 (N.D. Ill. 1991).

107. *See id*.

> In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically. Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original . . . but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it.

Id. (quoting Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986)) (internal quotations omitted).

108. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); *Storm Impact Inc*., 13 F. Supp. 2d at 789.

109. *See* 17 U.S.C. § 107 (relating to factor #4).

110. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (citing *Harper & Row Publishers, Inc*., 471 U.S. at 568).

111. *Id*. (finding the defendant's "fair use" defense to copyright infringement was impaired because they did not address the potential for their work to harm the market for derivative works the plaintiffs had exclusive right to prepare); *see Harper & Row Publishers, Inc*., 471 U.S. at 567; *Storm Impact Inc*., 13 F. Supp. 2d at 788.

112. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431-32 (1984); MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); Publ'ns Int'l, Ltd. v. Bally Mfg. Corp., 215 U.S.P.Q. 861, 862 (N.D. Ill. 1982) (concluding the publisher stole the cover of the copyright holder's arcade game; because illustrations on the covers of one of the publisher's books were non-educational and were only meant to lure buyers, they infringed the copyright and the fair use exception did not apply).

113. *Harper & Row Publishers, Inc*., 471 U.S. at 568; *Sony Corp. of Am*., 464 U.S. at 451.

114. Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992) (ruling in favor of copyright infringement because it was determined that the infringer copied the original material for its own

III. ANALYSIS

A. DOUBLE OR NOTHING—STRATEGIES FOR PROTECTION OF CASINO GAMES AND MACHINES

After learning about the doctrine of fair use and what it takes to obtain protection, one might ask why would a casino even want to make itself distinct from every other casino, rather than just be alike? After all, in the world of gaming, "[t]he concept of idea sharing and collaboration is one of interest and significance."[116] But one recurring question is whether these gaming ideas and concepts should be allowed such protection if so desired by the creator/owner of the casino games and machines.

The option of copyright protection for casinos should be present if game creators wish to have it. Gaming ideas, such as new computer-controlled gaming devices[117] or games like Double Exposure,[118] Spanish 21,[119] Three Card Poker,[120] Let It Ride,[121] and Caribbean Stud,[122] are great new concepts that can bring in "big money" for casino game creators and

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commercial purposes, without paying for it); *see also Sony Corp. of Am.*, 464 U.S. at 449 (noting commercial use is "presumptively" unfair use).

115. *See Sony Corp. of Am.*, 464 U.S. at 450 (noting "the purpose of copyright is to create incentives for creative effort").

116. Peter DeRaedt, *A Message from the President*, GAMING STANDARDS ASS'N (Winter 2004), http://www.gamingstandards.com/newsletter/winter04/presidentsmessage.html.

117. Anthony N. Cabot & Robert C. Hannum, *Gaming Regulation and Mathematics: A Marriage of Necessity*, 35 J. MARSHALL L. REV. 333, 358 (2002) (discussing different game products).

118. *Double Exposure*, WIZARD OF ODDS, http://www.wizardofodds.com/games/double-exposure (last updated Oct. 23, 2009) (providing the rules and strategy to this casino game).

119. *Spanish 21*, WIZARD OF ODDS, http://www.wizardofodds.com/games/spanish-21 (last updated Aug. 10, 2010) (providing the rules, strategy, house edge, potential bonus, rule variations, and methodology to this casino game).

120. *Three-Card Poker*, GAMBLING IL DADO, http://www.ildado.com/three_card_poker.html (last visited Dec. 19, 2011) (providing the game summary to this casino game); *Three Card Poker*, WIZARD OF ODDS, http://www.wizardofodds.com/games/three-card-poker/ (last updated Feb. 26, 2011) (providing the rules, ante, analysis, bonus, strategy, and variations to this casino game); *Three Card Poker–How To Play*, ABOUT.COM, http://www.casinogambling.about.com/od/othergames/a/3cardpoker.htm (last visited Dec. 19, 2011) (providing the rules, ante, strategy, and payout to this casino game).

121. *Let It Ride–Analysis and Expert Strategy*, WIZARD OF ODDS, http://www.wizardofodds.com/games/let-it-ride/ (last updated Jan. 31, 2011) (providing the rules, payout warning, strategy, house edge, betting format, and a method to seeing extra cards for this casino game); *Let It Ride–How To Play*, ABOUT.COM, http://www.casinogambling.about.com/od/othergames/a/LIR.htm (last visited Dec. 19, 2011) (providing the rule, strategy, and betting process to this casino game); *Let It Ride Poker*, GAMBLING IL DADO, http://www.ildado.com/let_it_ride_poker.html (last visited Dec. 19, 2011) (providing the game summary, house advantage, recommended strategy, and betting scheme to this casino game).

122. Cabot & Hannum, *supra* note 117, at 358 (discussing card games and computer-controlled gaming devices located in a casino).

casinos. These twists on blackjack and variations on poker might be worth millions of dollars, so a casino game creator might want protection on the new, brilliant gambling idea, as would the casino that owns the gambling game. This is where the doctrine of fair use for casino games and machines would come into play.

There is a need for guidelines and examples to follow in order for a casino game or machine creator to be allowed stronger protection from the fair use defense. The next sections of this article discuss model guidelines, rules, and regulations to mimic as possible options to give casino games and machines protection from allegedly "fair use" copying, such as adding a component to the fourth factor of the doctrine of fair use. A few examples are cited to show how these guidelines would be helpful in certain situations.

B. PUSH—POSSIBLE GUIDELINES TO PURSUE FOR PROTECTION UNDER THE DOCTRINE OF FAIR USE

In order to obtain protection from the doctrine of fair use, "use" needs to be properly defined for items that can be protected. For example, rather than being "used" in another casino without the original casino's permission, there should be protection against unwarranted "fair use" of a protected slot machine. At the same time, the owner of the unique casino game or machine must be the owner of the copyright, similar to the aforementioned factors of the doctrine of fair use. Currently, casino logos are protected, but common casino equipment, such as slot machines, card games, and dice games, are not protected.

"The Lanham Act[123] was intended to make 'actionable the deceptive and misleading use of marks' and 'to protect persons engaged in . . . commerce against unfair competition.'"[124] The same can be applied to "fake" or "fairly used" games and machines in various casinos that mimic or copy the actual unique games and machines from a specific casino. Using the intentions of the Lanham Act, casino games and machines will be protected to allow for a shield to new and innovative gambling concepts that may be created by a casino. Thus, casinos can potentially receive protection for ideas and not worry about another casino making a replica of their concept.

123. 15 U.S.C. § 1051 (2006).

124. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 767-68 (1992) (quoting 15 U.S.C. § 1127).

"In order to be registered, a mark must be capable of distinguishing the applicant's goods from those of others."[125] In other words, a mark must be "inherently distinctive" or identify a particular source of origin.[126] For instance, the rule can apply to special games and machines that are "inherently distinctive" for that specific casino. Again, instead of a merely protecting a mark, the law can now protect a gambling concept. In the end, the "famous" casino game or machine can then be associated with only the casino that created (or owns) the concept.

Moreover, the issue of whether the similarities in packaging create a likelihood of confusion is determined by "the total . . . impression" of the packaging, not by whether defendants' packaging imitates plaintiffs' packaging in every detail.[127] Thus, any slight change in the "packaging" of new slot machines and card games might not warrant protection for the creators of the new gambling amenities according to these rules, or the doctrine of fair use. For this reason, more stringent constraints need to be applied to the doctrine of fair use, such as adding a component to the fourth fair use factor relating to the effect on the potential market.

All of these safeguards lead to the ultimate goal of protection against public confusion.[128] When a patron plays a certain card game or slot machine, that person knows it is from a particular casino only. Public perception is important to casinos as is evident by their attempts to look the same both inside and out. However, this universal appearance still does not make casinos distinct. There needs to be protection of new and innovative gambling machines and games, so a casino may be able to stand out and profit from its original concepts, knowing it is the only casino to have a special game or machine. A patron might chose to go to a certain casino to play the original card game or slot machine, and the exclusivity of having such can be accomplished through protections, such as a stricter fair use factor or rigid laws.

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125. *Id*. at 768 (citing 15 U.S.C. § 1052).

126. *Id*. at 768-69.

127. *See* Chesebrough Mfg. Co. v. Old Gold Chem. Co., 70 F.2d 383 (6th Cir. 1934); Bulk Mfg. Co. v. Schoenbach Prods. Co., 208 U.S.P.Q. 664, 668 (S.D.N.Y 1980); 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 8.1, at 231 (1973).

128. *Cf*. Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 193 (2d Cir. 1996) ("[B]ecause the Lanham Act universally protects against consumer confusion, we see no distinction between trademark cases and misleading advertisement cases for the purpose of laches.").

C. INSURANCE—THE FOURTH FAIR USE FACTOR: EFFECT ON POTENTIAL MARKET

Because there are limits on what can be done under copyright infringement for casino games and machines, an additional component for the fourth fair use factor relating to market effect needs to be implemented to the doctrine of fair use. The proposed additional component for the fourth fair use factor will give the guidance needed to determine what is and what is not copyright infringement with regard to casino games and machines. The additional analysis to the fourth fair use factor is meant to be broad, rather than exact and precise, in order to encompass a great extent.

1. *Additional Component for the Fourth Fair Use Factor and Casino Technology*

Infringement of a copyrightable expression, such as a casino game or machine image, could be justified as "fair use" based on the alleged infringer's claim to a different use.[129] Without insuring public awareness of the original work, there would be no practicable boundary to the doctrine of fair use.[130] Thus, there must be a supplementary component added to the fourth fair use factor for slight variations to casino games or machine images, such as theme changes to the depicted slot machine.

As in *Blanch v. Koons*,[131] *Rogers v. Koons*,[132] and *Dr. Seuss Enterprises, Ltd. Partnership v. Penguin Books USA, Inc.*,[133] reader recognition of the defendant's "different perspective on context" mediates any potential conflict between a reader-response view of transformativeness and the derivative work right.[134] Not giving a casino compensation or

129. Heymann, *supra* note 78, at 461; *see* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

130. Heymann, *supra* note 78, at 461; *see Rogers*, 960 F.2d at 301.

131. 467 F.3d 244 (2d Cir. 2006).

132. 960 F.2d 301 (2d Cir. 1992).

133. 109 F.3d 1394, 1401 (9th Cir. 1997).

134. *Blanch*, 476 F.3d at 257 (describing how defendant was not held liable for copyright infringement since the artist's incorporation of plaintiff photograph in a collage painting constituted fair use); *Dr. Seuss Enters., Ltd. P'ship*, 109 F.3d at 1401 (stating distribution of a publication, not owned by the distributing party, is a demonstration copyright infringement); *Rogers*, 960 F.2d at 309-10 (describing how sculptor's use of copyright protected photograph constituted copyright infringement due to the commercial benefit and blatant copying that occurred); Heymann, *supra* note 78, at 464; *see* Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 764 (2005) ("It may be that consumers are perfectly capable of contextualizing reworkings of expressive texts if they have sufficient information about the source.").

credit when using its game or machine is a problem that needs to be resolved.

The change must subject one to liability when use of another person's name, likeness, or other indicia of identity is appropriated for commercial value without consent.[135] Hence, use of an original casino game or machine will make the copying casino liable for copyright infringement under the additional component to the fourth fair use factor.

2. *A Need for an Additional Component Applied to the Fourth Fair Use Factor*

"One cannot transform something one doesn't adapt or comment on."[136] In order to be transformative, the work must use the preexisting work for a different purpose from its creator.[137] Having a transformative work would be hard to accomplish with regard to a casino machine, such as a slot machine, when the sole purpose of gambling is for the user.

A gambling machine in one casino, using the same image from the original casino, cannot "serve[] an entirely different function" than the indicia associated with the original gambling machine in the original casino.[138] A gambling machine with indicia in a casino is used for one reason: to obtain monetary gain through the use and fame of original casino machine and game indicia. Thus, a replicated gambling machine (alleged infringer) would then have the same function as the original gambling machine to gain money. The proposed additional component to the fourth fair use factor would not allow for this copyright infringement of original casino games and machines. Further, indications of the additional component would significantly outweigh the "transformative" machine indicia fair use protection because it is an added component to the "effect on the potential market" factor.

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135. Parks v. LaFace Records, 329 F.3d 437, 458 (6th Cir. 2003); Seale v. Gramercy Pictures, 949 F. Supp. 331, 339 (E.D. Penn. 1996); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

136. Brief of Petitioner-Appellant at 12, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (No. 05-2514); Williams, *supra* note 52, at 321.

137. Williams, *supra* note 52, at 327 (stating the court cited the *Bill Graham Archives* opinion on this point).

138. Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) (concluding such copying was transformative because the thumbnail copies of the photographs the search engine produced and displayed did not "supersede[] the object" of the original photos in that they "served an entirely different function").

3. *Expanding upon the Fourth Fair Use Factor to Help Protect Casino Games and Gambling Machines Needs to Happen*

It is not necessary the indicia of a casino game or gambling machine contain a completely different image or appeal itself, so long as the indicia are distinguishable enough to make consumer confusion unlikely.[139] This would never happen when indicia are used in an original casino game or machine because the whole point of using the indicia is to entice people and get their attention. The additional component to the fourth fair use factor would eliminate this possible flaw in the doctrine of fair use and would not allow copyright infringement of original casino technology, such as a game or machine. After all, the "'Spectrum of Fair Use' analysis has qualities that many might see as fatal flaw: uncertainty, subjectivity, and arbitrariness."[140]

There is a copyrightable interest in casino technology, yet use of these games and machines cannot be done without consequences. With consumer confusion, for example, the right of publicity protects celebrities from possible copyright infringement of their image, so the next step in copyright protection must be taken by adjoining an additional component to the fourth fair use factor.

IV. PROPOSAL

After learning about the different prongs and factors that need to be established in order to apply the doctrine of fair use, one thing is clear: there are ways to protect new and innovative casino games and machines. In particular, there can be protection provided for casinos and their new specialty gambling games and machines if rules and regulations are put in place, similar to the doctrine of fair use and the Lanham Act. For instance, there must be a doctrine of fair use factor that is helpful to the copyright for original casino games and machines. Casinos should have their new, innovative games protected with rules, just like how a copyright is protected, but there should also be a factor set in place within the doctrine of fair use specifically which can cater casino games and machines. If the doctrine of fair use and Lanham Act guidelines are followed, then there will be the

139. 15 U.S.C. § 1125 (2006); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110-11 (9th Cir. 1992) (stating a false association claim requires the misuse or other distinguishing device to confuse consumers as to the origin, approval, or endorsement of the product); *see also* Cliffs Notes, Inc. v Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 494 (2d Cir. 1989).

140. Daniel Austin Green, *Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire*, 11 CHAP. L. REV. 183, 210 (2007).

necessary and adequate protection that is needed for casinos with original games and machines.

A. DOUBLING DOWN—INCLUDE AN ADDITIONAL COMPONENT IN THE FOURTH FAIR USE FACTOR TO BETTER PROTECT CASINOS

The proposed added component to the fourth fair use factor deals with casino technology protection, mainly games and machines. This additional component for the fourth fair use factor is not designed to conflict or challenge any of the statutory considerations. This component is intended merely to provide further guidance on the application of general common law principles of excuse and justification[141] in conjunction with statutory protection for fair use.[142] The additional section to the fourth fair use factor is meant not to be exact and precise, but rather to be broad in order to encompass a great extent. Adding a supplementary component for the fourth fair use factor is another step in the right direction for the history of fair use.

"[T]he true purpose of copyright [is] to benefit the public by getting new work."[143] Yet, use of a gambling game or machine from the original casino in a different, unauthorized casino does not fulfill that purpose, but rather infringes on the copyright. A secondary casino that contains a gambling machine or game from the original casino must contribute something more than a mere trivial variation. In order to qualify for legal protection, a secondary casino must create something that is recognizable as its own.[144] Even if a work is considered transformative and fits within the current four fair use factors, it is difficult to say that a re-creation of an original casino machine or game indicia is considered one's own work and not the original in general. With the proposed additional component to the fourth fair use factor, even if a recreation of an original casino machine or game indicia is considered transformative, the edited fourth fair use factor still considers the work of the creator to be copyright infringement because

141. *Id.* at 193-95.

142. *Id.* at 208.

143. Mark Hamblett, *Koons' "Transformative" Use of Photo Affirmed by 2d Circuit*, N.Y.L.J., Oct. 31, 2006, at 1, 2 (quoting Koons' lawyer, John B. Koegel); *see also* Blanch v. Koons, 467 F.3d 244, 250, 259 (2d Cir. 2006) (affirming that Koons did not infringe the copyright of Blanch's photograph because Koons' incorporation of the photograph in a collage painting constituted fair use, pursuant to 1976 Copyright Act); Williams, *supra* note 52, at 329.

144. Winter v. DC Comics, 69 P.3d 473, 480-81 (Cal. 2003) (declaring that when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, the artist's right of free expression is outweighed by the right of publicity); Comedy III Prods., Inc. v. Saderup, 21 P.3d 797, 810-11 (Cal. 2001).

re-creation of an original casino machine or game indicia in order to benefit one's work is not fair use and infringes on the copyrighted casino technology.

B. EXAMPLE

This supplementary analysis to include in the fourth fair use factor will protect against unwarranted use of an original casino machine or game indicia and concept or function, and not the original casino machine or game itself. For example, original casino machines and games, along with their indicia, could include such casino technology as GPMax operating system,[145] QuikTicket,[146] and Lord of the Rings microgaming.[147]

The fourth fair use factor needs to be altered in order to protect against unlawful use of casino machine or game indicia in casino technology. The additional component to the fourth fair use factor will provide the much-needed protection from others who try to capitalize on the currently defenseless original casino machine or game creator and its casino technology. This section added to the fourth fair use factor will not allow others to use casino machines and games for their own personal commercial benefit. Such protection of original casino machines and games is essential.

V. CONCLUSION

Suppose one depicted a mechanical robot of a dark-haired, tan-skinned, Caucasian male with a stubble beard wearing a leather flight jacket, messenger bag, Sam Browne belt,[148] waist belt with holster, khaki shirt, and trousers having a pistol revolver gun. What if this mechanical robot even

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145. *GameTech International, Inc. Announces Montana Gambling Control Approval of New Software Suite and Operating System*, PR NEWSWIRE (Aug. 5, 2011), http://www.prnewswire.com/news-releases/gametech-international-inc-announces-montana-gambling-control-approval-of-new-software-suite-and-operating-system-100067599.html (discussing the new GTMC operating system that will implemented for twenty-one newly designed games in Montana casinos).

146. *Global Case Access Gets Gaming Approval in Nevada*, CASINO CITY TIMES (July 27, 2010), http://www.casinocitytimes.com/news/article/global-cash-access-gets-gaming-approval-in-nevada-194494 (discussing how the newest GCA technology product, by unanimous approval from the Nevada Gaming Control Board, will allow casino patrons to have the choice of receiving either cash or a slot ticket when conducting an ATM transaction).

147. *Lord of the Rings Coming to Microgaming Powered Online Casinos*, CASINO GAMBLING WEB (Feb. 5, 2010), http://www.casinogamblingweb.com/gambling-news/online-casino/lord_of_the_rings_coming_to_microgaming_powered_online_casinos_53816.html (discussing the partnership between Microgaming and The Lord of the Rings trilogy in order to create video slot machines).

148. A wide belt, usually leather, which is supported by a strap going diagonally over the right shoulder.

had a whip and wide-brimmed fedora hat? If this mechanical robot, with precise physical attributes and identifications, was then to be used in a commercial, can any particular person claim that the mechanical robot is using his identity?[149] Is it fair to use this "generic robot" to sell products without the thought of any repercussions or ramifications?[150]

As one can see, an additional component to the fourth fair use factor dealing with marketability needs to be implemented immediately. Adding a component to the fourth fair use factor that will protect original casino technology, mainly gambling games and machines, from copyright infringement will help to advance the doctrine of fair use in the proper direction.

"Gambling has a long history of both prohibition and regulation."[151] Such regulation is done primarily by the individual states with supporting legislation by the federal government.[152] So, why not apply this same history and regulations to newly created, original casino games and machines, too? This article has not attempted to analyze or refute such an argument due to the inherently fact-based determinations that a proper fair use analysis requires. However, the argument should give courts pause . . . to think.

149. *See* INDIANA JONES AND THE KINGDOM OF THE CRYSTAL SKULL (Paramount Pictures 2008); INDIANA JONES AND THE LAST CRUSADE (Paramount Pictures 1989); INDIANA JONES AND THE RAIDERS OF THE LOST ARK (Paramount Pictures 1981); INDIANA JONES AND THE TEMPLE OF DOOM (Paramount Pictures 1984).

150. *Cf.* White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (declaring the identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice). Suppose one depicted a mechanical robot of a bald, African-American male wearing a baggy black uniform with red trim jumping through the air with a basketball in one hand, stiff-armed, legs extended open like scissors. *Id.* What if this mechanical robot even had the number twenty-three on his uniform and had his mechanical tongue hanging out? *Id.*

151. Katherine A. Valasek, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, 2007 MICH. ST. L. REV. 753, 754 (2007) (providing a historical discussion of the evolution of federal regulation and the states' roles in gambling). *See generally* James H. Frey, *Federal Involvement in U.S. Gaming Regulation*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (1998).

152. Valasek, *supra* note 151, at 754 (discussing the history of gambling regulation and changes made through the decades); *see* Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 431-34 (2006).