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Highest Form of Flattery - Application of the Fair Use Defense against Copyright Claims for Unauthorized Appropriation of Litigation Documents, The

Davida H. Isaacs

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The Highest Form of Flattery? Application of the Fair Use Defense against Copyright Claims for Unauthorized Appropriation of Litigation Documents

Davida H. Isaacs

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1. Assistant Professor of Law, Northern Kentucky University, Salmon P. Chase College of Law. Prior to teaching at Chase, Professor Isaacs practiced intellectual property law at major law firms in New York and Washington, D.C. for almost seven years. She is grateful to her extremely capable and thorough research assistant, Anthony H. Handmaker, as well as to several colleagues who provided their advice and support, including Joshua Sarnoff and David Super.
I. INTRODUCTION

"'[S]ue the bastards' for copyright infringement!"² So suggested a United States Circuit Court Judge several years ago to a lawyer friend who was a founding partner of a firm recognized as "a pioneer of condominium law."³ The friend had claimed that another established and respected law firm had copied, without authorization, portions of documents created by his firm.⁴ While the aggrieved lawyer did not follow that off-the-cuff advice to sue, he did decide to discuss the matter with the senior partner of the allegedly offending law firm. The accused law firm's response may come as a surprise to many lawyers: it paid the pioneer firm for the use of those documents. Given the law firm's potential liability if it were to lose a copyright infringement suit — statutory damages that reach as high as $150,000 — perhaps the choice to pay was sensible.⁵

This was not the only recent assertion of copyright as to a legal document. In 2001, the reputable plaintiffs' side securities law firm of Milberg Weiss Bershad Hynes & Lerach LLP publicly threatened to sue a number of other law firms for copyright infringement.⁶ In various class actions, Milberg Weiss had represented certain classes of plaintiffs, while the other law firms had represented other classes.⁷ Alleging that the other firms had copied and adapted its complaints for their own use, Milberg Weiss contended that, as a result, it was repeatedly denied the valuable role of lead plaintiffs' counsel.⁸ While the firm apparently never followed through on the threats to sue, it remains unclear whether the firm's inaction was the result of settlements or a concern that the claims were not viable. In any case, it seems unlikely that Milberg Weiss has actually abandoned such threats: the following year the firm began placing copyright notices on its complaints.⁹

² Birch, Stanley F., Jr., Copyright Protection for Attorney Work Product: Practical and Ethical Considerations, 10 J. INTELL. PROP. L. 255, 256 (2003).
³ Id. at 255.
⁴ Id. at 256.
⁵ However, in that situation, the works at issue were real estate documents. As a result, the documents were likely not entitled to copyright protection. See infra notes 72-74 and accompanying text.
⁷ See id.
⁸ Id.
⁹ Id. It is not necessary to register works to obtain copyright protection, nor is it necessary to affix a copyright notice, although registration is required in order to file suit, and affixation of a copyright permits the copyright holder to seek additional remedies. See 17 U.S.C. § 408 (2000) (amended 2005).
The above two examples suggest that infringement suits against fellow members of the Bar may be on the horizon. Breaking from centuries-old tradition, attorneys have recently begun threatening one another with claims of copyright infringement based on the unauthorized appropriation and adaptation of their legal documents, particularly litigation documents. The ostensible growing concern as to unauthorized use of litigation documents—which may, perhaps, be more accurately described as an emerging eagerness to seek payment for such use—may be the most recent consequence of the general business trend, which is one of intensified interest in safeguarding items which may be considered, appropriately or not, protectable intellectual property. Moreover, widespread application of computer technology, as well as a greater frequency of job-hopping by lawyers, have caused such use to become more convenient, and thus likely to become increasingly prevalent. But technology and the resulting known access to others’ work also means that copying is becoming more conspicuous. As a result, one can expect that allegations of infringement will continue to increase.

With this situation in mind, this Article addresses two fundamental questions regarding such claims. First, are litigation documents copyrightable works, and, if they are, how much protection are they entitled to? Second, could accused attorneys successfully defend against copyright infringement claims on the basis that their actions were permissible “fair use” of the works pursuant to section 107 of the Copyright Act? Thus far, there is no

10. See infra notes 26-32 and accompanying text.
11. Id.
12. This article focuses primarily on litigation documents, and complaints and memoranda of law in particular, for three reasons. First, once filed with a court, those documents are more likely to be accessible to other attorneys than most other legal works. As a result, such documents are more likely to be copied and, furthermore, whatever copying does occur is more likely to be uncovered. It is true that transactions provide access to some other types of documents, but the relatively private nature of individual and commercial transactions lessens the chance both for access to the documents and discovery of subsequent copying. See infra Part II. Cf. Birch, supra note 2, at 256 (discussing the copying of real estate documents). Second, it was simply impractical to address whether the levels of creativity and discretion used to draft every type of legal document might ever be sufficient to warrant copyright protection. See infra Part II. Third, the fee structure for litigation tends to be per-hour, while the fee structure for transactional work is more likely to vary to a per-document fee. The per-hour fee structure is a significant factor supporting the conclusion that copying will not harm the value of a copyrightable legal document. See infra Part IV. The fair use defense is highly fact-specific, so this article leaves for another time full consideration as to how the most common fee structure for each type of document might change the analysis regarding copying of such works.
published opinion regarding a claim of copyright infringement by one law firm against another based on use of a litigation document, and the few existing pronouncements are conflicting. One of the most venerable treatises has concluded that complaints may be entitled to protection, but a leading scholar rebuffs that conclusion. Indeed, in conflict with the conclusion reached in this Article, an earlier, more limited analysis of the applicability of the fair use defense in these circumstances concluded that the defense would never be viable. In sum, this issue presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act.

By juxtaposing the impact of the unauthorized use of litigation documents with both the contours and the purposes of copyright law, this Article addresses the legal problem created by one attorney’s use of another’s legal work.

Part II of the Article examines which types of legal works are entitled to the limited-time monopoly provided by copyright protection. Reviewing both the purpose of the memorandum of law and the complaint, as well as the process of drafting those documents, it becomes clear that not all such documents are the formulaic, fill-in-the-blanks works that some people may imagine. Indeed, many contain some portions which entail both original effort and creative judgment. For those documents in which the idea behind the original, creative expression may be expressed in a myriad of other ways, protection is

14. Compare 1 MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.18[E] (2000) [hereinafter NIMMER] (“There appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal documents should not be protected under the law of copyright.”) with Conley, supra note 6 (noting that Thomas G. Field, Jr., an intellectual property law professor at Franklin Pierce Law Center in Concord, N.H., believed that “Milberg Weiss doesn’t have a protectable copyright in its complaints” because complaints lack sufficient creativity to justify copyright protection). Professor Field equated legal complaints with Motorola’s real-time sports updates, which the Second Circuit had previously declared non-copywriteable. Id.; see National Basketball Ass’n v. Motorola, 105 F.3d 841, 843 (2d Cir. 1997) (rejecting the NBA’s misappropriation claim against Motorola, finding that the NBA had no property right in such factual descriptions).


17. See infra Part II.B.
proper. Portions of many memoranda of law satisfy this creativity requirement; even portions of some complaints will satisfy this requirement.

Nevertheless, even an attorney who authored a protectable litigation document should generally not be entitled to seek damages against another attorney’s copying of the same material. As the background discussion in Part III and the analysis in Part IV demonstrates, copyright’s “fair use” provision was intended to address situations in which enforcement of the copyright protections would be both counter-productive to the purpose of statutory scheme and would endanger traditional public policy goals.18

In the case of litigation documents, there is no need to use copyright’s protections to encourage additional creative works. An attorney’s role is not one of creative artist, but rather of partisan advocate for her client. The client’s only interest in a lawsuit is to achieve a particular goal, and the obligation to zealously advocate for her client provides an attorney with all of the incentive needed to produce an effective, valuable work.

In any case, others’ use of these works will not affect copyright’s incentive to produce additional works. The fee structure most commonly used in litigation practices, per-hour billing, makes it extremely likely that any unauthorized use would cause little, if any, harm to the market value of a work. The Supreme Court cases considering the “fair use” defense unanimously agree that an absence of harm strongly suggests that such use should be permitted.

Yet the Copyright Act’s provision for statutory damages provides considerable incentive of its own to assert a claim for infringement, regardless of the absence of harm. Those damages may be whatever the court “considers just” within the limits provided by statute, ranging from “not less than $750 or more than $30,000” for each act of non-willful infringement, to as high as $150,000 for each act of willful infringement.19 Facing the potential of a significant award, a defendant would likely offer to settle with the copyright owner. Whether as a statutory damages award or as a settlement, this payment would generally be considered a socially and economically inefficient “economic windfall.” That windfall might be justifiable if one could fairly assume that the putative infringing attorney could have bargained, in advance, for authorization to use the work. Indeed, one could expect that this bargaining would have occurred because economic theory posits that where another’s use of a work would not decrease its value to the copyright owner, the copyright owner would be willing to license the work.

Attorneys never reach such licensing agreements, however, because several discrete “market failures” prevent the marketplace from properly re-

18. See infra Parts III, IV.

19. 17 U.S.C. § 504(a)(1) (2000 & Supp. 2004) states that a copyright infringer is liable for “the copyright owner’s actual damages and any additional profits of the infringer.” However, the plaintiff has the option of choosing to receive statutory damages instead: “[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action” Id. § 504(c)(1).
allocating the right to use the work. First, it is highly likely that some licensing does not occur because attorneys will simply refuse to license their works, regardless of any offer. Such "hold-outs" may exist for several reasons, including the hope of using those works to attract new clients and the fear of offending existing clients. Second, as the time spent negotiating and settling on a license causes both the price charged by the author to increase and the value placed on the document by the second attorney to decrease, there is a greater possibility that those transaction costs thwart the efficient re-allocation of resources. Third, the marketplace fails to take into account the public benefit derived from the wide dissemination of these works and, as a result, the total value of the dissemination would likely not be reflected in any licensing offer made to an author.

The underlying public benefit is access to adequate legal representation for more than simply our wealthiest citizens, and this benefit is a fundamental principle underlying the American justice system. Distribution of others' works permits well-articulated legal arguments to be accessible to a greater percentage of the public, and society undoubtedly derives a significant benefit from that accessibility. Moreover, society prefers lower legal fees not only as a matter of cultural values, they also permit society to protect parties' rights in a more economically efficient way. Unfortunately, that public benefit of lowering transaction costs is a "positive externality," and such externalities are not taken into account in the marketplace because of the impossibility of identifying the particular beneficiaries. As a result, the author is never offered the full value that would result from wider distribution of the work.

If litigation attorneys could be held liable for copyright infringement, the benefits associated with widely disseminated litigation documents would cease and there would be a substantial loss to public welfare resulting from the higher costs of legal representation. In light of this, and in light of the absence of any benefit to enforcing the copyright monopoly, the "fair use"

20. There is an ongoing debate as to whether application of fair use doctrine should be limited to circumstances in which there has been a demonstrable, significant "market failure," or whether it should apply more broadly to circumstances in which the social value of allowing an unauthorized use to continue outweighs the social value of additional authorship resulting from prohibiting a use. Compare Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1601 (1982) (advocating the former, and asserting that "the courts and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market") with Glynn S. Lunney, Jr., Fair Use and Market Failure: Sony Revisited, 82 B.U. L. REV. 975, 998-1000 (2002) (advocating the latter). This article need not wade into this debate because the choice of approach would not change the outcome. First, the presence of market failures in this situation indicates that the former approach would not prevent a finding of fair use. Second, because copyright's incentive is not needed in order to ensure the creation of additional litigation documents, the same conclusion would be reached if one were to consider the issue from the latter "balancing of public interests" approach.
doctrine should be applied to ensure that the presence of market failures does not prevent attorneys from adapting others’ litigation documents.21

II. COPYRIGHT CLAIMS BASED ON USE OF COMPLAINTS AND MEMORANDA OF LAW

Copying portions of other attorneys’ litigation documents,22 such as complaints and memoranda of law, is a longstanding practice.23 Yet only recently have attorneys shown a noticeable interest in protecting their works from such copying.24 This begs the question as to why this shift has occurred.

A. Societal Changes Facilitated and Promoted Attorneys’ Copying

Within recent years, the business world in general has become more aware of the value of intellectual property, whether in the context of copyright or of trademark and patent. A business may improve its chance for success in today’s ultra-competitive marketplace through its capability to recognize and protect its own intellectual output, as well as the efficient use of other businesses’ intellectual resources, where possible.25 While lawyers may occasionally react slowly in recognizing marketplace realities, they have apparently begun to consider how to value, control and use their intellectual output.

This increase in awareness parallels two other societal changes, which, taken together, strongly suggest that the volume of unauthorized uses of another’s legal documents is significantly greater than it was even twenty-five

21. An author will also not be able to seek damages under state law claims such as plagiarism, conversion, and misappropriation, because application of those claims to use of another’s creative work is preempted by copyright law. See, e.g., Dielsi v. Falk, 916 F. Supp. 985, 992-93 (C.D. Cal. 1996) (noting that plaintiff’s claim for conversion, even if re-cast as a claim for misappropriation or plagiarism, is clearly preempted by federal copyright law because the claim “makes the crucial allegation that Defendants have wrongfully used and distributed Plaintiff’s work of authorship”).

22. Litigation often raises the issue of “work product protection” of certain documents. However, in this article the term “work” does not imply any claim to that protection; rather, it is used solely in the copyright sense of the fixed expression of an idea.

23. See Birch, supra note 2, at 257 (noting the frequency of such copying).

24. See id. at 257 (noting the absence of discussion regarding this issue, and remarking that, “[o]ne would think in the current competitive and lawyer-mobile environment that characterizes the practice of law, firms would pay more attention to their own intellectual property.”).

years ago. The first, the increasingly widespread use of computers, and in particular the internet, has permitted greater access to others' works and has simplified copying; thus, likely increasing the rate at which copying occurs. Yet it is reasonable to assume that this same technological development has also caused such copying to become more conspicuous.

It is certainly undeniable that access to other lawyers' litigation work product has been expanding. During most of the twentieth century, the most likely avenue through which an attorney would have access to another's work would be if he fortuitously received it from the other side during the course of litigation. Thus, once an attorney had received a document from opposing counsel, the attorney would be able to make use of those opposing arguments in a subsequent case. Occasionally an attorney might learn of a relevant case through the professional "grapevine" or from a legal journal or newspaper. If so, before having someone go to the appropriate courthouse and transcribe or photocopy the document, he would have had to evaluate whether the possible value of it justified the cost and effort involved in procuring it.26 Such a laborious process could have been quite expensive if the case file was not in a nearby courthouse.27 Over the past five to ten years, however, it has become increasingly easy for attorneys to search for and obtain filed documents concerning issues of interest. As many courts have placed their dockets online and require parties to file documents electronically, it is becoming more common to make the documents themselves similarly accessible.28

The same technological advances have made the process of incorporating another's work into one's own less complicated. Fifty years ago, in order for an attorney to use a portion of another attorney's memorandum of law,29

26. As onerous a process as that must have been, it was made more feasible by the invention of photocopyers. Before photocopyers were common, obtaining copies of documents was plainly even more costly and time-consuming.

27. See Brian Craig, Legal Briefs: Helpful but Also Hazardous, in 13 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 132 (Mary A. Hotchkins ed., 2005) (noting, until recently, the limited availability of legal briefs from other jurisdictions at courts and local law libraries).


29. As discussed infra note 157 and accompanying text, it is virtually impossible for a lawyer to incorporate an earlier complaint or memorandum of law in its entirety, because some of the facts will specifically relate to the individual case.
the attorney would have had to: (1) modify, by hand, the useful portion so it flowed smoothly within the new document; (2) ask his secretary to re-type that portion and incorporate it into the new document, and then (3) confirm that the portion was correctly re-typed. If the information contained in that portion was relatively simple to comprehend and explain, it was probably almost as easy to simply re-write the passages as to copy them. In today’s world, an attorney would be able to scan the relevant portions into her computer or perhaps, even more conveniently, download documents that are accessible online. Slight modification to incorporate the copied material into his own brief is but a few keystrokes away. Given the ease by which an attorney can use computers to discover, acquire and copy filed documents which may be useful in other contexts, it would not be surprising to see an increase in the use of others’ legal documents.

This same ease of access to filed documents, however, also makes it easier for attorneys to uncover documents that include portions copied from their works. In the case of Milberg Weiss, because the documents were used in the same litigation as the copyrighted works, discovery of the allegedly copied complaints was almost inevitable. Even when the putative infringing work is not used in the same litigation, however, modern technology increases the chance that an attorney will uncover his copied work. In addition to the more general-purpose search engines, there is already software specially made that permits someone to search documents for portions lifted from his works.30

The growth in lawyers’ professional mobility represents the second change in society. Compared to twenty-five years ago, lawyers are substantially more likely, over the course of their careers, to work for multiple employers.31 Like others engaged in the development of intellectual property, lawyers are likely to be tempted to take with them to their new employers work that they, or others working for their former employer, created. Even


31. See Daniel J. Dilucchio, Is There Still Room at the Top, 153 N.Y. L.J. 355 (July 27, 1998) (discussing the changes in the legal field and asserting that lawyers will work for multiple employers during the span of their careers).

32. In theory, there are other means, such as non-competition agreements, by which an employer could discourage former employees from using such documents. See 17 U.S.C. § 201(b) (2000) (“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.”) (emphasis added). Until now, use of such agreements has been fairly rare. See Birch, supra note 2, at 257 (“[N]on-competition agreements are rare in the law firm environment”). If they were to become more common, the threat of a misappropriation claim would be likely to discourage copying regardless of the existence of a viable infringement claim. While it is conceivable that an attorney with sufficient bargaining power could bargain for the right to keep authorship of his own works, it would be virtually un-
litanation documents which are not easily discoverable or accessible to others in the legal community may become the object of appropriation by a law firm's former lawyers.

This change in mobility raises a crucial question: When an attorney employed by a law firm produces a work for a client, who owns the copyright to that work? Copyright law is clear that ownership of the copyright vests in the "author" of a work.33 While this crucial term is not defined within the Copyright Act, it is generally recognized that the "author" of a work is the person who has created the work itself.34 If the creating attorney is a sole practitioner, she will be the author of any works she creates. However, the copyright statute expressly states that an employer is the author of any work that an employee creates within the scope of employment.35 As a result, a law firm associate's legal works are "works made for hire," and the law firm itself is considered the author of those works.36

A natural question arises: Why doesn't the client himself own the copyright on any work created on his behalf? After all, the client is paying for the work. The result rests on the fact that when a solo practitioner or law firm is retained by a client, it is as an independent contractor. The solo practitioner or law firm does not enter into an employer-employee relationship with a client. Because legal documents do not fall within any of the categories of works which may be "specially ordered or commissioned,"37 the attorney, or the law firm at which he is employed, not the client, is considered the author/copyright owner of those works.38 The client possesses only a proprie-

heard of for a potential associate to have such power, though a sought-after partner might. See Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984) (holding that a partner, as co-owner, was not liable for copyright infringement because a partnership has co-ownership of all company assets, including copyrights); Dead Kennedys v. Biafra, 37 F. Supp. 2d 1151, 1153 (N.D. Cal. 1999) (noting that determination of ownership is controlled by state laws and does not fall under copyright laws).

34. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 214 (1954).
36. See Birch, supra note 2, at 259 (recognizing that "while the actual composer of the law firm's work may be the 'associate' toiling away in the catacombs for little more pay than that of a federal circuit judge, the law firm, by operation of law, becomes the 'author' entitled to copyright ownership").
37. See 17 U.S.C. § 101 (2000) (amended 2005) (defining a "work made for hire" as either: (1) one "prepared by an employee within the scope of his or her employment"; or (2) one of nine specified categories of specially ordered or commissioned works, provided that the parties expressly agree in writing that the work is made for hire); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 738 (1989).
38. The client may bargain for an assignment of the copyright, but few clients ever think to do this. See Birch, supra note 2, at 260 (noting that it is the attorney or law firm, not the client, in which the copyright vests, and commenting on the infrequency as to which clients think about the copyright ownership of works created on
tary interest in the actual, physical papers created for purposes of her legal representation. An exception occurs when the attorney is employed "in-house" by a company. Where the "client" is also the employer, the employer is the "author" of any work created in the scope of his employment, as it would be in any other employer-employee relationship.

In any case, a viable copyright infringement claim may accrue from an attorney's discovery that there has been unauthorized use of one of his documents only if the portion that was "lifted" contains copyrightable expression. If such documents lack the qualities for copyrightability, then, barring non-copyright-related restrictions, those documents are freely available for copying. Subsection B explains why many memoranda of law, as well as a few complaints, are entitled to at least some copyright protection. Subsection C discusses what a plaintiff must demonstrate in order to establish a *prima facie* case of infringement.

Thus, if a law firm creates a form which is intended to be used repeatedly by the client (e.g., a form employment agreement), theoretically the client would need to acquire an assignment of, or license for, the firm's exclusive right to reproduce the work in copies. Only by such an assignment or license could the client be certain that it preserved its ability to legally re-use any copyrightable expression within a legal document. See *id*. However, in real life, few clients actually arrange such a formal transfer of rights.

39. See, e.g., Resolution Trust Corp. v. H., P.C., 128 F.R.D. 647, 650 (N.D. Tex. 1989) (ordering law firm to turn over to client the entire contents of Plaintiff's file; permitting law firm to retain copies); Fed. Land Bank v. Fed. Intermediate Credit Bank, 127 F.R.D. 473, 479 (S.D. Miss. 1989), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989)) (denying a law firm's motion to quash or modify a deposition subpoena *duces tecum* served on it by receiver for a former client for those documents owned by the former client); Corrigan v. Armstrong, Teasdale, Schaflky, Davis & Dicus, 824 S.W.2d 92, 98 (Mo. Ct. App. 1992) ("Without regard to property rights, the attorney must be required to turn over to his client any documents for which the client has bargained and paid. . . . Moreover, there should be no question that the client has a right of access to the attorney's work product for information needed to understand those documents. Likewise, if the attorney is hired to represent the client in processing or defending a claim, the client at a minimum must be entitled to those papers required by law to be filed in an appropriate tribunal and those related papers essential or necessary to make the former papers meaningful. These may include pleadings, depositions, interrogatories and the like."); Minn. Law. Prof'l Responsibility Bd., Op. 13 (1989) (declaring that the attorney-client relationship imbues the client with an absolute ownership interest in any final and filed products of the legal relationship). See also Brian J. Slovut, *Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client's File*, 76 MINN. L. REV. 1483, 1510 (1992).

40. An example of a non-copyright-based restriction might be a clause in an attorney's employment contract that prohibits the use of any law firm documents after the attorney leaves the firm.
B. The Copyrightability of Complaints and Memoranda of Law

One might assume that the copyrightability of the most common types of litigation documents would have been settled long ago. In fact, that issue has not been addressed by the courts at all.\textsuperscript{41} Litigation documents plainly fall within the type of goods covered by the Copyright Act because they meet the definition of "literary works"\textsuperscript{42} and they are "fixed in a tangible medium."\textsuperscript{43}

In addition to those physical requirements, however, copyright protection also has content requirements; it is restricted to only expression which is

\textsuperscript{41} The only discussion at all regarding documents created within the course of litigation occurred in \textit{Khandji v. Keystone Resorts Management, Inc.}, in the context of a discovery dispute, not an infringement action. 140 F.R.D. 697 (D. Colo. 1992). Several decisions have addressed copyright infringement claims concerning contracts, and in those cases have concluded that the works at issue did not qualify for copyright protection. But the differences in the approach to creating contracts, on the one hand, and the complaints and memoranda of law, on the other hand, however, indicates that those decisions are not applicable. \textit{See infra} notes 72-74 and accompanying text (discussing cases in which boilerplate contract language was held to lack sufficient originality to justify copyright protection).

\textsuperscript{42} 17 U.S.C. § 101 (2000) (amended 2005) (defining "literary works" as "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").

\textsuperscript{43} \textit{Id.} (stating that a work is fixed only when "its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived . . . for a period of more than a transitory duration"); \textit{id.} § 102(a) (In order for a work to be copyrightable, it must be "fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). Note that many courts have already expanded their rules so that the term "papers" encompasses electronically filed documents. \textit{See, e.g., FED. R. CIV. P. 5(e)} ("A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules."). As more and more courts require that documents be submitted solely via electronic media, however, some of those documents may never be conventionally printed. \textit{See also Whiteman, supra} note 28, at 469 (noting that "[w]ithin a few short years after the submission of the first CD-ROM brief, electronic filing has become a reality in a large number of federal and state courts."). While the issue has not been entirely resolved, thus far most cases have taken the view that a document existing solely in electronic form may still meet the "fixation" requirement. \textit{See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993)} (holding that transferring a computer program from a permanent storage device into a computer's random access memory (RAM) created a "fixed" copy for the purposes of establishing copyright infringement); \textit{Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983)} (holding that a computer program in object code embedded in an electronic read-only memory device (ROM) chip is copyrightable).
both original and creative. In general, any particular original, creative expression will be protected from any substantially similar expression. Copyright protection is not an all-or-nothing proposition – if only some portions of a work fulfill those criteria, those portions may be entitled to copyright protection even though the remaining portions may not.

Sufficient originality is present in any expression that is "independently created" – in other words, that is not the result of substantial copying, either directly or indirectly, of an earlier work. Because only a particular expression of an idea is protected, not the idea itself, a copyrighted work may contain ideas that have appeared in earlier works and still contain original expression. The idea/expression distinction is important because, of course,

44. 17 U.S.C. § 102 (2000) (amended 2005) (providing copyright protection to "original works of authorship"). See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351 (1991) (declaring that the requirement of originality in a copyrightable work is a "constitutionally mandated prerequisite . . . [that] predate[s] the Copyright Act of 1909"). See also Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 547 (1985) (noting that the only portions of works – that is, the only expressions – entitled to copyright protection are those "that display the stamp of the author's originality"); Nimmer, supra note 14, § 2.01, at 2-6 ("[C]opyright protection subsists only in 'original works of authorship'").

45. Nimmer, supra note 14, § 2.01[B], at 2-14 to 2-15 ("[C]reativity . . . [does] not mean an 'inventive leap' or [a] 'new idea' in the sense of never having been conceived before. Instead, it refers to matter bearing a spark of distinctiveness in copyrightable expression.").

46. See infra Part II.C. (discussing infringement). Thus, the idea of two star-crossed lovers on opposite sides of some family or clan dispute has been the subject matter of numerous works of fiction, yet each original expression of that idea is copyrightable. See, e.g., Romeo and Juliet, Shakespeare; West Side Story, Leonard Bernstein; Julie and Romeo: A Novel, Jeanne Ray, Onyx Books; Reissue edition (June 12, 2001); Walt Disney Prods. v. Filmation Assocs., 628 F. Supp. 871, 877 (C.D. Cal. 1986); Universal City Studios, Inc. v. Film Ventures Intern., 543 F. Supp. 1134, 1140-41 (D.C. Cal. 1982).

47. Feist, 499 U.S. at 348 ("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.").


49. 17 U.S.C. § 102(b) (2000) (amended 2005) provides: "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."
many legal documents contain similar ideas and arguments. For example, a party’s memorandum of law may contain the argument that a complaint contains insufficient facts to support a particular element of a claim. The presence of that idea in earlier legal documents does not preclude portions of the memorandum of law from being original if the author did not copy the expression of that idea from another source.

Even where a second author draws upon an earlier work when creating his own, the qualitative amount of variation required to create a new, protectable work is fairly low. According to the Supreme Court, all that the change must amount to is anything more than a “trivial variation;” that any “distinguishable variation” resulting from an author’s independent creative endeavor “will constitute sufficient originality.”

By their nature, complaints are generally filled with factual allegations unique to the circumstances of the case. Many memoranda of law may also contain portions of original writing, in which the relevant principles of law are applied to the facts of the case. Thus, portions of many complaints and memoranda of law would be sufficiently original so as to satisfy the requirement for copyright protection.

It is the other requirement — sufficient creativity — that is the greater hurdle faced by legal documents, even though in order to be copyrightable, a work need possess only “some minimal degree of creativity.”

See also Harper & Row, 471 U.S. at 547 (“[N]o author may copyright facts or ideas”); Nimmer, supra note 14, § 2.01[B], at 2-14. Thus, the idea of two star-crossed lovers on opposite sides of some family or clan dispute has been the subject matter of numerous works of fiction, yet each original expression of that idea is copyrightable. See, e.g., Romeo and Juliet, Shakespeare; West Side Story, Leonard Bernstein; Julie and Romeo: A Novel, Jeanne Ray, Onyx Books; Reissue edition (June 12, 2001); Walt Disney Prods. v. Filmation Assocs., 628 F. Supp. 871, 877-78 (C.D. Cal. 1986); Universal City Studios, Inc. v. Film Ventures Intern., 543 F. Supp. 1134, 1140-41 (D.C. Cal. 1982).

50. Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., 155 F. Supp. 2d 1, 24, 40 (S.D.N.Y. 2001), aff’d on other grounds, 277 F.3d 253 (2d Cir. 2002); Alfred Bell & Co., 191 F.2d at 102-03. See also Nimmer, supra note 14, § 2.01[B], at 2-12 (citation omitted) (“Any ‘distinguishable variation’ of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author’s independent efforts, and is more than merely trivial.”).

51. See Birch, supra note 2, at 259 (“One might not be surprised to find an experienced practitioner able to create, from his or her own intangible experience and thoughts, a legal document from the proverbial ‘whole cloth.’”). Cf. infra notes 72-74 and accompanying text (discussing cases in which boilerplate contract language was held to lack sufficient originality to justify copyright protection). Judge Birch comments that “[n]evertheless, it would be prudent to contemporaneously document the sources utilized by the drafter whether they be cerebral or tangible.” Birch, supra note 2, at 259.

52. Feist, 499 U.S. at 345 (“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.”). For many years, it was possible for a work to obtain copy-
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selves are not copyrightable; otherwise, the presence of a copyright would be an obstacle to free speech. Thus, the facts of a case, governmental works such as statutes, case law precedent, and facts relating to such precedent are all unprotectable. Along the same lines, simple compilations of facts involving no creative judgment or discretion have been found to lack the requisite creativity. Examples of such factual compilations include judicial case reporters and telephone books. Some protection may be permitted if the author used her judgment in choosing which facts to include and how to arrange the collected facts so they may be used effectively by readers. Even in those cases, however, the work is entitled only to the “thin” copyright protection, which precludes only verbatim copying of the selection and arrangement.

right protection, regardless of its creative content, if it was the product of sufficient effort. See id. at 361. Under this “sweat of the brow” doctrine, copyright protection permitted an author to obtain the benefits due him as a result of his hard work. See id. However, in Feist, the Supreme Court repudiated this doctrine, and held that at least some amount of creativity is required for copyright protection. Id. (holding that the simple alphabeticization of names in the white pages telephone book did not require sufficient creative discretion so as to warrant copyright protection). See Mid Am. Title Co. v. Kirk, 991 F.2d 417, 421 (7th Cir. 1993) (noting the Feist Court’s rejection of the “sweat of the brow” doctrine).

53. See 17 U.S.C. § 105 (2000) (prohibiting any copyright protection for governmental works, including statutes and judicial decisions); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) (holding that neither statutes nor judicial opinions were copyrightable). Once otherwise protectable creative expression is incorporated within governmental works, it becomes fact when referring to it in that context; Veeck v. S. Bldg. Code Cong. Int’l, Inc., 293 F.3d 791, 801 (5th Cir. 2002) (en banc) (holding that, even though model codes created by an industry organization were entitled to copyright protection, the towns’ building codes incorporating verbatim those model codes were in the public domain and thus may be freely copied, because “for copyright purposes ‘laws are facts’”).

54. 17 U.S.C. § 101 (2000) (amended 2005) (defining “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”).

55. Matthew Bender & Co. v. West Pub’l’g Co., 158 F.3d 693, 699 (2d Cir. 1998) (holding that because the page numbers were assigned by a computer program, they did not involve even a “modicum of creativity” and neither the page numbers nor the volumes were entitled to copyright protection).

56. Feist, 499 U.S. at 364.

57. Id. at 348. See also Mid Am. Title Co., 991 F.2d at 420-22 (reversing the grant of a motion to dismiss, allowing plaintiff the opportunity to prove that creation of the title commitment report at issue required sufficient “judgment and creativity in determining which information from the vast amount of land title data available sufficiently reflects upon marketable title”).

58. Id. at 348.
If all complaints were merely rote, objective compilations of facts organized in traditional or obvious forms, then, as one scholar suggested, they would lack the creativity required for copyright protection. Indisputably, the discretion available to the attorney writing a complaint is much less than is available to a novelist, who can create the setting, characters, and events based on personal whim. If a complaint is to be legally sufficient, it must assert the presence of proper jurisdiction and the claims at issue, as well as allege facts supporting those claims. Despite these strictures, however, an attorney may use significant professional judgment in drafting a complaint. While it is often clear that the inclusion of a particular fact would be either helpful or harmful to the plaintiff’s case, sometimes it is not, and in those situations the attorney must make the “creative” decision as to whether to include that fact in the complaint. For example, when representing a plaintiff who was in a car accident an hour after receiving new eyeglasses, her attorney might need to decide whether providing information regarding his client’s new eyeglasses suggests that her driving vision was accurate or whether that information might imply that her corrected vision was suspect. Even as to those facts which are most likely helpful, an attorney must decide how to balance the need to provide sufficient information to support the complaint (thereby preventing dismissal based on failure to state a claim) with the desire to withhold some information until after the defendant has answered the complaint. Careful organization of these facts may satisfy the pleading requirements yet avoid “showing the plaintiff’s hand,” which may be crucially important in a strategy to pursue early settlement negotiations.

Thus, the creativity used to draft complaints may vary substantially from lawyer to lawyer. When an attorney has essentially followed a simple formulaic approach – almost from a fill-in-the-blanks form book – she has used no discretion and therefore has not put forth the requisite creativity. In contrast, when an attorney has employed an unusually high level of professional judgment in the organization and arrangement of a document, the expression is arguably entitled to the “thin” copyright protection offered for compilations, thus precluding the verbatim copying of the selection and arrangement.

59. See Conley, supra note 6 (describing Professor Field’s comment equating a legal complaint and the brief real-time sports updates that it sent through its pagers, stating that both appeared to be non-copyrightable compilations of facts). In National Basketball Ass’n v. Motorola, the court had rejected the NBA’s misappropriation claim against Motorola, finding that the NBA had no property right in such factual descriptions. 105 F.3d 841, 846-47 (2d Cir. 1997).

60. Regardless of the right of fair use, an attorney using reproduced information is not permitted to assume the accuracy of the information in the original document. Rather, the attorney must engage in his own pre-filing investigation pursuant to Federal Rule of Civil Procedure 11. See Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1280 (3d Cir. 1994) (upholding Rule 11 sanctions against attorneys who filed a securities fraud complaint, because the attorneys failed to personally investigate the underlying law and facts that were copied from another complaint).
A smaller number of complaints include portions which go beyond a relatively dry recitation of facts and include more expressive language, with the intention of not only satisfying pleading requirements but also of placing the client's position in a sympathetic light. A more dramatic expression is particularly likely when the plaintiff intends to seek interim remedies in which the equities of the case are expressly relevant, such as in consideration of awarding temporary restraining orders and preliminary injunctions. But in other situations as well, such as when the plaintiff may anticipate a motion to dismiss, a smart attorney will draft the complaint using more expressive language, recognizing that the judge's view of the facts has the potential to alter the disposition of that motion.

 Portions of a memorandum of law are even more likely to contain such creative expression. As with a complaint, it is clear that if an attorney is properly representing his client, his work will support his legal position with a great deal of factual information which cannot be protected, including the details of the case, and any relevant law and precedential statements. For example, an adequate memorandum of law in opposition to a motion to dismiss a complaint should include: (1) a recitation of those allegations in the Complaint which satisfy the elements of each claim; and (2) a citation to any statutory or common law that suggests the allegations in the complaint satisfy those elements. Even more so than the complaint, memoranda of law are likely to be written with the purpose of swaying the judge towards the perception that equity favors the author's client. Developing this sympathetic presentation requires carefully chosen language in order to frame the factual and legal landscape and the supporting arguments. Thus, many memoranda of law contain expression which goes far beyond simple factual compilation, and indeed which is as substantial as in other clearly protectable factually-based works, such as a biography.

 Nevertheless, even though some imaginative expression in complaints and memoranda might satisfy the low standard for creativity, much of it will run afoul of the "merger" doctrine. This doctrine acts as a check on copyright's potential to allow an author to monopolize the ability to communicate,
by either precluding or limiting the protection available to a work’s expression. Where there is a fairly limited number of ways to express an idea in a relevant context, courts offer only narrow protection to such a work, deeming only verbatim copying to be infringing. Where the possible expressions are extremely limited, courts decline to provide any protection.

When drafting a complaint, there are significant limitations as to how the ideas must be expressed. The allegations of a complaint are supposed to be entirely factual. Legal “terms of art” and other practical restrictions limit the number of ways many ideas can be expressed to such a significant extent that any expression can be fairly said to merge with the underlying idea. First and foremost, the plaintiff’s attorney is limited by the need to write allegations in such a way so that she will be able to discern from the answer what the defendant has admitted and what he has denied. Likewise, generally a court’s rules will instruct that the contents of each paragraph should be as limited as possible. Similarly, while the selection and organization of facts in a complaint may be sufficiently creative, the very minimal number of practical options available in order to create a legally sufficient complaint suggests that, in most cases, a court would deny copyright protection to even that aspect of a complaint. Nevertheless, it is conceivable that a small number of complaints, particularly those seeking a more emotional reaction, may contain assertions that could be expressed in a fairly large number of ways and thus avoid the “merger” doctrine.

A memorandum of law, however, is a less restrictive document, both in format and in substantive scope, than a complaint. As a result, there may be sufficient diversity of choice in formulating an argument such that the expression used may avoid the “merger” doctrine and receive some protection.

64. Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967) (holding that the sweepstakes rules based on social security numbers was not copyrightable because there were a limited number of ways in which to express the basic idea of sweepstakes instructions).


66. Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (holding that a pin designed in the shape of a bee was not copyrightable because there were only a limited number of ways in which to make a pin in the shape of a bee and the idea of a bee pin thus merged with the expression of the idea). When there is a “merger” of an idea and expression, copyright does not provide protection, for copyright only protects expression of an idea, not the idea itself. See NIMMER, supra note 14, § 13.03[B][3].

67. See, e.g., FED. R. CIV. P. 10(b) (“All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings.”).
Discussion in a memorandum regarding an issue will naturally be limited by the law and facts involved, but may be able to be expressed in a significant number of ways. For example, a memorandum of law discussing flag-burning may discuss the importance of free speech in a just society using fanciful, creative language, without any reference to facts. Such evocative expression may be indeed copyrightable, though the factual context may cause a court to protect the author only from verbatim copying of the expression.

Recognition that some expression within memoranda of law, and perhaps some complaints, may be entitled to copyright protection does not mandate the conclusion that all legal documents, or even all litigation documents, are similarly protectable. Contrast the above works with, for example, the answer to a complaint. Either by rule or by custom, an answer virtually always responds to the allegations in the order in which they are set forth, and the responses are limited to brief statements admitting or denying an allegation, or denying knowledge sufficient to form a response. While some answers may use original expression to identify which portions of an allegation are admitted and which are denied, the number of ways to express such information are very limited. Thus, an answer would generally not be copyrightable, either due to an absence of creativity or the merger doctrine.

This would be similarly true, for instance, of a document providing notice of a motion. Such a document is intended to provide notice to the court and other parties to the litigation as to the nature of the motion. As required by some civil procedure rules, this motion paper itself must provide a set of specific facts — usually, the title of the motion, the relief sought, the date and the location of any hearing related to the motion. Decades of use have established customary terminology for those documents, terminology which is used to fulfill this traditional notice function. Indeed, one would expect that the terminology was intentionally chosen for its commonality and general recognition as to meaning. Similarly, discovery documents, both the requesting documents and responsive documents, would almost never contain copyrightable expression. Many definitions used in discovery requests are expressly established by federal and local rules of procedure, and the meaning

68. See, e.g., Fed. R. Civ. P. 8(b).
69. Of course, allegations which are part of a counterclaim are likely to be drafted much like those in a complaint, and thus they may be as entitled to copyright protection as any complaint.
70. See generally S.D.N.Y. R. 7.1, 7.2, 11.1; Jt. Ky. Loc. R. 5.1, 7.1. Local Rules of the United States District Courts for the Southern and Eastern Districts of New York states that "[w]illful failure to comply with [the rules regarding structure and content of memoranda of law] may be deemed sufficient cause for the denial of a motion." S.D.N.Y. R. 7.1. Furthermore, Kentucky Local Rules require that "[a]ll motions must state precisely the relief requested." Jt. Ky. Loc. R. 7.1(a). An attorney must comply with the local rules in drafting any court papers or face possible denial; nevertheless, there is little room for creativity when drawing motions or other court documents.
of other words and phrases have been established by local understanding and/or common law. As a result, it would be rare for an attorney to include original and/or creative expression which would give rise to copyright protection.

It was for these same reasons – lack of originality, lack of creativity, and the presence of merged idea and expression – that courts rejected copyright claims on contract language, even where such contract provisions have undergone minor revision. As courts have recognized, parties choose such contract language precisely because of its accepted meaning, often established in case law. Using terms with accepted meanings helps parties ensure a mutual understanding and a “meeting of the minds.” Any modification to

71. A document is defined as any “writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.” FED. R. CIV. P. 34(a); S.D.N.Y. R. 26.3(c)(2). An opposing party may request information from a party in the form of an interrogatory, a written set of up to twenty-five questions that must be answered. FED. R. CIV. P. 33(a). Motions, memoranda, pleadings, and other court documents are defined by each court, however most courts require that the paper be plainly written, typed, or copied, be signed by the attorney, and be clear in its purpose. See, e.g., JT. KY. Loc. R. 5.1, S.D.N.Y. R. 11.1, N.D. CAL. CIV. R. 7-2(b), 7-4(a).

72. Donald v. Zack Meyer’s T.V. Sales & Serv., 426 F.2d 1027, 1030 (5th Cir. 1970) (finding that the variations from earlier contracts in the plaintiff’s forms were not meaningful, and declaring that “it may be fairly assumed that such variations in language as did occur in plaintiff’s ‘Agreement’ were deliberately insignificant, for he plainly wanted a valid conditional sales contract or chattel mortgage, and validity was an attribute which the earlier forms had been proved through use to have’’); Donald v. UARCO Bus. Forms, 478 F.2d 764, 766 (8th Cir. 1973) (rejecting the argument that transporting language previously used in sales contracts to service contracts constituted sufficient creativity and originality to warrant a copyright); M.M. Bus. Forms Corp. v. UARCO, Inc., 472 F.2d 1137, 1140 (6th Cir. 1973) (“Even though word arrangements have been altered, they are at best merely a paraphrasing of earlier forms. . . . [W]e see no distinguishable variation in any of these simplistic legal arrangements that can be attributed to the drafter’s own creativity.”). Cf. Cont’l Cas. Co. v. Beardsley, 253 F.2d 702, 706 (2d Cir. 1958) (upholding the copyright protection of insurance forms and instruments, but noting that “in the fields of insurance and commerce the use of specific language in forms and documents may be so essential to accomplish a desired result and [highly] integrated with the use of a legal or commercial conception”). Compare ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 85 (2004) (noting that, as of the late 1990s, one attorney copyrighted his “sharecropping” contracts between the growers and the farmworkers). Simply because the attorney, Peter M. Gwosdof, may have filed his contracts with the Copyright Office, however, does not mean that the documents are protectable under copyright law.

73. It is possible that, where a contract must address an entirely new issue – for instance, applying old legal concepts to new technology – it will contain a few original, creative phrases and sentences. However, like other contracts, the parties are likely to attempt to incorporate as much of the well-established language as possible,
the provisions with the intent to create original expression would generally have to be insignificant, because the uncertainty created by a change in language would often be unacceptable to one or more parties. The need for insignificant modification arises because the parties run the risk of having a court interpret a more substantial change as signifying that the party intended to deviate from the provision's well-established meaning. As a result, there is also a strong argument that the concepts in such contracts and the expressions used have been functionally merged. And similar arguments could be made for most provisions in wills and other estate and trust documents which have well-established meanings upon which attorneys rely. Overall, transactional documents are much more likely to contain only merged expression.74

In sum, complaints and memoranda of law may either lack the requisite originality and creativity, or may run afoul of the merger doctrine. However, it is possible that some documents may contain portions deserving of copyrightable expression. If so, incorporating into a new work enough of the copyrightable portions so that those sections are “substantially similar” to the original work constitutes infringement, unless such copying constitutes fair use.

C. Claims for Infringement Based on Use of Complaints and Memoranda of Law

Assuming that some litigation documents may contain copyrightable expression, the question then turns to what activity would infringe on that copyright. The exclusive rights provided to a copyright owner are: (1) the right to reproduce the work; (2) the right to adapt the work (i.e., to create derivative works based upon the original); (3) the right to distribute the work; (4) the right to publicly display the work; and (5) the right to publicly perform the work.75 Anyone who violates any of these rights, without a valid defense, infringes on the copyright.76 A person may infringe on the right to reproduce

in order to establish clarity. Thus, even contract provisions incorporating new elements are not likely to be entitled to copyright protection.

74. The law firm accused by Judge Birch’s friend could defend its conduct using a similar argument. See Birch, supra note 2, at 256. Even assuming, because condominium law was a developing area, those real estate documents contained original expression addressing new issues, one could expect that the documents attempted to apply well-established real estate terminology to the extent possible, in order to distinguish the particular provisions where modifications occurred. It is possible that the number of ways in which the underlying concepts could have been expressed was so limited by common real estate language that the merger doctrine would have applied.

75. 17 U.S.C. § 106 (2000 & Supp. 2004). These rights are given for an extended, but limited, period of time. See id. §§ 301-305. The right to publicly perform is applicable to literary works adapted by plays and dance routines. Id. § 106(4). Conceivably, the right to publicly perform could be violated if another attorney made unauthorized use of copyrightable material during an oral argument.

76. Id. § 501(a).
a work even if she copies only a portion of the protected expression. Thus, when an attorney incorporates portions of another’s copyrightable expression into her own complaint, the creation of that “derivative work” may infringe both the right to reproduce the document and the right to adapt the document. If the author has filed the document with a court, there may be infringement not only of the rights of reproduction and adaptation, but also of the right to distribute the work.

In order to bring a successful infringement action, a copyright owner must demonstrate: (1) that the defendant made some use of the protectable elements of the copyrighted document in creating his own document, and (2) that, as a result of copying those protectable elements, there is “substantial similarity” between the copyrighted document and the accused document—that is, a member of the targeted audience would find the two documents recognizably, materially similar. In many situations, an attorney may admit

77. 17 U.S.C. § 101 (2000) (amended 2005) defines a “derivative work” as “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.” It also includes “[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . . .”

78. The author presumes for the sake of this article that the act of filing does not cause the legal documents at issue to lose their copyright protection. Indisputably, when musicians have submitted copies of their songs to the court as exhibits in order to resolve a copyright dispute, those songs have not lost their copyrighted status. Of course, other parties in a case (or in other cases) must be able to freely quote a filed document in order to accurately describe the legal position taken by the filing party. However, such use is simply a very specific “fair use” of the work, and not an indication of a waiver of copyright protection.

79. Only a legal or “beneficial” owner of one of the exclusive rights has standing to sue. Id. § 501(b). A “beneficial” owner would be a party with a license to exercise the rights which have been infringed, but only if it is an exclusive license (i.e., the license provides that the copyright owner will license those rights to no one else during the duration of the license). See, e.g., Silvers v. Sony Pictures Entm’t Inc., 402 F.3d 881, 884-85 (9th Cir. 2005); Warren v. Fox Family Worldwide, 328 F.3d 1136, 1143-44 (9th Cir. 2003).

80. See, e.g., Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 711 (S.D.N.Y. 1987) (defining the “substantial similarity” test as “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work”), Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1001 (2d Cir. 1995) (considering whether “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”) (quotation omitted) (alteration omitted); Atari, Inc. v. N. Am. Philips Consumer Elec. Corp., 672 F.2d 607, 614 (7th Cir. 1982) (The test for “substantial similarity” is “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 protectible expression by taking material of substance and value”).

http://scholarship.law.missouri.edu/mlr/vol71/iss2/4
to copying another’s work. However, where the plaintiff must rely on circumstantial evidence instead to demonstrate that copying has occurred, he must prove both a reasonable probability that a defendant had access to that work and a sufficient similarity between the copyrighted and accused works. Such access would be clear when the accused law firm obtained the copyrighted work through a prior litigation. While access may be less clear in other situations, several courts have inferred access where the work at issue was in the possession of a third party who had done business with both the plaintiff and the defendant. A plaintiff could argue that the court is an analogous “third party” maintaining the filed litigation documents as public records (unless they are under seal). As more courts make filed documents available through the Internet, a plaintiff will find it easier to argue that the defendant had access to the work. It is true that, unlike in private commercial situations in which the third party might bring the existence of the copyrighted work to the attention of the defendant, a court will not alert interested attorneys to the filing of a particular work. However, newer resources are making it progressively easier to locate filed documents. The older public database of federal court information, PACER, is in the final stages of being replaced by the new, more comprehensive Case Management/Electronic Case files (CM/ECF) System, through which attorneys may both file case documents electronically and access publicly available court files. These databanks do not include all

81. Peel & Co. v. The Rug Market, 238 F.3d 391, 394-95 (5th Cir. 2001) (“A bare possibility [of access] will not suffice; neither will a finding . . . based on speculation or conjecture.”).

82. See id. at 394-95 (denying summary judgment, finding a likelihood that the Indian manufacturer had access to plaintiff’s rug designs through the American distributor, who would have seen plaintiff’s designs from visits to showrooms and trade shows, as well as in catalogues); Kamar Int’l, Inc. v. Russ Berrie & Co., 657 F.2d 1059, 1062 (9th Cir. 1981) (holding that access has been inferred where the work was in possession of a third party that had done business with both plaintiff and defendant); Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350, 354-55 (4th Cir. 2000) (finding evidence of access sufficient where design of logo sent to intermediary who had immediate access to person involved with football team).

83. See also Birch, supra note 2, at 262 (explaining that, in his story, the complaining attorney’s demonstration that the unauthorized use had occurred was “easily accomplished” since both sets of the purportedly copied documents “had been filed as public records” – because these were real estate documents, presumably they were filed with the appropriate governmental authorities).

84. PACER (Public Access to Court Electronic Records) provides electronic access to court information, including case reports and dockets from Federal District, Appellate, and Bankruptcy courts. See What is PACER?, http://pacer.psc.uscourts.gov/pacerdesc.html (last visited Apr. 29, 2006).

85. Case Management CM/ECF Electronic Case Files, http://www.uscourts.gov/cmecf/cmecf_about.html (last visited Apr. 27, 2006) (“CM/ECF not only replaces the courts’ old electronic docketing and case management systems, but also provides courts the option to have case file documents in electronic format, and to accept fil-
courts, but as time goes on it will be increasingly fair to assume that an accused attorney had access to a publicly filed work. In any case, the plaintiff need not prove to a certainty that the defendant accessed the work; the more similar the works' expressive portions, the easier it is for a plaintiff to prove that there is a reasonable probability that the defendant had access. Thus, under some circumstances simply the ability to obtain the document electronically may suffice to demonstrate that the defendant accessed the copyrighted work.

"Substantial similarity" between the copyrighted and accused works can be shown only by comparing the work's copyrightable expression. A legal document's non-copyrightable elements - e.g., the facts of the case, the facts and holdings of precedent, statutes, and other expression which is unoriginal or subject to the doctrine of merger - cannot be used to prove that the works are substantially similar. What sort of "similarity" must be shown depends on the level of copyright protection afforded the particular expression allegedly copied - either protection from only verbatim copying or wider protection from paraphrasing. Thus, how much of a work must be copied in order to be "substantially similar" varies from case to case. As described earlier, a

86. Susan Wakeen Doll Co. v. Ashton-Drake Galleries, 272 F.3d 441, 450 (7th Cir. 2001) ("The more a work is both like an already copyrighted work and ... unlike anything that is in the public domain, the less likely it is to be an independent creation." (citation omitted) (emphasis omitted)).

87. Substantial similarity means that a defendant may be liable for copyright infringement if the copying of plaintiff's copyrighted expression is substantial. See, e.g., Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74-76 (2d Cir. 1997). There are various bases for finding substantial similarity, including (1) "fragmented literal similarity"; and (2) "comprehensive nonliteral similarity." "Fragmented literal similarity" is not a complete literal similarity, but is often "no more than a line, or a paragraph, or a page or chapter of the copyrighted work" that at some point "become[s] substantial so as to constitute ... an infringement." NIMMER, supra note 14, § 13.03[A][2] at 13-53. "Comprehensive nonliteral similarity," on the other hand, refers to "the situation where there is comprehensive similarity but no word-for-word or other literal similarity." Id. § 13.03[A][1] at 13-36. In fact, the fact that the defendant merely paraphrased, rather than literally copying the work does "not preclude a finding of substantial similarity." Id.

88. Stone v. Perpetual Motion, LLC, 87 Fed. Appx. 51, 52 (9th Cir. 2004) ("In evaluating substantial similarity, we filter out elements that are not protectable.").

89. See supra notes 65-66 and accompanying text.

http://scholarship.law.missouri.edu/mlr/vol71/iss2/4
legal document, such as a complaint or memorandum of law, is inherently so fact-specific that an attorney using another’s work would always need to tailor it in order to address the particular dispute at hand. Most frequently, one would expect an attorney to copy only limited amounts from the original work. However, copying large portions of creative expression would likely cause documents to be substantially similar.

Nevertheless, even in many situations in which substantial similarity has been demonstrated, an infringement claim should not succeed. The next section discusses why copying work by attorneys for use in other cases would generally constitute “fair use.”

III. USING THE "FAIR USE" DOCTRINE IN ADDRESSING MARKET FAILURES

A. The Purpose and Limitations of Copyright Law

"Intellectual property" is a most unfortunate misnomer. There is a strong argument for concluding that the economic windfall provided by copyright law is not intended to protect any purported "property rights" of authors, but rather to benefit society by encouraging new original, creative works.90 Historically, the immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975))); id. at 432 ("The sole interest of the United States and the primary object in conferring the monopoly, this Court has said, “lie in the general benefits derived by the public from the labors of authors.”) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)). The most recent predecessor to the Copyright Act of 1976 was the Copyright Act of 1909. 17 U.S.C. § 26 (1909); See David R. Johnstone, Debunking Fair Use Rights and Copyduty under U.S. Copyright Law, 52 COPYRIGHT SOC'Y U.S.A. 345, 353-54. The House Legislative Report on the 1909 Copyright Act states:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

torically, lawmakers have expressed great skepticism of any government-granted monopolies over scientific and artistic works. In the eighteenth century, the English monarchy bestowed monopoly rights on favored companies, including publishing houses, in order to limit the dissemination of information and to provide those companies with substantial profits. Yet, despite that skepticism, the Constitution includes a specific provision permitting Congress to enact copyright law "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." The public benefits from its access to original, creative works. Further, some limited monopoly protection is desirable because in its absence, there would be little economic incentive to produce new works, because otherwise once an author intro-

(emphasis added); THE FEDERALIST No. 43 (Alexander Hamilton) (stating that "[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law.").

91. V WRITINGS OF THOMAS JEFFERSON 45, 47 (Ford ed. 1895) ("[T]he benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."). See Graham v. John Deere, 383 U.S. 1, 5-6 (1966): (discussing the clause in reference to patent laws, the court emphasized that, "[t]he clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the useful Arts. It was written against this backdrop of [the grants by the British monarchy during the 18th century].").

92. See Edward C. Walterscheid, Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause, 7 J. INTEL. PROP. L. 315, 355-56, 363-64 (2000). The royalty's abuse led to several cases (for example, Davenant v. Hurdis (1599) and Darcy v. Allin (1602)) in which the English courts held that such monopolies were against principles established by common law. Id. at 321-22. After the abuses re-appeared a few decades later, Parliament enacted the Statute of Monopolies, declaring void all government grants of exclusive commercial rights as contrary to English law. Id. at 324. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 n.12 (1984) ("Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws.").


94. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Sony, 464 U.S. at 429. See also Lunney, supra note 20, at 994-95 n.93; Glynn S. Lunney, Jr., The Death Of Copyright: Digital Technology, Private Copying, and The Digital Millennium Copyright Act, 87 VA. L. REV. 813, 870 (2001) ("Copyright proponents insist that copyright serves such a public purpose by providing a needed incentive for the creation of works of authorship. Because works of authorship are relatively easy to copy, proponents insist, too few works will be created in the absence of protection. Only by protecting these works against copying, proponents continue, can we ensure the public an adequate supply of creative works."); Edwin C. Hettinger, Justifying Intellectual Property, 18 PHIL. & PUB. AFF. 31, 47-48 (1989) (declaring that, but for the right to exclude others for some period of time, there would be inade-
duced a new work into the marketplace, competitors would instantly copy it, the price would be driven down to the marginal cost of additional copies, and the author would be unlikely to receive sufficient profit, or "economic rent," to cover her initial authorship costs. With a temporary monopoly, however, the author is able to set a price for copies of his work (as well as derivatives) somewhat above their marginal cost, allowing him to earn a profit on the sales of some copies, once the costs of creation have been recouped. That profit provides an incentive to create new works. Thus, the "market value of the work" is the value of those copyright exclusivities in the marketplace.

When copyright’s exclusivities provide more financial incentive than is necessary to encourage additional works, however, it does not serve its purpose. Likewise, to the extent that copyright’s exclusivities fail to consider the benefit to society of additional access to certain works, it does not serve its purpose of generating "progress." Only upon dissemination of new works does society derive benefit from their creation; thus, where public access to certain works has significant social benefit, greater progress may result from wider dissemination than the progress which would result from additional works.

Under modern economic theory, and in particular the "Coase theorem," broad copyright protection creates little risk of harming society. The presumption is that even if copyright initially allocates rights to a party for whom those rights have relatively little value, the marketplace will remedy any improper allocation by re-allocating those rights to whomever they are adequate incentives to produce intellectual property, resulting in a less than "socially optimal output").

95. Lunney, supra note 20, at 995 ("[I]f we grant the author a legal right to prohibit unauthorized copying, thereby enabling her to set a price for her copies somewhat above their marginal cost, then the author will earn some economic rent and have a corresponding incentive to create the work.") See Alfred C. Yen, When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law, 62 U. COLO. L. REV. 79, 81 (1991) ("By giving authors the ability to prevent others from reproducing, distributing, performing, displaying, or basing new works on original material, copyright creates a property right which authors may exploit commercially. The possibility of realizing such financial gains gives authors incentives to create new works from which the public may benefit."). Such "cost" includes not only the actual cost of the materials used, but also the "opportunity cost" associated with the loss of the time spent on creating the work.


97. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 41 (6th ed. 2003). Posner notes that the use of a copyrighted work by one party does not reduce society’s use of the protected work.
most valuable. This theory assumes that each individual in society is “rational” – that is, an individual will pursue any transactions which he expects will improve his aggregate amount of satisfaction – and that this pursuit of satisfaction leads to a series of mutually beneficial transactions through which individuals exchange resources, such as the right to use a work, money, or time. Imagine a situation in which a second party values the right to use a work at a higher amount than the copyright owner values the ability to prevent that use – i.e., the right to exclusive use of the work. In theory, the second party will be able to license the work by paying the copyright owner an amount that is more than the value the copyright owner ascribed to the exclusivity but less than the value the party ascribes to the right to use the work. As a result, both the copyright owner and the second party are better off.

Under some circumstances, however, the marketplace does not re-allocate the resources distributed by copyright law as modern economic theory would envision. This failure occurs because modern economic theory professes to predict results only where “perfect” market conditions exist. In this hypothetical perfect market, certain assumptions apply, including that: (1) the goods are private, not public, goods – i.e., that use of the resource by one of the two parties limits use of that resource by others in society.

98. Id. at 51 (“[I]f there are gains from trade rational parties will trade . . . [and] the initial assignment of property rights will not affect the ultimate use of property if transactions are permitted”). This article takes this basic premise as true, even though there is evidence that the initial assignment of intellectual property rights is not neutral because “people appear to value a commodity that they own much more than an identical commodity that they do not own.” Jeffrey J. Rachlinski & Forest Jourden, Remedies and the Psychology of Ownership, 51 VAND. L. REV. 1541, 1551-59 (1998) (discussing this so-called “endowment effect,” and its impact on the Coase theorem). Nonetheless, the impact of this endowment effect, while interesting, is beyond the scope of this article.

99. See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960) (describing this basic economic theory); Paul A. Samuelson & William D. Nordhaus, Economics, 73 (15th ed. 1995) (Economics theory relies on the idea that “people tend to choose those goods and services they value most highly.” Id. Consumers choose goods that are most useful to them, that provide the most satisfaction.).

100. See Yen, supra note 95, at 84.

101. See Samuelson & Nordhaus, supra note 99, at 31. A “perfect” market exists when all goods and services are traded on the market and no firm or consumer can affect the market price of a commodity. An efficient allocation of resources is produced in a “perfect” market.

102. The perfect market is characterized by the presence of perfect information and the absence of transaction costs, monopolies, externalities, and public goods. Id. at 31. The failure of these conditions destroys the market’s presumptive advancement of the social welfare. Id. Another is that there are no natural monopolies. A natural monopoly – in contrast to the governmentally-created monopoly, such as copyright, is one that is based on a party’s exclusive control of the supply of a good, rather than a
(2) the parties possess perfect information – *i.e.*, that the parties possess all the information needed to accurately assess the value of a good;\(^ {103}\) (3) there are no transaction costs – *i.e.*, that the transaction process itself does not cost the parties anything;\(^ {104}\) and/or (4) the parties involved in the transaction are the only ones who would be affected by it – *i.e.*, that there is no benefit or harm caused by transferring the resource that will not be accurately accounted for by the transacting parties (such benefit or harm is referred to as a “positive externality” or “negative externality,” respectively).\(^ {105}\)

In the real world, however, one or more of the assumptions will almost inevitably be invalid. As a result, some transactions which would be mutually beneficial do not occur – *i.e.*, there will be a “market failure.”\(^ {106}\) For instance, every transaction has costs associated with learning about the opportunity and engaging in it.\(^ {107}\) In some situations, these expenses raise the cost of the good to a point at which the parties no longer find the transaction to be mutually beneficial – at least one party would be paying more, including transaction costs, for the good than that party values it.

In other situations, the parties involved in the potential transaction are not the only ones who would be affected by it.\(^ {108}\) Sometimes a re-allocation of resources greatly benefits the public. Yet there may be no practical method by which the market can determine either the identity of those who benefit or the precise value of the goods to those individuals. As a result, it is impossible for the public to add the value received to the transaction – in such a case,

\(^{103}\) *Id.* at 153-54.

\(^{104}\) *Id.* at 272.

\(^{105}\) *Id.* note 97, at 7 (noting that if transaction costs are zero, then the ultimate use of the property is unaffected by the initial assignment of the property).

\(^{106}\) *Id.* note 99, at 32. Externalities are typically associated with imposing costs on society, known as negative externalities, such as pollution or toxic waste. See also ANDREAS PAPANDREOU, EXTERNALITY AND INSTITUTIONS, 58-64 (1994). The author notes that externalities are typically costs and benefits that are not taken into account in determining the market price.

\(^{107}\) *Id.* note 105, at 144-45 (1994) (asserting that market failure is the result of lack of information and that market failure is caused by transaction costs).

\(^{108}\) *Id.* at 145 (“Information comes as close to a panacea for market failure as one can get. If there was just complete information there would be no economic problems to contend with.”).

\(^{109}\) *Id.* note 99, at 32. In this case, parties outside the transaction may receive benefits or pay costs for which no economic transaction has occurred. Samuelson notes that there are goods for which no private production would occur because it would be impossible to obtain the economic benefit for such widespread public use of the good. *Id.* Examples include public roads, the national weather service, and the support of basic science.
that benefit is a "positive externality." Unfortunately, when two parties determine whether to engage in a transaction, they "rationally" consider only the values that they personally assign to the resources, and do not take into account these societal benefits. As a result, in some situations in which that positive externality is present, the private parties involved in the potential transaction conclude that a transaction would not be mutually beneficial – even though the benefit to the public could, if recompense was possible, make the transaction beneficial to both private parties. As a consequence, where there is a significant positive externality to an activity, the calculation of the benefit from the transaction may severely undervalue the advantage of the transaction, causing fewer of the transactions to occur than would be socially optimal.

As explained in Part IV, at least several of these market failures are present in the context of licensing litigation documents. As a result, the market cannot be counted on to properly disseminate those documents. However, as discussed generally below, and in application to litigation documents at the end of Part IV, the Copyright Act’s “fair use” provision permits courts to address these market failures.

B. Using the Fair Use Defense to Address Market Failures

The Copyright Act’s “fair use” provision is a means by which courts can adjust for the imperfect market conditions which thwart the corrective transactions predicted by Coasean theory, thereby ensuring that “courts . . . avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” In its most recent decision on fair use, Campbell v. Acuff-Rose, the Supreme Court expanded the use of that provision so that the defense may be used in additional circumstances of market failure, including circumstances in which the public benefit of permitting dissemination of a work clearly outweighs any de minimus harm to the copyright owner.112

109. Id. at 347 (Externalities are involuntary exchanges of costs or benefits, imposed upon others outside the marketplace). Negative externalities are typically associated with imposing costs on society, known as negative externalities, such as pollution or toxic waste. Id. at 32.

110. A “perfect” market exists when there are no externalities. Id. at 27-32. Market equilibrium is achieved, absent market failures, where buyers are willing to pay the price for which sellers are willing to provide the product. Id. Because there is no transaction associated with externalities, the seller has no motivation to consider the additional cost or benefit of the externality. Id.

111. Kelly v. Arriba Soft Corp., 336 F.3d 811, 817, 820 (9th Cir. 2003) (citation omitted) (noting that “[t]he Copyright Act was intended to promote creativity, thereby benefiting the artist and the public alike.”).

The "fair use" defense was codified in section 107 of the Act, which states:

The fair use of a copyrighted work . . . 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.113

During section 107's codification, Congress expressly and repeatedly indicated that the section was meant to continue the common law "fair use" doctrine as "an equitable rule of reason," balancing a variety of interests.114 Congress was careful to leave open the circumstances in which equity would favor a finding of "fair use": "the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute."115 The statutory language was not meant to limit a court's ability to consider whatever issues or concerns might be rele-

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114. H. REP. NO. 94-1476, at 65-66 (1976) (emphasis added). See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) ("[Section 107] identifies various factors that enable a court to apply an 'equitable rule of reason' analysis to particular claims of infringement.") (footnote omitted); Campbell, 510 U.S. at 584-85 (drawing on a House Report and reasoning from Sony to determine that the character of a work is one factor to be weighed against others); Sony, 464 U.S. at 455 n.40 ("Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests.").
vant to reaching an equitable conclusion: "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." Applying this philosophy, courts have concluded that Congress' choice of the term "include"—rather than "are"—in describing the four factors indicates that the listing is not meant to restrict what a court may consider in determining equity, but rather simply provides useful guideposts. Moreover, certain categories of "fair uses" were listed solely in order to "give some idea of the sort of activities the courts might regard as fair use under the circumstances," and the Supreme Court has recognized this, repeatedly acknowledging that the list was not intended to be comprehensive.

As early as its 1984 decision in Harper & Row Publishers, Inc. v. Nation Enterprises, the Supreme Court had recognized that section 107 could be used to address the impact of market failures when they would lead to inequitable results. In Harper & Row, the plaintiff's publishing house asserted a copyright claim against the magazine The Nation which arose out of the unauthorized use of verbatim quotes from the soon-to-be-published memoir by President Ford regarding political events during and shortly after the Watergate years.

The Harper & Row Court summarily reviewed the first three factors in section 107. The factual "nature of the copyrighted work" weighed in the defendant's favor because "fair use" is more easily justified for non-fiction

116. Sony, 464 U.S. at 448 n.31 (emphasis added). See also Campbell, 510 U.S. at 577 ("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.").

117. See Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) (Posner, J.) ("[T]he four factors that Congress listed when it wrote a fair use defense (a judicial creation) into the Copyright Act in 1976 are not exhaustive and do not constitute an algorithm that enables decisions to be ground out mechanically.") (citing Campbell, Harper & Row, and Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 522 (7th Cir. 2002)). See also Campbell, 510 U.S. at 577-78 (observing that the statute uses the terms "including" and "such as," and that the statute's definitional section indicates that those terms suggest that subsequent listed information serves an "illustrative and not limitative" function) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)).

118. See Harper & Row, 471 U.S. at 550 (citing S. REP. NO. 94-473, p. 61 (1975)).

119. See, e.g., id. at 561 (explaining that the listing in section 107 "was not intended to be exhaustive").

120. Id. at 546-47.

121. Id. at 543.

122. Id. at 547 n.2.

123. Id. at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").
works for two reasons. First, works of a primarily factual nature may impact other societal objectives, and as a result, there is "a greater need to disseminate factual works than works of fiction or fantasy." In contrast, most fictional works are created primarily for artistic pleasure; thus protection of an author's exclusive rights will likely only thwart a defendant's attempt to generate entertainment. Second, there are often non-copyright-based incentives to create factual works, which minimize or even eliminate the need for the copyright's monopoly protection.

On the other hand, the Court found that the two other section 107 factors - the purpose and character of the use, as well as the amount copied - clearly weighed against a finding of "fair use." The use was clearly for a commercial purpose and the portion copied was a critical segment of the work.

Nevertheless, the Court stated that the first three factors are unimportant in light of the fourth factor - "the effect of the use upon the potential market for or value of the copyrighted work" - which, the court declared, was "undoubtedly the single most important element" in determining whether a defendant could successfully assert "fair use." The unauthorized use in Harper & Row likely had a significant impact on the sales of the copyrighted work because it beat that work to the marketplace. As a result, the Court concluded that, in such a circumstance, the defendant's use was not "fair use."

In anticipating the equity of permitting an unauthorized use when it would not harm the value of the work, the Court implicitly recognized the underlying economic principle that, barring any harm to the copyright owner, there should have been a transaction between the putative infringer and the copyright owner. Presumably, the amount charged by the copyright owner

124. See id. Fictional works are closer to the "core" purpose of copyright, and thus deserve greater protection than factual, because fictional works, created with the primary intent of providing artistic pleasure, do not have any separate basis for economic value other than the value associated with providing copies, and derivative works, to the public. Id. at 594 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 496-97 (1984) (Blackmun, J., dissenting) ("Informational works, like the Ford manuscript, that readily lend themselves to productive use by others, are less protected." (quotations omitted))). Accord Stewart v. Abend, 495 U.S. 207, 237 (1990). See also Compaq Computer Corp. v. Ergonome Inc., 387 F.3d 403, 410 (5th Cir. 2004) (upholding jury decision finding fair use of a manual indicating ergonomic hand poses).

126. Id. at 564.
127. Id. at 561-66.
128. Id. at 562-65. Indeed, the court went so far as to declare that "[i]n the fact that a publication [is] commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." Id. at 562. However, this position was later repudiated by the court in Campbell. See infra note 135.
130. Id. at 569.
131. Id. at 566-67.
would be an amount less than the value that putative infringer ascribed to the right to use the work. Thus, both parties would be better off than before the transaction. The failure to engage in such a transaction indicates that at least one of two types of market failures had occurred.

First, it is possible that at least one of the parties lacked sufficient information to adjudge how the other valued the rights involved, and that as a result the misinformed party took a bargaining position that prevented the other party from increasing his aggregate satisfaction. Second, it is possible that even though the relative value of the rights should have permitted a transaction that would have been mutually beneficial, the “transaction costs” – the costs of either in becoming aware of the possible transaction and/or in engaging in the transaction – might have been so high that the parties could no longer formulate a transaction in which both sides could be assured of increasing his aggregate satisfaction. Harper & Row’s approach suggests that, properly applied, the “fair use” defense should address those market failures, sanctioning an unauthorized use where there would be no harm at all to the market value of the copyrighted work. 132

The Harper & Row Court’s approach to “fair use” permitted the Court to cure several types of market failure; however, its conclusion that the existence of any harm defeats the defense was overly simplistic. That conclusion ignores situations in which greater dissemination would create a significant public benefit but, because that public benefit is a positive externality, the market fails to respond to that benefit with the anticipated transaction recompensing the copyright holder and re-allocating the right to use the work. The Supreme Court rectified Harper & Row’s error in Campbell, in which Acuff-Rose claimed that the Roy Orbison melody for “Pretty Woman” was infringed when used for a parody by the rap group 2 Live Crew. 133 In that case, the Court repudiated the Harper & Row assertion that “fair use” can only be found when there is no harm to the value of the copyrighted work, declaring that a finding of “fair use” is not precluded by some market harm:

This factor, no less than the other three, may be addressed only through a “sensitive balancing of interests.” Market harm is a matter of degree, and the importance of this factor will vary, not only

132. This theoretical conclusion ignores the fact that the defendant who succeeds in using the fair use defense of this basis is not required payment of any amount to the plaintiff copyright owner. Cf. Campbell v. Acuff-Rose Music, 510 U.S. 569, 578 n.10 (1994) (discussing cases “raising reasonable contentions of fair use where there may be a strong public interest in the publication of the secondary work,” and suggesting that a “copyright owner’s interest [might] be adequately protected by an award of damages for whatever infringement is found” (quotations omitted)). Having endured the costs of the litigation, the plaintiff ends up in a worse position than the plaintiff would have been in had the market imperfections not existed.

133. Campbell, 510 U.S. at 572-73.
with the amount of harm, but also with the relative strength of the showing on the other factors. ¹³⁴

The Court also rejected the Harper & Row conclusion that a commercial use is presumptively not a “fair use.”¹³⁵ Indeed, although the Court briefly referred to “the other three” factors listed in section 107, the Campbell Court gave greatest weight to a factor not listed: the social benefit presumed to be proffered to the parody.¹³⁶ Considering the likelihood of market harm, the Court rejected as speculative all of the plaintiff’s arguments as to damage to the original work.¹³⁷ As a result, the Court suggested that, barring evidence that the copyright owner was likely to produce a derivative rap song and that the market value of such a song would be damaged by the parody, the creation of the new work was likely to be a “fair use.”¹³⁸ The Court gave no

¹³⁴. Id. at 590 n.21 (citation omitted).
¹³⁵. Id. at 584 (rejecting the notion that the commercial nature of the use could by itself be a weighty consideration, observing that “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research . . . are generally conducted for profit”). Accord NXIVM Corp. v. Ross Inst., 364 F.3d 471, 477-78 (2d Cir. 2004).
¹³⁶. Campbell, 510 U.S. at 579 (recognizing that “[l]ike less ostensively humorous forms of criticism, [parody] can provide social benefit . . . .”). Indeed, parody has been described by one scholar as: “[A]n important vehicle for both artistic and societal criticism, accomplishing its purpose by exposing the mediocre and the pretentious. Consequently, this art form influences the development of popular culture and, generally, the development of society.” Michael A. Chagares, Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies, 12 COLUM. J. L. & ARTS 229, 230-31 (1988) (quotation omitted). The relative insignificance of the parodied subject – a fictional work regarding a particular man’s attention towards a woman walking down the sidewalk – suggests a relatively low value of such a critique, in comparison to the value of critiques of factual works involving more direct social or political viewpoints.
¹³⁷. Campbell, 510 U.S. at 579 (rejecting a presumption of harm because the parody at issue was “transformative” – i.e., that it transformed the original work into something else, by “add[ing] something new” to the original work, “with a further purpose or different character” than for which it was first used, or “altering the [original] with new expression, meaning, or message.”); id. (“[T]he 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 court explained that whereas “[w]hen the second use is an exact duplication for commercial purposes, the inference of market harm is appropriate because it can be presumed that any identical copy competes with the original,” where the work had been transformed, “market substitution is at least less certain, and market harm may not be so readily inferred.” Id. at 591-93 (expressing skepticism that a significantly transformed work would cause any harm to either the value of exact copies of the original work, or the value of any derivative works).
¹³⁸. Id. at 591-93 (Although “the licensing of derivatives is an important economic incentive to the creation of originals,” the court concluded that it was unlikely
weight to any psychological harm which the plaintiff might suffer from a parody of its work.\textsuperscript{139} Rather, any psychological distress weighed in favor of "fair use," because it would likely preclude a marketplace response to the defendant's interest in appropriating the work: "[T]he 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."\textsuperscript{140} It should be recognized, however, that the unwillingness or inability of a potential parodist to pay the extreme amounts needed to compensate the copyright owner for the presumed psychological distress does not, strictly speaking, constitute a market failure. If the value to the parodist of using the work was high enough, the parties would theoretically engage in such a transaction.

In comparison, the benefit to society did constitute a positive externality causing a market failure, though the Court never expressly described the effect of the parody in those terms.\textsuperscript{141} As a result, \textit{Campbell} reveals that, where dissemination of some works creates a significant social benefit unlikely to be addressed by private transactions, particularly one likely to be greater than that the copyright owner would intentionally create a similar derivative – that is, a parody – of its own work); \textit{id.} at 593-94 (noting that neither party had provided sufficient information regarding the relevant markets for both Acuff-Rose's original work and its parody, and remanding the case to permit the defendant to pull the "evidentiary hole.") \textit{Cf.} Harper v. Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 567 (1985) ("[O]nce a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression.").

139. See \textit{Campbell}, 510 U.S. at 529.

140. \textit{Id.} at 592 (concluding that it was unlikely that the copyright owner would intentionally create a similar derivative – that is, a parody – of its own work).

141. Because the \textit{Campbell} court never expressly discusses the public benefit as a "positive externality" or the cause of market failure, it is not clear whether a market failure is a requirement for finding fair use if the market value has been harmed, or whether the defendant could succeed simply upon a showing that the public benefit outweighs the harm. Nonetheless, one can read the surmise the Court's requirement of a market failure from its statement that "[e]ven favorable evidence [of an absence of harm to the market value], without more, is no guarantee of fairness." \textit{Id.} at 590 n.21 (citing Pierre N. Leval, \textit{Toward a Fair Use Standard}, 103 \textit{HARV. L. REV.} 1105, 1124, n.84 (1990)). The court referred to a hypothetical situation in which a film producer’s "appropriation of a composer's previously unknown song that turns the song into a commercial success," and commented that, the boon to the song does not make the film's simple copying fair." \textit{Id.} Presumably if there was no market harm to the work, any balancing would favor a finding of fair use. The Court's conclusion that a benefit would not necessitate such a finding implies that an additional circumstance, such as a market failure, must be present to overcome the copyright owner presumed right to choose to whom to market his work. In that hypothetical, there was no market failure that prevented the appropriator from arranging to license the song. \textit{See Leval, supra, at 1124.}
any minimal harm to the market value of the work, it is appropriate to use the “fair use” doctrine to address the inherent market failure.

The Campbell Court’s approach was not new, but rather a return to the similar “fair use” analysis used in *Sony Corp. of America v. Universal City Studios, Inc.* In considering the use of a video recorder to copy programs in order to “time shift” them to convenient viewing times, the *Sony* Court declared that merely because each work was likely copied in its entirety did not weigh heavily against a finding of “fair use.” The Court focused instead on the fact that the use of the Betamax videocassette recorder in order to permit more convenient viewing provided a significant public benefit: the “expansion of public access to freely broadcast television programs.” This result was particularly valuable, the Court concluded, because television had become the dominant medium by which important news and information was communicated to the public. Given the defendant’s showing of a societal benefit, the Court required plaintiffs to demonstrate “some meaningful likelihood of future harm” in order to defeat the assertion of “fair use.” While the plaintiff theorized that it might be harmed in several indirect ways, the Court found that this harm was “speculative and, at best, minimal.”

142. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (stating that its conclusion was based partially on the “nature of a televised copyrighted audiovisual work”). It is somewhat perplexing that, despite the noted significance of the works’ nature, the Court engaged in virtually no discussion regarding that factor. Because the copied works most likely included fictional as well as factual works, the “nature of the work” itself should arguably have weakened the claim for fair use.

143. *Id.* at 454 (noting that the public interest in making television broadcasting more available was previously cited by the Court in *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508 n.12 (1983)). The defendants argued that any time-shifting increased viewer access to television programming because otherwise viewers would have had no way to ever see those programs (except possibly in reruns). *Id.* at 454.

144. *Id.* at 454-56. However, the court did not limit the public interest at stake to news programs or programs regarding public policy. *Id.* Compare *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985) ("Nor do respondents assert any actual necessity for circumventing the copyright scheme with respect to the types of works and users at issue here.") (emphasis added).


146. *Id.* at 451, 454 (quoting the district court, and concurring with its conclusion as to the description of the harm). The television producers and broadcasters at issue in *Sony* were not paid by the viewing public for their works, the Court found that they could not demonstrate any direct loss from the viewing public’s ability to copy and watch the works at a later time. *Id.* at 451-53 (noting that the district court found plaintiff claims of harm were based on many unproved assumptions, including: (1) that the public’s viewing of taped shows would be improperly monitored, resulting in a loss of ratings for those shows; (2) that “live television or movie audiences will decrease as more people watch Betamax tapes as an alternative”; and (3) that “time-shifting will reduce audiences for telecast reruns”).
of the failure to show anything but "nonminimal" harm, the Court concluded that the societal benefit from the additional dissemination was sufficient to demonstrate "fair use." The benefit to society from the defendant's assistance in disseminating television programs clearly constituted a positive externality causing a market failure, although, as in Campbell, the Sony Court never expressly described the effect in those terms.

Thus, in analyzing whether the unauthorized use of litigation documents constitutes "fair use," one should not limit consideration to whether the copyright owner may suffer some injury. Rather, one must consider the likelihood and extent of such harm, and balance it against the likely benefit to society from the dissemination of those types of works in light of any failures which may prevent recognition of that benefit by the market and hence thwart appropriate curative transactions.

IV. "FAIR USE" OF LITIGATION DOCUMENTS

As suggested by Campbell and Sony, the "fair use" defense is appropriate either: (1) where the unauthorized use causes no meaningful harm to the work's value, and thus does not impair the incentive to create new work, or (2) where, despite the fact that the benefit from the dissemination greatly outweighs some harm to the work's value, a market failure will prevent the putative infringer and copyright owner from being able to engage in the mutually-beneficial transaction expected by the economic theory underlying copyright law. Focusing on the "fair use" doctrine's ability to restrain copyright's overbreadth is important, because "[t]oo often in fair use analyses, courts and commentators leap from the fact that some consumers are obtaining unauthorized access to the conclusion that such free riding will necessarily impair the incentives for creating the work."

Indeed, at least one commentator has fallen into this trap when examining an attorney's unauthorized appropriation of another's litigation work, concluding that the ability of other attorneys to "free ride" is a sufficient reason to defeat a claim of "fair use." It is true that the two factors generally given less weight by the Court - the purpose and character of the use, and the

147. Id. at 456 (describing the failure of the plaintiffs to demonstrate the likelihood of any harm that was "nonminimal"); id. at 450 ("[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create").

148. Lunney, supra note 20, at 1000. See Compaq Computer Corp. v. Ergonome Inc., 387 F.3d 403, 412 (5th Cir. 2004). In Compaq, the Fifth Circuit affirmed the jury finding of "fair use" as to the computer manufacturer's appropriation of portions of a copyrighted book describing ergonomically correct hand positions for computer users, because "[t]he jury could . . . have reasonably concluded that [the distribution of the unauthorized material] had little or no impact on the potential market." Id. at 411.

149. Wang, supra note 15, at 736-39 (arguing that other attorneys' use of copyrighted complaints could not constitute fair use).
amount copied – would likely weigh against finding an attorney’s copying to be fair use. However, as discussed in detail below, sanctioning that copying would not diminish the intended incentive. A litigation attorney who is paid per-hour to create a work and who cannot repeatedly charge for creating that work or using it in any derivative works has sufficient incentive to create new works without any post-creation “market value” to be harmed by an unauthorized use.150 And even though any minimal harm which might exist would be far outweighed by the benefits in most situations, several market failures conspire to prevent the expected re-allocative transactions.

In the absence of any actual market harm, the question arises as to why an attorney might sue for copyright infringement. The answer lies in the plaintiff’s ability to seek statutory damages under the Copyright Act. While a plaintiff is always free to request her actual damages,151 she has the option of choosing to receive statutory damages instead.152 The award of statutory damages is whatever the court “considers just” within the limits provided.153 In cases in which the plaintiff cannot prove that the infringement was “willful,” the Copyright Act allows a sum of “not less than $750 or more than $30,000” per infringement.154 However, if the court finds that the defendant’s behavior was “willful,” the court has discretion to “increase the award of statutory damages to a sum of not more than $150,000” per infringement.155 The potential for any significant award in such an outcome might cause a defendant to settle, unless it is clear that a court would find that his appropriation constituted “fair use.”156

A. Section 107 “Fair Use” Factors Applied to Litigation Documents

Given the growing indications that infringement claims regarding litigation works may be forthcoming, there is a need for a careful examination as to whether their unauthorized use may qualify as a “fair use.” If one were to engage in a cursory analysis, it might be tempting to reject the defense because the copying may be substantial in some unusual cases and because the allegedly infringing litigation documents are used for the same purpose as the originals. However, applying copyright’s protections so broadly would not

150. See infra notes 172-74 and accompanying text.
152. Id. § 504(c) (stating that “the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action.”)
153. Id.
154. Id.
155. Id.
156. Id.
comport with the goal behind providing those protections, and thus would not be appropriate for these types of works.

First, there is no market value that would be impaired by defining others' use as "fair use." The only benefit that copyright may provide to an original attorney is the ability to charge clients less when creating derivative works, but any increase in clients from that competitive advantage is highly speculative. Thus, there is no meaningful harm caused by other attorneys' use of those works and permitting any de minimus harm would not impair copyright's intent to foster those works. Second, wider dissemination of litigation documents unquestionably provides a benefit to society as a whole. The resulting lower cost of representation expands access to the courts, and increases the ability of members of the public to obtain restitution for harm at a cheaper price, the dissemination of those documents moves society towards a more optimal economic situation. Accordingly, permitting reliance on the "fair use" defense will prevent infringement claims from hindering public welfare without impairing copyright's goals.

1. The Amount of and Substantiality of the Portion Copied

In theory, because of the wide range in the "amount of and substantiality of the portion" of documents copied in different cases, this factor would vary in its implication to a "fair use" analysis. An unauthorized use is unlikely to be an exact copy of the work, unlike copying a favorite album, for instance, because, even in the most extreme situation, in which an attorney is representing another plaintiff in the same action, an exact copy of the work would not be appropriate to submit to the court. Let us return to Milberg Weiss's threatened copyright claims against other law firms representing other classes of plaintiffs in the same securities lawsuits. If Milberg Weiss's accusations were true, the attorneys copying that firm's complaints would undoubtedly have had to change the caption as well as several paragraphs describing the classes of plaintiffs represented. But such use is at one end of the spectrum, needing a minimum amount of revision because the unauthorized use was part of the same case.

More frequently, one would expect the unauthorized use to be fractional because the matter for which it is produced would likely overlap only to a limited extent with the parties and issues in the matter for which the original work was created. In such circumstances, an attorney may choose to copy

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157. Regardless of the right of fair use, an attorney using reproduced information is not permitted to assume the accuracy of the information in the original document. Rather, the attorney must engage in her own pre-filing investigation pursuant to Rule 11. See Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1280 (3d Cir. 1994) (upholding Rule 11 sanctions against attorneys who filed a securities fraud complaint, because the attorneys failed to personally investigate the underlying law and facts that were copied from another complaint).

158. See Conley, supra note 6.
only a portion from the original work, such as a particularly clear explanation of a complex legal concept, or a strikingly powerful analogy or description. As stated in the Introduction, attorneys regularly copy at least small portions of documents. However, insubstantial copying rarely comes to the attention of the copyright owner and one would imagine that attorneys would be reluctant to sue other members of the bar for relatively small violations. Moreover, in general, the smaller the amounts copied, the less confident the plaintiff may be about proving infringement. Thus, in practice, an attorney is likely to assert a claim only where the copying has been fairly substantial.

As the portion used becomes more significant, this factor would increasingly weigh against finding “fair use.” However, both the Sony and Campbell decisions indicate that the “amount of and substantiality of the portion” copied is given relatively little weight in comparison to other factors. Because the Copyright Act is concerned with protecting the author’s monopoly only to the extent necessary to ensure that the incentive to produce is retained, this factor is only relevant as an indication of whether the second work is likely to offer a substitute for the original. Such a substitution would violate the fourth factor, which “is concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright-holder.” As explained below, there are generally no subsequent “sales” of a litigation document because an attorney will not be able to re-bill later clients for the initial work. The absence of a subsequent market means that a later work, even where significant copying has occurred, cannot be considered a “market substitute.” As a result, this factor should be given little weight in regard to litigation documents.

2. The Purpose and Character of the Use

The “purpose and character” of another attorney’s unauthorized use of documents weigh against finding “fair use.” This Article takes as a presump-

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159. This assumes that the original and accused works are “substantially similar” so as to constitute infringement. 17 U.S.C. § 107 (2000 & Supp. 2004).
161. See Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984) (declaring that the fact that the entirety of each work was likely copied in its entirety did not weight heavily against a finding of fair use).
163. Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 110 (2d Cir. 1998); see Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624 (7th Cir. 2003) (“[T]here is no per se rule against copying in the name of fair use an entire copyrighted work if necessary.”).
164. See infra notes 172-74 and accompanying text.
tion that the purpose of the unauthorized use is representation of a client, as opposed to, for instance, creation of a more general-purpose product, such as a popular reference guide entitled "The 100 Best Briefs Concerning Civil Rights Cases." The Court has declared that the commercial nature of a use should not cause a presumption against "fair use," so it is not the for-profit nature of an attorney's practice which might defeat the defense. But, unlike the parodic use of the work in *Campbell*, any derivative use in the context of client representation would not be "transformative" because it would be used in the same way as the original work — *i.e.*, in a legal document in order to plead a client's case.\(^{165}\) As a result, the attorney-author of the work could presumably create the same type of derivative work, and thus this factor argues against a finding of "fair use."

3. The Nature of the Legal Works

As explained in greater detail below, the nature of the legal works supports a finding of fair use.\(^{166}\) Litigation documents, such as complaints and memoranda of law, are precisely the types of works for which protection is unnecessary. Litigation materials have no inherent artistic purpose. Even those legal documents containing sufficient creativity to warrant some level of copyright protection are (one hopes) primarily based on the application of the facts to law, rather than derived solely from the attorney's imagination. The client's goal in paying for legal representation is to win his case, or arrive at a favorable settlement, and any documents related to that representation are created solely with the intent to set forth the clearest, most persuasive argument in favor of the client's position.\(^{167}\) As others have noted, "copying is often encouraged by practitioners, rather than frowned upon."\(^{168}\) One court has gone so far as to find "no impropriety" in one attorney's plagiarizing of

165. *See discussion supra* note 137 and accompanying text (noting that the *Campbell* court described a transformative work as one of a different character than the purpose for which the original work was first used, or "altering the [original work] with new expression, meaning or message," *Campbell*, 510 U.S. at 579). *See also* Wang, *supra* note 15, at 737 (concluding that where there has been verbatim copying of an entire complaint, with the exception of revising the filing's attorney information, the work is not "transformative"). *Cf*. City Consumer Servs., Inc. v. Horne, 100 F.R.D. 740, 747-48 (D. Utah 1983) (holding that plaintiffs' counsel's compilation of documents collected in support of plaintiffs' conspiracy claims was copyrightable, but that plaintiffs' counsel could be ordered to produce the compilation, because the use in litigation is similar to use for scholarship and research purposes, and such transformative use does not constitute infringement).

166. *But see* Wang, *supra* note 15, at 737 (incorrectly concluding that the factual nature of the work weighs against a finding of fair use).

167. Matthew Band & Matt Schrues, *Dastar, Attribution and Plagiarism*, 33 AIPLA Q. J. 1, 13 (Winter 2005) ("[L]egal scholarship depends on credit for authorship, whereas practitioners' products are almost entirely functional.").

168. *Id.* at 13-14.
another's work. One might reasonably argue that the widespread copying by attorneys suggests, in and of itself, that most practitioners recognize that at least some copying qualifies as "fair use." As a result, the nature of the documents favors a finding fair use.

4. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

As indicated in Campbell, while some harm to the value of a copyrighted work will not necessarily defeat a finding of "fair use," the absence of such harm unquestionably weighs in favor of finding it. In light of this, it is important to recognize that others' unauthorized use of a litigation document is unlikely to cause any market harm to its value.

As explained in subsection 1, copying of litigation documents falls along a broad spectrum of use. On one end is the alleged extensive use made by other law firms of Milberg Weiss's complaints; on the other end is the more common circumstance, in which there is more limited use of a work, usually when the matter for which it is produced overlaps only to a limited extent with the parties and issues in the matter for which the original work was created. As a result, copying could warrant claims for violation of the right to copy, violation of the right to create derivative works, or both. Like the impact of creating exact copies, the market impact of creating derivative works must also be assessed because the inquiry into any harm to the market value of the work "must take into account not only of harm to the original but also of harm to the market for derivative works." Because the market for litigation services is quite different than the market for many other types of copyrightable goods, the market harm analysis is quite different than in many other markets for copyrighted works. Per-hour billing, as opposed to billing a fixed amount for a particular activity, is the common fee structure for litigation matters. Litigation attorneys, who bill

169. Fed. Intermediate Credit Bank v. Ky. Bar Ass'n, 540 S.W.2d 14, 16 n.2 (Ky. 1976) ("We see no impropriety in one lawyer's adopting another's work, thus becoming the 'drafter' in the sense that he accepts responsibility for it."). But see WPOW, Inc. v. MRLJ Enters., 584 F. Supp. 132, 136-37 (D.D.C. 1984) (impounding an application to the FCC on the grounds that the application contained an engineering design for an antenna that had been copied from a competitor's application, and finding that both the FCC and the professional association at issue disapproved of the use of another engineer's work product).


172. See Gillian K. Hadfield, The Price of Law: How the Market for Lawyers Distorts the Justice System, 98 MICH. L. REV. 953, 964 (2000) ("To begin, it is important to remember that legal costs are (usually) the product of hourly legal fees and the
per hour, possess a direct incentive to create their own litigation documents, both in the fee for the time spent as well as in the incentive of obtaining additional compensation by providing future legal services. If an attorney failed to create a work, or created a work of inadequate quality, she might very well lose her client. As a result, the attorney needs no additional incentive to encourage the creation of these works and maintaining copyright’s exclusivity would simply provide a windfall to the author without encouraging any “progress.”

This fee structure means that once the first client pays for the work, it no longer has an appreciable market value to the author. The American Bar Association has clearly opined that attorneys who charge per hour are not permitted to repeatedly bill for the creation of the same work.\footnote{\textsuperscript{173}} While an attorney may use portions of an earlier work he created, he may not simply charge for the use of a previously created document and when creating a derivative work, he could not receive additional compensation for creating the portions of the earlier work that was being recycled. Thus an attorney could bill only for the time needed to incorporate the original work into any later work.\footnote{\textsuperscript{174}} As a result, the most direct benefit of copyright protection – the ability to charge repeatedly for the same work or for derivatives thereof – does not apply.\footnote{\textsuperscript{175}}

\footnote{173. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993) (discussing this common approach to billing).}

\footnote{174. Id. ("When [a per-hour] basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill a client phantom hours. . . . [F]ee enhancement cannot be accomplished simply by presenting the client with a statement reflecting more billable hours than were actually expended."). See also MODEL RULES OF PROF’L CONDUCT R. 1.5(a)(1) (2002) ("Fees") (providing that a lawyer will charge a reasonable fee, based on the time and labor, novelty and difficulty of the questions involved and the skill necessary to perform the legal service properly); MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."). The ABA opinion recognizes that the lawyer who agreed to hourly compensation is free “to suggest additional compensation . . . because the lawyer was able to reuse prior work product on the client’s behalf.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993). However, it would be extremely unusual for a client who retained the attorney at a per-hour fee to agree to such a request.}

\footnote{175. Compare this profit structure to that of the common example of musical compositions. Recording companies often expend large amounts of money creating albums, obtaining no immediate compensation, with the expectation that they will be able to sell numerous copies of a particularly successful album. So long as the copyright owner is able to enforce that monopoly, he is able to charge as much for the ten-thousandth copy of the album as for the first copy and for any new derivative works based on the album. As a result, the exclusive rights to copy and creative derivative works are quite valuable.}
An attorney's interest in serving his client will fully motivate him to create any derivative work needed for a case, even if he cannot repeatedly charge for the underlying original work. Consequently, permitting unauthorized use of an attorney's work would not likely thwart copyright's goal of encouraging authors to create works that would otherwise not be created without the incentive of temporary market exclusivity. It is not surprising, then, to learn that "[t]he codes of professional responsibility that set the ethical standards for practicing lawyers are silent on the subject of plagiarism."

In theory, upon learning that the litigation requires the creation of a derivative work, the attorney could switch to a per-task fee structure and then charge the client an amount greater than what she would receive for the derivative if she charged on a per-hour basis. This is, however, an unlikely scenario. Most motions occur, and thus most memoranda of law are filed, after litigation is already underway. Understandably puzzled as to the mid-representation change, a client would likely ask what inspired it. Assuming that the attorney was ethical, he would have to provide the reason. Even if the attorney were to charge less than he would if he needed to create the document anew and billed per hour, one might expect that the client would be very unhappy at not reaping the full benefit of his attorney's previous creation. Given the other revenue that the attorney would expect to gain from his client during the remainder of the representation, it would behoove the attorney to avoid antagonizing the client over one document. It must be noted that in the uncommon circumstance that the useful expression is in a complaint or other document used towards the beginning of the litigation, if the attorney recognized its derivative nature from the start he could set his initial fees on a per-task basis, thereby providing savings to the client and additional income to himself. In that case, one could argue that the per-task fee is profit from the initial work, in which case there would be a corresponding market value. However, as discussed in Part II, it would be relatively rare for any portion of a complaint to be copyrightable.

Absent a direct effect on the work's market value, an attorney might claim that once he has created a work, his possession of it permits him to offer lower estimated fees for the litigation, compared to attorneys who are forced to bill time for creating a new work. Unauthorized use allows other attorneys to offer the same lower fees, and as a result the author loses his competitive advantage in attracting new clients. This theory is highly speculative for several reasons. First, price is not the only basis on which a client

177. The most obvious exception is a motion for an immediate remedy, such as a temporary restraining order or preliminary injunction.
178. The new work need not be, and indeed almost never is, drafted "from scratch." Other attorneys are always free to copy a concept, approach or even a specific analysis, as long as the expression was different. Moreover, because these legal documents are based primarily on facts, rather than fantasy, their protection is likely to be "thin," and thus limited to the precise language of expression.
chooses an attorney. Though some people might claim otherwise, most attorneys are not fungible goods similar to the proverbial "widget." Clients choose their particular attorney for a variety of tangible and intangible reasons such as reputation, personal comfort level, pre-existing professional relationship, location, etc. This is likely to be especially true in litigation matters, compared to many transactional matters. Because litigation is often an extended, intense experience, clients are more likely to give greater weight to factors other than cost. Thus, unless a potential client acknowledges that she decided to retain an attorney other than the author because the prices were the same, it would be virtually impossible for an author to demonstrate that he lost a client because of the absence of the competitive advantage provided by the copyrighted work.

Second, a litigation client does not generally retain an attorney for a particular document. Thus, when discussing the potential cost of litigation with a client, an attorney with a per-hour fee structure will give an estimate as to the amount of money it will take to reach a certain stage in a case. In order to reach each of those benchmark points, the attorney would be engaged in a wide variety of "projects" - fact-gathering, discovery, etc. Usually, the cost for all of these projects would be incorporated in the estimate needed to reach that stage. In many cases, only a minor portion of the estimated bill will be based on any particular document. Even at the beginning of a case, it may be expected that a client is likely to seek estimates of the costs past simply the filing of the complaint. It would be relatively rare that the cost of any one document would play such a significant role in a client's choice of attorney.\textsuperscript{179}

The damages theories set forth by Milberg Weiss are equally speculative, even assuming portions of its complaints were copyrightable.\textsuperscript{180} In the class actions in which Milberg Weiss alleged copying of its complaints, the firm represented one of several classes of plaintiffs.\textsuperscript{181} Milberg Weiss asserted that it was denied the coveted role of lead plaintiffs counsel in each of these cases\textsuperscript{182} because the attorneys representing other plaintiffs were able to

\textsuperscript{179} In contrast, many other types of works - particularly those created as part of transaction-side practice of law, such as wills and real estate documents - are billed out per document or per transaction. In those circumstances, it would be more appropriate to apply a compensation structure similar to that applicable to a song or other works which consumers seeking exact copies of, because the attorney may receive additional revenue for the same work from each client. As a result, an attorney who follows that fee structure may be able to argue that a defendant who makes any unauthorized use of one of his transactional documents harms the market value of his work, by providing a substitute for the plaintiff's work.

\textsuperscript{180} See Conley, supra note 6.

\textsuperscript{181} See id.

\textsuperscript{182} See Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1277 (3d Cir. 1994) (noting that, "[t]he lead attorney position is coveted as it is likely to bring its occupant the largest share of the fees generated by the litigation").
copy its complaints.\textsuperscript{183} The firm also argued that because it did not receive the lead counsel role, each of its classes did not receive as favorable an outcome, including larger final settlements, as it would have had Milberg Weiss been leading the plaintiffs’ action.\textsuperscript{184} In sum, the firm purportedly received less in the way of attorney’s fees than it would have due to its subordinated position, both because it did not receive the largest portion of the attorneys’ fees awarded, and because the entire pie of attorneys’ fees was smaller than it would have been otherwise.\textsuperscript{185}

Milberg Weiss’s argument that this asserted harm entitles it to copyright protection fails on several counts. First, the claim has a weak causation argument. It assumes that if the other firms had not copied the infringing aspects of the work, they would not have been able to create equally impressive complaints.\textsuperscript{186} It further assumes that the courts’ decisions to award the “lead counsel” position to other attorneys was based primarily, if not solely, on the superior quality of Milberg Weiss’s writing, as opposed to other factors that the court is required or permitted to take into account.\textsuperscript{187}

\begin{itemize}
  \item [183] See \textit{id.}
  \item [184] \textit{Id.}
  \begin{quote}
    “There are cases where Milberg lost the lead plaintiff role to a firm that does not have the same expertise, experience and resources,” Herman said. The result [of Milberg not taking the role as lead counsel to the plaintiffs], sometimes, is a lower settlement than Milberg’s expertise might have brokered, or a case getting dismissed when it shouldn’t have been, he adds. “I think that [Milberg Weiss lawyers] are saying that they would have done a better job,” Herman says. Because of other firms copying its complaints, Milberg Weiss got shut out of the plaintiffs’ lead counsel role in shareholder suits against at least four corporations, he said, citing Baker Hughes Inc., which creates technology for oil and gas producers; BroadVision, which provides portal software for \textit{Fortune} 500 companies; software company Critical Path; and Pilot Network Services Inc., which provided managed network access and security services before closing in 2001. Lerach said he can’t estimate the economic losses to the firm connected with those cases. Herman said he hasn’t done the analysis yet, but damages would vary depending on the case. In a big case they could be in the millions of dollars, he added.
  \end{quote}
  \item [185] \textit{Id.} (second alteration in original).
  \item [186] Milberg Weiss could not claim to have lost any potential clients in the same litigation as a result of the unauthorized use, because it could not have represented a second class whose interests would have potentially conflicted with its first one. See, \textit{e.g.}, \textsc{Model Rules of Prof’l Conduct} R. 1.7(a) (2003) (noting that there might be a material risk if an attorney represents two clients in a concurrent action); \textsc{Model Rules of Prof’l Conduct} R. 1.8(g) (2002) (stating that an attorney who represents two clients on the same issue may not make an “aggregate settlement” on one client’s behalf that would adversely affect the other client).
  \item [187] As explained in Part II, \textit{supra}, the facts are not protectable, only and/or their selection and organization if that does not run afoul of the merger doctrine. See, \textit{e.g.}, \textsc{Fed. R. Civ. P.} 23(g)(1)(C).
\end{itemize}
Second, the argument appears to attribute to the courts absolutely no intelligence. Most judges would be able to infer that a complaint which is "substantially similar" to one previously filed in the same proceeding would likely have been modeled on the earlier work, and the court would take that fact into account in determining which counsel would be the most competent lead counsel. Thus, there is no basis to imagine that, if a copycat complaint is filed, the original counsel would be less likely to be named lead counsel or less likely to be offered the same substantial percentage of attorneys' fees.\(^8\)

Indeed, given the potential for significant attorneys' fees if he is appointed lead counsel, it is unrealistic to suggest that an attorney would create a lower quality work even if he knew that other attorneys might copy substantial portions of its complaint. Moreover, any conscious decision not to draft the most effective possible complaint because of the possible impact of copying would undoubtedly be a violation of the ethical obligation to advocate zealously on behalf of the class.\(^9\)

In sum, where an attorney uses a per-hour fee structure to charge for the creation of litigation documents, he suffers no recognizable harm from unauthorized use of the documents. Yet the opportunity for statutory damages, instead of actual damages, may provide sufficient motivation to assert a claim for infringement.\(^\) The award of statutory damages may be whatever the court "considers just" within the limits provided by statute, ranging from "not less than $750 or more than $30,000" for each act of non-willful infringement, to as high as $150,000 for each act of willful infringement.\(^\) Facing the potential of a significant award of statutory damages, a defendant would likely offer to settle, paying the copyright owner an economic windfall.\(^\)

\(^{188}\) Milberg Weiss also conjectured that, because that firm was not given the lead plaintiff role, its clients might have received a smaller monetary remedy than they otherwise might: "'If the lead plaintiff that wins is not necessarily a good, diligent lead plaintiff and retains counsel that aren't the most aggressive, well-financed and competent, they do lose out,' Lerach said." Conley, supra note 6. However, there is no evidence that damages to a third party were ever meant to be considered in the potential harm to the value of the copyrighted work. Indeed, such damages should be irrelevant because they are so tangential and speculative that they are unlikely to have any affect on the incentive to create the underlying work. In any case, this loss to the firm's clients is as speculative as Milberg's losses - there is no way of establishing the impact of the choice of lead counsel.

\(^{189}\) See, e.g., MODEL RULES OF PROF'L CONDUCT PREAMBLE [2] (2003) ("As a representative of clients . . . a lawyer zealously asserts the client's position under the rules of the adversary system.")

\(^{190}\) See supra notes 151-52 and accompanying text.

\(^{191}\) Id.

\(^{192}\) When a defendant fears the possibility of statutory damages, the settlement will provide the copyright owner with an amount greater than the injury suffered by the use (presumably it is under those circumstances that the copyright owner would seek statutory damages). That economic windfall is, for society's purposes, an inefficient "dead loss."
B. The Market Is Unable to Rely on Licensing to Ensure that Litigation Documents Will Be Properly Disseminated

In an economically ideal system, one could rely on the market to ensure that, where economically rational, the copyright owner would license her litigation documents. An attorney plainly derives some value from being able to use portions of another's work, or else he would not do so. As with the author, that second attorney, who presumably also bills per hour for litigation documents, may not bill time for the creation of work he did not create - thus, the benefit to him is not in the ability to charge the client for that work. Rather, the value to the second attorney is presumably found in the time that is saved not having to create new non-infringing expression. One could expect that much, though not necessarily all, of that saved time is spent on other billable work. As a result, the value of the use of a previously-created work is the value of that additional billable time.

Thus, economic theory states that so long as the benefit to that second attorney was greater than the harm to the author, the second attorney would, in a mutually beneficial transaction, license the work and recompense the author for any harm. Indeed, one could expect that these transactions would happen regularly in light of the absence of any significant harm to the author from such subsequent use. Nonetheless, private transactions between attorneys are rare for several reasons. First, it is highly likely that some licensing does not occur because attorneys will simply refuse to license their works, regardless of any offer. Such "hold-outs" may exist for several reasons, including the hope of using those works to attract new clients and the fear of offending existing clients. Second, transaction costs make it less likely for parties to be able to reach a licensing agreement where one should otherwise occur. Third, the market fails to take into account the value to society as a whole from having litigation works more readily available. Because of these flaws, users cannot count on licensing to be available as an option.

1. Licensing Is Limited by a Significant Hold-Out Problem

The opportunity to license one's work is irrelevant to those attorneys who refuse to authorize others to use their works, regardless of any licensing offer. Some may take this position because they hope to obtain some of the clients who, if the documents were freely available for use, might go to competitors. As explained in Part IV.A. above, it would be a fairly rare circumstance in which a client would hire a particular attorney because that attorney has exclusive use of a particular litigation document. This is so, in part, because a client involved in litigation rarely has a particular document in mind when discussing strategy and costs; and, in part, because there are a large number of variables affecting a client's choice of attorney (as described ear-

193. See supra Part IV.A.
lier, these considerations include reputation, personal comfort level, pre-existing professional relationships, location, etc.\textsuperscript{194} However, despite these facts, it seems likely that many attorneys would prefer to maintain exclusive control over their works in order leave open the possibility that possession of such works will confer some sort of professional advantage. Another reason for hold-outs may be an unwillingness to risk alienating current clients by making available to others the work for which they paid large sums. Even if the licensed version is a heavily redacted and simplified version of the work, that prospect is one that savvy attorneys will consider.\textsuperscript{195}

This hold-out problem may help to explain the quick demise of several independent "brief banks.\textsuperscript{196} Austin-based eLaw launched its first brief bank in 2000, offering briefs and other legal documents for download at four dollars to nine dollars per page.\textsuperscript{197} The company offered the firms which agreed to permit it to use its documents up to twenty-five percent of the revenue obtained from those documents, as well as a share of eLaw's subscription revenues.\textsuperscript{198} At least one firm claimed that it had joined the brief database in the hopes of attracting new business — said one partner from Baker & Hostetler: "No firm can be known by everyone in the country . . . . This is a chance for people to learn about [the firm] and that we are in the labor business and good at it."\textsuperscript{199} Yet, as of February 2001, only nine law firms among the top "Am Law 200" had agreed to license their works to eLaw.\textsuperscript{200} Despite having raised $12.5 million in venture capital, the company folded around June 2001.\textsuperscript{201}

\textsuperscript{194} Nathan Koppel, \textit{Productize This! Recycling briefs and memos for resale on the Web may enrich a vendor or two, but does it make sense for law firms?}, American Lawyer (Feb. 2001) ("Philip Crowley, Assistant [General Counsel] for Johnson & Johnson, says that he would not make hiring decisions based on isolated work product: 'The process of selecting outside counsel is so involved, it has to be someone you know you can work with and that . . . understands your institution.'").

\textsuperscript{195} \textit{Id.} (quoting one lawyer as saying, "[i]f a client just paid $25,000 for a research memo, how happy are they going to be to see that sanitized on a Web site for $12?").


\textsuperscript{197} Koppel, \textit{supra} note 194 (noting that eLaw.com had thus far "signed content deals with six Am Law 100 firms and three Am Law 200 firms[, none of which, as it happens, ranked among the top 50 for profitability in [Am Law's top 100 law firms].").

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} Cf. \textit{id.} ("Theodore Banks, associate general counsel at Kraft Foods, Inc. [said]: 'I'm not sure that we would look for a law firm based on some brief they published online, except in a narrow area of expertise where we don't have any resources among the firms we currently use.'").

\textsuperscript{200} \textit{Id.}

\textsuperscript{201} Alicia Pounds, \textit{eLaw.com Folds}, AUSTIN BUS. J., June 19, 2001. The failure of a similar company, Juritas.com, suggests that there may be multiple causes for the
2. Transaction Costs Will Deter Many Potential Licensing Agreements

In the absence of online brief banks as marketplaces for licensing litigation documents, it is likely that fewer transactions than might be economically efficient will occur, because under many circumstances some costs make these transactions prohibitively expensive. The cost of identifying and locating the author with whom to engage in the transaction is probably not a significant cost, because litigation documents include the attorney's name.202 The value of the work to the licensee is the value of the time saved by not having to re-create the same work. However, the precise worth of the document must also take into account any time spent negotiating a license. Likewise, the potential income from licensing a work is diminished by the time spent in licensing negotiations. As the time spent negotiating the license and settling on a license causes the price charged by the author to increase, and the value of the document to the second attorney to decrease, there is a greater possibility that the transaction costs thwart the efficient re-allocation of resources. Additionally, because law firms are not primarily in the business of licensing, the time spent developing these licenses may be considerable. Thus, even where such transactions are otherwise viable, the costs of negotiating these licenses are likely to hinder any licensing agreements.

C. The Market Does Not Account for the Societal Value Accruing from the Dissemination of Litigation Documents

The most serious problem with relying on the market to respond to the exclusivities given to the author of a copyrighted litigation document is the inaccuracy of an initial assumption—that the only value of the dissemination is the benefit obtained by the second attorney. The additional dissemination of legal works provides substantial societal benefits by providing the opportunity for better quality legal representation, and lowering the costs associated with legal transactions.203 Yet that significant public benefit is a positive ex-

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203. The unusual societal benefits also distinguish this situation from that made for unauthorized use of works created by those in other professions in which people generally charge by the hour, rather than per work.
ternality for which the market has no method to adjust. As a result, regardless of a likelihood of some minor harm, the "fair use" defense is warranted. Dissemination of litigation documents supports the societal value of adequate legal representation. American society values few institutions as much as the judicial system. One of the most basic functions of a society is to provide a civilized and just method of resolving public and private disputes. The judicial system permits redress for violations of economic and social harms caused by other private parties or the political machinations of other branches of government. In adversarial judicial system, the assumption exists that if every party is able to obtain adequate representation, justice will prevail. However, costs can be a significant barrier to allowing others to obtain quality representation.\textsuperscript{204} The litigation documents rest at the core of this system, and the public benefits when each side has the ability to provide a court with well-articulated analysis. One would expect that if each party is able to support its position using particularly clear communication, with perhaps more eloquent language, there is an increased likelihood of a just result. Even if the outcome in a particular case would be the same, there is a national moral and psychological value to having only the most minimal, crucial limitations on the ability of the public to express their positions to the courts: "The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."\textsuperscript{205} When the public's interest in reaping this benefit is compared against, at most, the \textit{de minimus} loss to attorney-authors, there is a strong argument in favor of "fair use."

Second, allowing dissemination of litigation works would lower the costs associated with obtaining appropriate relief for a legally remediable harm, thus allowing a more efficient economic system. For example, according to economic theory, a breach of contract would be rational if the breaching party can pay to the injured party the damages suffered by the breach, so that the injured party is made whole, and still obtain a greater profit than if that party had satisfied its obligations under the contract.\textsuperscript{206} As a matter of economic theory, everybody wins.\textsuperscript{207}

\textsuperscript{204} In 2003, the average billing rate of contracts litigation specialist was $250 per hour, while securities attorneys charged $338 per hour. \textit{2003 Survey of Law Firm Economics}, Altman Weil Pensa Publications, Inc. See Hadfield, \textit{supra} note 172, at 957 (noting that, in 1998, the average hourly rate for lawyers in the United States was $180).


\textsuperscript{206} See Yen, \textit{supra} note 95, at 98 ("The economist need not worry about whether the compensation is actually paid because of the assumption that government can costlessly make the necessary cash transfers from the winners to the losers.") (citing A.M. POLINSKY, INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989)).

\textsuperscript{207} In most breach of contract cases, the factfinder is not permitted to award punitive damages in order to discourage such activity. This indicates that society has
In the ideal situation, of course, the parties agree on the damages suffered and the breaching party voluntarily pays to the second party that amount. Thus, the cost to each side of the restitution process, as opposed to the restitution for the breach itself, is close to zero. In many situations, however, the breaching party either denies owing any restitution or claims to owe much less than the injured party contends. Under those circumstances, the injured party may consider seeking redress in the courts. In determining whether to seek compensation for its injury, the party must consider the cost of the restitution process. Where the transaction costs associated with seeking restitution are greater than the amount the harmed party can be expected to obtain from a lawsuit, the injured party would likely not seek to recover the damages suffered. The higher this transaction cost, the more often an injured party will deem it economically inefficient to sue in order to obtain restitution. Yet society as a whole obtains a benefit from increasing the number of injured parties that obtain restitution, thereby creating an economically optimal situation. Lowering legal expenses helps address the market failure created by these transaction costs.

Of course, until such a time as the court is able to award the plaintiff his attorneys' fees in more than a small number of cases, legal representation is always going to force a plaintiff to incur some transaction cost, thereby preventing it from reaching true economic efficiency. The goal, however, must be to come as close to that ideal efficiency as possible. Permitting fair use of legal documents results in less expensive representation, thus increasing the number of economically and socially efficient outcomes.

In sum, lowering the cost of legal representation supports the basic American value of making the justice system more accessible and accurate, and increases the public's political and psychological welfare. In addition, found it societally acceptable for a party to breach a contract, where it is economically rational to do so. See, e.g., United States v. Blankenship, 382 F.3d 1110, 1133-34 (11th Cir. 2004); Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) ("[B]reaches of contract that are in fact efficient and wealth-enhancing should be encouraged, and . . . such 'efficient breaches' occur when the breaching party will still profit after compensating the other party for its 'expectation interest.'").

208. See Yen, supra note 95, at 97 n.92 (describing when an otherwise efficient copyright licensing agreement might not occur because of the cost associated with, among other things, the parties' legal representation).

209. This harm to efficiency applies equally well to liability grounded in non-economic claims, though it is more difficult to quantify the damages. Take a civil rights violation, for instance. Each potential plaintiff places some (theoretically quantifiable) value on the benefit that would be obtained from a remedy for such a violation. In some circumstances, such as civil rights cases, some potential plaintiffs would choose to pursue legal action in order to demonstrate their right to relief, regardless of whether the monetary value of any award could justify the expenditure of legal fees. However, the cost of obtaining legal vindication would still likely be a significant factor in those cases, because those plaintiffs may be less likely to be able to afford to pay high legal fees.
lowering the transaction costs caused by legal representation increases the number of situations in which an injured party may obtain the restitution needed in order to create a more economically efficient state. However, neither of these benefits to the public would be taken into account by any possible transaction between an attorney and a competitor wishing to use a copyrighted work. Only by allowing such use to qualify as “fair use” can one circumvent this market failure.

V. CONCLUSION

As technology evolves to make appropriation and adaptation of others’ litigation documents increasingly simple, copyright protection of litigation documents would provide nothing but a trap for the harried, unwary attorney. Copyright is meant to foster the “progress” of protectable works, and tolerance for that governmental monopoly is founded on the assumption that the mythical “marketplace” will re-allocate the associated rights to those who will value them most highly. That marketplace is not the non-stop bazaar it purports to be, however – it is closer, perhaps, to a desert mirage. As a result, copyright’s protections inadvertently extend to works that authors would create regardless of the monopoly incentive. Yet the Copyright Act’s provision for statutory damages might provide an attorney with sufficient motivation to assert a claim for infringement. If such claims begin to deter attorneys from adapting litigation documents, the cost of quality legal representation may increase significantly. This would place such representation out of reach of larger segments of the public and impair the legal system’s efficiency. Fortunately, attorneys should be able to defend against those claims using section 107’s “fair use” provision, in order to ensure that the effect of the copyright law does not run counter to its purpose.

The existence of a defense does not negate the fact that expression within some litigation documents may be entitled to copyright protection. It is true that many documents will lack the requisite originality or creativity; others may contain an expression which is so merged with the underlying idea that protection of that expression would impair others’ ability to argue a similar point. However, some litigation documents – a few complaints, and even more memoranda of law – will contain portions with original, creative language in situations in which the underlying idea may be stated in many ways, and documents containing such expression are entitled to protection.

Nonetheless, attorneys should generally not be permitted to succeed in an infringement action based on another attorney’s use of his litigation document. Every day, lawyers sit at their desks, struggling to find the right words to use in a complaint or a memorandum of law, with the hopes that those words will persuade the court or the other side of the correctness of their client’s position. A substantial number of these lawyers turn to another attorney’s work for language – sometimes simply a particularly clear paragraph describing a complex legal issue, and sometimes a larger portion containing an especially cogent legal argument – and incorporate it into their own docu-
ment. This process has almost certainly been repeated for decades, and most likely for centuries. While a superficial analysis might lead the "fair use" defense to be rejected because allegedly infringing litigation documents are used for the same purpose as the original works, in few places in society do the broad protections of copyright law make less sense than in the area of litigation.

The attorney's responsibility to zealously represent his client is his motivation to create these works, and an attorney needs no additional motivation. In any case, most litigation attorneys charge for their services on a per-hour basis and may not bill later for those same works. As a result, there is no market value that would be impaired by defining others' use as "fair use." The only benefit that copyright may provide to an original attorney is the ability to charge clients less when creating derivative works, but any increase in clients from that competitive advantage is highly speculative. Thus, there is no meaningful harm caused by other attorneys' use of those works; permitting any de minimus harm would not impair copyright's intent to foster those works.

While there is little harm from wider dissemination of useful litigation documents, there are unquestionably substantial benefits. Not only does the putative infringing attorney presumably receive a benefit of time saved, the public welfare is also greatly improved. The lower resulting cost of representation expands access to the courts, which strengthens a basic moral value in American society – that of "justice for all." In addition, the dissemination of those documents moves society towards a more optimal economic situation by increasing the ability of members of the public to obtain restitution for harm at a cheaper price.

Given the absence of significant harm and the high value that society puts on a legal system that is available even to those without substantial resources, one would expect a transaction in which the copyright owner receives sufficient benefits to cause him to be willing to authorize others to use the work. Unfortunately, these transactions do not occur for three reasons. First, many attorneys would, if asked, simply refuse to license their works, regardless of any offer. Such "hold-outs" may exist for several reasons, including the hope of using those works to attract new clients and the fear of offending existing clients. Second, the putative infringer does not engage in the transaction because the costs involved in negotiating a licensing agreement almost invariably outweigh the benefits. As the time spent negotiating and settling on a license causes the price charged by the author to increase, and the value placed on the document by the second attorney to decrease, it becomes more rational for the second attorney to simply re-invent the document – especially because he would likely be able to charge for that work. Finally, the marketplace does not account for the value attributable to the cumulative increase in public welfare from the additional dissemination, and thus the author is never offered the full value that would result from broader distribution of the work.
Because these market failures thwart the transactions which would properly re-allocate the work to those who would most highly value its additional use, permitting attorneys to begin to enforce the copyright monopoly would stifle progress rather than encourage it. The "fair use" provision was intended as the remedy for such situations. As a result, while attorneys using others' complaints or memoranda of law should be aware that portions may be protectable, attorneys should also be able to successfully defend infringement claims by asserting that any adaptation constitutes "fair use" of those documents. Permitting reliance on that defense will prevent these claims from hindering both copyright's ultimate goals and the public welfare.