A THEORY OF NONCOMMERCIALITY IN FAIR USE

Stav Zeitouni[1]

The commerciality doctrine in U.S. fair use law is notoriously vague. Though seemingly intuitive and based on long-standing precedent, courts have struggled with two distinct incoherencies. First, judicial reasoning has oscillated among various definitions: some opinions equate commerciality with a for-profit motive, while others emphasize market harm, unpaid customary price, or even indirect reputational gain. Second, even after a determination of noncommerciality is reached, courts disagree on the normative weight it ought to bear within the first factor. The absence of a unified framework has thus led to a jurisprudence marked more by doctrinal improvisation than by principle.

These determinations are important because they impact the scope of protection given to several types of activity, primarily scholarly, educational, and personal. Many actions we undertake in our everyday lives when engaging with copyrighted materials depend on an intuition that noncommercial activity is generally legitimate. Normatively, this intuition can be vindicated if we have a better appreciation for the foundational role incomplete commodification plays in the copyright system as a whole. The second part of the paper develops a theoretical argument along these lines, and argues that noncommercial uses deserve protection on the basis of their contribution to this incomplete commodification. Ultimately, it argues that the resolution to the double incoherence of noncommerciality lies in narrowing the "profit" definition so that it refers solely to monetary profit, and in recognizing that, generally, the first factor should weigh in favor of fair use when uses are noncommercial.

[1] Postdoctoral Scholar, Center for Private Law Theory, University of California, Berkeley, School of Law. Thank you to fellows at NYU's Information Law Institute and at Berkeley's Center for Private Law Theory, as well as participants at the 43rd Annual ATRIP Congress for their invaluable feedback. Special thanks go to Hanoch Dagan, Mark Gergen, Jeanne Fromer, Barton Beebe, Will Darwall, Pinchas Huberman, Daimeon Shanks-Dumont, Tal Mendelson, Michael Beauvais, Alon Jasper, Kat Geddes, Ignacio Cofone, Kathy Strandburg and Ben Sobel for helpful conversations and comments.

INTRODUCTION

"When I expressed an earnest wish for [Samuel Johnson's] remarks on Italy, he said, 'I do not see that I could make a book upon Italy; yet I should be glad to get two hundred pounds, or five hundred pounds, by such a work.' This shewed both that a journal of his Tour upon the Continent was not wholly out of his contemplation, and that he uniformly adhered to that strange opinion, which his indolent disposition made him utter: 'No man but a blockhead ever wrote, except for money.' Numerous instances to refute this will occur to all who are versed in the history of literature."[2]

When the Supreme Court ruled that commercial uses were not presumptively unfair in *Campbell v. Acuff-Rose*, it relied on Samuel Johnson's centuries-old quip to assert that such a presumption could not only not have been intended by Congress, but could also not have been inferred from the common law.[3] The position that money alone motivates creation

[2] JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 302 (1791).
[3] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) ("…Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that '[n]o man but a blockhead ever wrote, except for money.'")

was far from consensual even in Johnson's time, however. Even James Boswell, Johnson's biographer who recorded the famous quote, noted his firm disagreement in the text.

Portraying creativity in such mercenary terms was nevertheless useful in the court's mission to rescue copyright law from heading down a path in which all that would be needed in order to defeat the fair use defense was a showing of commerciality. This was necessary for the introduction and adoption of transformativeness as an important test within the first factor,[4] but it did little to clarify what by then had become a confusing and incoherent line of precedent concerning the meaning and effect of commerciality.

The matter has only gotten more tangled in the intervening years. Inconsistent definitions, ambiguous presumptive force and a general lack of theoretical grounding have made courts circumspect in their reliance on it, particularly when its outcome could lend support to a finding of fair use. Such was the case, for example, in the recent *Hachette v. Internet Archive*, discussed in Part I, in which the Second Circuit found the use unequivocally noncommercial and then immediately downplayed that finding by emphasizing the centrality of transformativeness in the first factor.

Despite this fact, courts continue listing commerciality as a criterion that must be analyzed within fair use analysis. Moreover, many users rely on the intuitive legitimacy of noncommercial use to sanction a range of everyday uses, including backing up music collections, teaching, and fandom-related art and writing. Perhaps because of its statutory origins, or because of its intuitive appeal, commerciality remains a mainstay. It is thus serving some utility, though it is often very difficult to get a good handle on what it is. This paper offers a path forward by identifying and clarifying two central incoherencies in the doctrine as it stands.

To begin, Part I centers on an incoherence in the *definition* of commerciality in case law. Judicial reasoning has oscillated between an equation of commerciality with a for-profit motive, market harm, unpaid customary price, or even indirect reputational gain. The malleability of the definition allows courts significant flexibility in determining the ultimate outcome of fair use, but is not without its costs, especially in cases involving non-transformative, noncommercial uses. For example, a definition which takes the author's losses as its point of departure (such as the one adopted in *A&M Records v. Napster*) will find commercial uses even when the alleged infringers explicitly eschew monetary profits. This creates a doctrine that is wildly out of step with the intuitions of most would-be users and extends the scope of commerciality so that it threatens to absorb nearly all unauthorized uses. This Part identifies and critiques different elements of the various "commercial"

4

definitions, ultimately arguing for a significant narrowing of the definition so that it encompasses monetary profit alone.

Clarifying the definition used by the courts only resolves one incoherence, however. The problem is not simply one of misclassification, but of a deeper conceptual instability: the fair use doctrine lacks a clear account of what role commerciality is meant to play in the broader balance between authorial incentives and public access. The second incoherence concerns the *normative weight* a determination of noncommerciality ought to bear within the first factor and in fair use more broadly. Part II catalogues the ways in which this incoherence shows up in fair use cases. In particular, it identifies the conceptual pendulum courts operate under, in which two different conceptions of commerciality compete to control the weight given to a determination of commerciality. The first is almost entirely semantic and ad-hoc, determined by whether or not a profit is being made, while the second draws on policy considerations and differentiates uses based on whether they serve the public (rather than the individual user) in some way. The unclear presumptive force of either commerciality or noncommerciality also has its roots in this incoherence.

Part III then offers a normative theoretical account which locates noncommerciality as an important signal for noncommodification, which itself enables the system of copyright to function. This account can help to vindicate the importance of noncommerciality as a criterion in fair use and to parse cases which ought to at least weigh the first factor in favor of fair use. The final section of this Part then returns to several cases discussed throughout and reappraises them by combining the narrower definition of commerciality in Part I with the normative understanding of noncommerciality in Part III.

I. DEFINING COMMERCIALITY

According to the utilitarian approach which is said to explain and guide the development of U.S. copyright law, copyright is understood as a set of limited exclusive rights, granted to creators in order to incentivize the creation of socially valuable works. Ostensibly, the limits of the rights are reached when the social benefit gained by increasing incentives is outweighed by the social cost of limiting the public's use of the works. The purpose of fair use within this scheme is to provide an important valve through which to negotiate that balance, so that "the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."[5]

[5] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

But finding that balance is a notoriously tricky pursuit, and the exact contours of fair use and its theoretical salience remain subject to longstanding scholarly and judicial disagreements.[6] Whatever view one takes on these, in practical terms, fair use analysis is often the place within the overarching copyright framework in which non-authorial interests are elaborated so that they can be brought into consideration alongside the enumerated rights of the owner. The analysis is structured by the four factors listed in section 107, drawing on criteria developed in common law from the nineteenth century onwards, and codified in 1976.

Commerciality finds its statutory hook in §107(1) (the first factor), which instructs courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[7] The first factor has gone through several different interpretive iterations over the years, but most contemporary analyses tend to list transformativeness, commerciality, and occasionally good faith as relevant components when determining the balance for or against fair use. Notably, the language of the statute contrasts between "commercial" and "nonprofit educational purposes" rather than "commercial" and "noncommercial," but courts have repeatedly treated this segment as broad enough to include the latter.[8]

Outside of copyright law, "commercial" does not have a fixed legal definition, and different areas of law (and, indeed, different statutes within the same law) conceptualize and define it in different, often contradictory ways. Within intellectual property law itself, "commercial" can take on diverging meanings. In her article on commerciality in intellectual property, Jennifer Rothman developed a taxonomy of these different meanings that arise in different areas of trademark, patent and copyright law:

> "First, "commercial" is used to indicate *use in commerce* that falls within Congressional powers to regulate under the Commerce Clause. Second, "commercial" is used to identify *commercial speech* (as that term has been defined by the Supreme Court in its First Amendment jurisprudence)… A third definition of "commercial" is a broader reference to any *for-profit* use. At times, "for-profit" is limited to instances in which there is an active interest in seeking financial gain (usually through sales), while at others it is meant more broadly as seeking any benefit (whether monetary or not). Fourth, and sometimes related to a for-profit use in a more general sense than mere financial profits, is the use of

[6] See e.g. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (listing various commentators who have "lambasted fair use doctrine as hopelessly unpredictable and indeterminate.")

[7] 17 U.S.C. § 107(1).

[8] See e.g. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.")

> "commercial" to indicate a use that might cause an IP-owner *market harm*. Finally, "commercial" has been used as a pejorative term to indicate uses that are of *lesser value* – ones that are considered base or of limited expressive value."[9]

Different definitions and conceptions of commerciality serve different purposes, and I do not intend to argue here that it would be useful to do away with these divergences entirely for the sake of uniform coherence. Moreover, Rothman argues that in copyright, unlike in other areas of IP, "the primary meaning of "commercial" is to indicate a *for-profit* use."[10] Nevertheless, as this section shows, the definition of commerciality within fair use is not uniform. Therefore, with this general background in mind, I propose to examine specifically the doctrine of fair use in order to question whether the divergences *within* it are similarly useful, in light of copyright law's goals. At the same time, this background is important to keep in mind because it can also help to explain where some of the definitions and conceptions are being borrowed from.

This Part provides an overview and critique of the definition of commerciality as it has developed in doctrine. The analysis below diverges from similar explorations by other scholars in that it isolates different components of the definition in order to examine them separately. Empirical studies on fair use as well as more comprehensive studies of the doctrine tend to apply a chronological or holistic approach, often in an attempt to understand the effect of a determination of noncommerciality on fair use as a whole.[11] These are important in their own right, but the approach adopted here attempts to reconstruct the definition on its own terms before moving on to examining its role in fair use and in copyright more broadly. In doing so, this section provides the relevant backdrop for the argument developed in Part II, which identifies and integrates two conceptions of commerciality at play in the myriad definitions.

The discussion in this section is split into four parts: the first introduces some common definitions and the paradoxes they give rise to through a discussion of the recent rulings in *Hachette v. Internet Archive*. This section highlights the components discussed in the following parts, including customary price, user profit and market harm. It critiques the

[9] Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1935–36 (2015).
[10] *Id.* at 1963.
[11] See e.g. Matthew Sag, *Predicting Fair Use*, 73 OHIO STATE L. J. 47, 58–61 (2012); Rothman, *supra* note 8, at 47–48; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updates, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 28–30 (2020); D.R. Jones, *Commerciality and Fair Use*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 620 (2015). Igor Slabykh, *Ambiguous Commercial Nature of Use in Fair Use Analysis*, 46 AIPLA Q. J. 293 (2018) adopts a similar methodology in terms of attempts to articulate and critique various contradictory definitions of commerciality, but our approaches diverge significantly in the identification of these definitions and in the separation between definition and normative weight.

inclusion of customary price in commerciality definitions, and argues that market harm is useful in a much more marginal way than current case law indicates. The final section then goes into the two (indeterminate) meanings of the word "profit," showing that courts have sometimes gone further than what is usually colloquially understood as "commercial" and included indirect, and even non-monetary gains such as professional reputation.[12] In order to begin unpacking these "varieties" of noncommerciality, and to begin the exploration of the value of noncommerciality, this section provides a preliminary survey of important precedents which exemplify the term's underlying tensions.

A. A Shifting Definition

In an early and much-critiqued dictum, the court in *Sony Corp. v. Universal City Studios* held that "every commercial use of copyrighted material is presumptively" unfair.[13] The presumption caused endless confusion for lower courts, and the Supreme Court stepped in several years later with a revision in *Campbell*, in which the judges not only reoriented first factor analysis around transformativeness, but also explicitly instructed against the *Sony* presumption:

> "[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country.""[14]

Following the *Campbell* court's reasoning, commerciality on its own does not carry the force of presumption *against* fair use, and neither does noncommerciality "insulate" from an overall finding of fair use. This articulation still leaves the door open for a presumption of fair use when noncommerciality is present, a fact which the court came close to recognizing in 2021 when it declared that "[t]here is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are indisputably commercial."[15] This is

[12] *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989).
[13] *Sony*, 464 U.S. at 451.
[14] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).
[15] *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 32 (2021).

probably an overstatement,[16] but it highlights the importance of examining noncommercial uses, rather than commercial ones, in order to understand the role of the commerciality criterion within fair use. It is especially in cases of noncommercial, non-transformative uses where the criterion can be best isolated and understood on its own terms. It is also where the determination carries weight,[17] because courts perceive it as weighing the first factor somewhat in favor of fair use, and perhaps even tipping the scales entirely. This last consideration may also be the reason why courts struggle to locate a central locus for noncommerciality.

To illustrate this point and to begin the exploration of noncommerciality conceptualizations, consider the discrepancy between the district and circuit court in the recent suit brought by book publishers against the Internet Archive (IA). The latter, whose mission is to "provide Universal Access to All Knowledge,"[18] launched the Free Digital Library in 2011. The Digital Library makes full digitized scans of books available for borrowing on a one-to-one ratio between the printed books owned by IA and by partnered libraries and digital copies that it loaned to users (a practice IA calls "controlled digital lending").[19] In 2020, four major book publishers sued IA for copyright infringement. The District Court granted them summary judgement in relation to print books available on the Free Digital Library which are also available in ebook format for licensing.[20] The court's permanent injunction was later affirmed by the Second Circuit.[21]

The District and Circuit Courts diverged in their findings on commerciality, however. The District Court, which found that IA's use of the works was non-transformative and commercial, began its analysis of commerciality by appealing to what is perhaps the most frequently cited definition of commerciality, culled from *Harper & Row Publishers v. Nation Enterprises* (cited here in context, bold added to signify the part generally quoted in isolation, including by the District Court in *Hachette*):

[16] At least empirically, a finding of noncommerciality is not dispositive towards a finding of fair use (unlike transfomativeness). See Beebe, *supra* note 10, at 29 ("of the 47 core opinions since Sony that found that the defendant's use was noncommercial in nature, a respectable minority of 11 opinions (23.4%) found overall that it was nevertheless not a fair use.")

[17] *Cf.* the Fourth Circuit's reasoning in *Bouchat v. Baltimore Ravens Ltd. P'ship*, 737 F.3d 932, 941 (4th Cir. 2013) ("the commerciality inquiry is most significant when the allegedly infringing use acts as a direct substitute for the copyrighted work").

[18] *About IA*, INTERNET ARCHIVE, https://archive.org/about/ (last visited Jul. 16, 2025).

[19] Apart for a short period during the early stages of the COVID-19 pandemic, in which IA removed limits on the amount of borrowed copies.

[20] *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) [hereinafter: *Hachette 2023*].

[21] *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024) [hereinafter: *Hachette 2024*].

> "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use… In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. **The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.**"[22]

The *Harper & Row* definition presents several internal paradoxes discussed in detail below, but for present purposes, suffice to stress the use made of it by the *Hachette* court in order to extract two components. First, that IA "stands to profit" from its use of the publishers' books, and, second, that it does so without "paying the customary price":

> "**IA exploits the Works in Suit without paying the customary price. IA uses its Website to attract new members, solicit donations, and bolster its standing in the library community**… Better World Books also pays IA whenever a patron buys a used book from BWB after clicking on the "Purchase at Better World Books" button that appears on the top of webpages for ebooks on the Website… IA receives these benefits as a direct result of offering the Publishers' books in ebook form without obtaining a license. Although it does not make a monetary profit, IA still gains "an advantage or benefit from its distribution and use of" the Works in Suit "without having to account to the copyright holder[s]," the Publishers… The commercial-noncommercial distinction therefore favors the Publishers…
> It is "largely irrelevant" that an IA patron's private reading of an ebook provided by IA is noncommercial… What matters is whether IA profited from copying the Works. And although the "commercial nature of a secondary use is of decreased importance when the use is sufficiently transformative such that the primary author should not reasonably expect to be compensated," […] this is far from that situation. The Publishers reasonably expect to be compensated for the reproduction of their copyrighted works, and IA stands to profit from its non-transformative exploitation of the Works in Suit. The commercial-noncommercial distinction, like the transformativeness inquiry, therefore counsels against a finding of fair use."[23] (emphasis added)

The court thus identifies the availability of a license as the relevant "customary price," and the "profit" at hand to include not only indirect profits such as a general solicitation of donations on the website, but also the bolstering of IA's reputation. This last interpretation appears again and again in various cases where direct monetary gain is not immediately apparent, and is often cited back to *Weissman v. Freeman*, a case involving academic

[22] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).
[23] *Hachette 2023*, 664 F. Supp. 3d at 383–84.

plagiarism, where the Second Circuit found that the plagiarist "stood to gain recognition among his peers in the profession and authorship credit,"[24] and that in such settings "profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure."[25] What is instructive here is the insistence on finding a commercial purpose on the part of IA and the circuitous way of finding it. In adopting this extremely broad definition, the court seems to be trying to sidestep the role of noncommerciality in not only weighing the first factor towards fair use, but also in establishing a strong overall presumption of fairness.

Given the different components at play, it is perhaps unsurprising that the Second Circuit reversed the finding on commerciality while nevertheless affirming the overall injunction. An examination of its reasoning showcases the lack of cohesive precedent on the matter. It is not so much that the district court was wrong in its reading of relevant cases, as that there are several diverging interpretive paths arising from different lines of precedent. The Second Circuit, in an appeal to a more commonsense intuition, chose a narrower reading that established that IA does not profit directly from the Digital Library, despite its solicitation of donations and partnership with Better World Books. The court found the connection between any profit gained from the latter and the actual use being made of the copyrighted works of the lawsuit to be "too attenuated [to] characterize the use as commercial on that basis."[26] In doing so, it tapped into several cases that attempt to parse out incidental profit, or profit that is only very indirectly linked to the use in question. Due to this interpretation, the court concluded that "[a]lthough IA exploits the Works in Suit without paying the customary price, it does not profit directly from that exploitation…"[27] It thus placed considerable emphasis on the question of the *user's profit*, rather than the question of customary price.

The *Hachette* court also addressed the place of non-monetary profit in commerciality analysis. While agreeing that profit can sometimes be measured in non-monetary terms for this purpose, it distinguished *Weissman* because IA did not "stand to gain the direct reputational benefits that accompany **presenting another's work as one's own**. Rather, it obtains only those nonmonetary benefits that attend **most other legitimate, secondary uses,** including advancing its mission and bolstering its reputation" (emphases added).[28] This seems to locate the crux of the *Weissman* definition in the question of attribution, rather than anything to do with what profit or commerciality might mean. I will argue below that non-monetary definitions of profit are unhelpful for the commerciality inquiry and ought to be abandoned, and the *Hachette* court provides a good example of why. If the

[24] *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989).
[25] *Id.*
[26] *Hachette 2024*, 115 F.4th at 185–86.
[27] *Id.*
[28] *Id.*

lower court (and other courts before it) was correct in its understanding that the upshot of *Weissman* is that *any* gain, including non-monetary, ought to be assessed as possible profit – then the definition really is overly-broad. In the Second Circuit's words, it leads to the preposterous conclusion that "the activities of virtually any nonprofit organization that bolsters its reputation through its own nonprofit activities" are, in fact, commercial.[29] If, however, as the Circuit Court would have us believe, lack of attribution is the fulcrum of the definition, surely its place is in the controversial good faith prong of the first factor,[30] rather than in the commerciality prong. In either case, "commercial" ought not include "non-monetary gain."

Finally, the Second Court reached the inevitable conclusion: IA's use was noncommercial. In such cases, one would expect the first factor to be "tipped" towards fair use, in line with Supreme Court precedent discussed above.[31] It is clear, however, that the *Hachette* court was uncomfortable with such a resolution. To square the circle, it concluded that despite the noncommercial use, "transformativeness remains the "central" focus of the first factor… Thus, because IA's use of the Works is not transformative, the first fair use factor favors Publishers."[32] This interpretive move necessitated a significant leap: no longer is transformativeness the central inquiry such that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[33] Instead, in the *Hachette* reimagining, transformativeness becomes entirely dispositive of the first factor. One wonders what role commerciality plays within a framework that views it as irrelevant when a use is transformative, and entirely discounts it when a use is not. The court's final paragraph renders the entire inquiry seemingly meaningless.

The *Hachette* case in its District and Circuit Court iterations thus showcases two conundrums bedeviling the (non)commerciality inquiry: first, what is the crux of the commerciality definition? Is it about user profit or the customary price to be paid to the original creator? Is the profit to be measured in monetary terms? Must it be directly tied to the use made of the work, or is indirect gain also commercial? Second, what weight should be accorded to noncommerciality within the first factor and within fair use more generally, given its statutory and intuitive significance?

I note here that the role of noncommerciality within the first factor (i.e. in relation to transformativeness) and its role within fair use (i.e. in relation to other factors) – are, in

[29] *Id.*
[30] For a description and critique of this component of fair use, see Simon J. Frankel & Matt Kellogg, *Bad Faith and Fair Use*, 60 J. COPYRIGHT SOC'Y U.S.A. 1 (2012).
[31] *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021).
[32] *Hachette 2024*, 115 F.4th at 185–86.
[33] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

fact, two separate questions. Reasoning through them requires a conception of noncommerciality as a *kind of use* within the framework of copyright, which necessitates a more normative discussion about the contribution of noncommercial uses to the goals of copyright. That discussion is addressed in depth in Parts II and III. The rest of this Part takes up the different components of the first conundrum, highlighting cases which pull in contradictory directions and critiquing some longstanding interpretations which subvert the meaning of noncommerciality.

B. Customary Price or User Profit?

The *Harper & Row* definition of commerciality is ubiquitous in commerciality fair use cases. Over and over again, courts intone that the "crux" of the commerciality-noncommerciality distinction is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[34] But this definition obfuscates the question of commerciality by substituting the singular monetization inquiry with two possible alternative "cruxes": user profit or the failure to pay "the customary price." Did the court intend that both need to be absent for a use to be deemed noncommercial, or merely that these factors need to be considered without setting necessary or sufficient requirements?

The issue at hand in *Harper & Row* concerned a magazine's scooping of content from President Ford's soon-to-be-published memoir concerning his decision to pardon former president Nixon. The court wrestled with the mixed purpose uses the magazine argued for, both commercial (to sell magazines) and noncommercial (news reporting). The fact that The Nation scooped the memoir's content by acquiring a purloined copy of the manuscript, and in doing so infringed on the right of first publication (rather than the right to reproduce copies) further muddied the waters. The good faith of the defendant's conduct is usually considered separately from commerciality, but in the instant case it seems that the majority allowed one to bleed into the other. In particular, the finding that "[The Nation] was free to bid for the right of abstracting excerpts from "A Time to Heal""[35] suggests that the bidding itself is the "customary price" the majority is contemplating. In circumventing this bidding without consent and with a stolen copy (i.e. in bad faith), coupled with its at least partial profit motive (even if mixed with non-profit motives), the court found The Nation's use to be commercial. Ultimately then, the court relied both on The Nation's (monetary) profitmaking *and* the fact that it did not pay the customary price. The customary price

[34] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).
[35] *Id.* at 563.

requirement, however, maps more easily onto a bad faith inquiry, rather than commerciality.

The upshot of this analysis should be that customary price has a negligible role in determining commerciality. Considering the counterfactuals demonstrates this point: would The Nation's use have been any less commercial if it *had* entered and won a bid to publish the excerpt it infringed? Presumably, it would still be a mixed *use*, both commercial and noncommercial. It is true that the question would not have been litigated under such circumstances, but that does not alter the purpose of the use in itself.

The corollary question – would the use have still been commercial had The Nation not stood to gain anything from its publication? – is more complicated precisely because of *Harper & Row*, but, again, the *use* to which the work is being put does not alter depending on whether or not a customary price is paid. Instead, "customary price" is either a consideration of whether the copyright owner got their "due," or whether the user behaved properly. As to dues, the "customary" part of the term implies that it cannot be determined merely on the basis of the owner wanting to be remunerated or setting a price. However, the determination of whether a price is to be paid at all is exactly what fair use analysis is for. In other words, "whether there is a "customary price" depends, of course, on whether the secondary use is a fair use or an infringement. Measuring the hypothetically lost royalties serves no purpose unless we have learned from other factors whether the copyright owner was entitled to charge for the use."[36] As to bad faith, insofar as it ought to be considered at all – keeping in mind the Second Circuit's reading of *Campbell* such that the good or bad faith of the defendant "generally contributes little to fair use analysis"[37] – its consideration ought to be analytically separate from commerciality. Thus, paying the customary price might alter the overall determination of *fair use*, but it should have very little to do with the determination of *commerciality*.

Nevertheless, courts that cite back to *Harper & Row*, like the *Hachette* court, include both components. Although the lack of license payment is often noted perfunctorily, the core of the analysis generally revolves around the meaning of "profit."[38] Sometimes,

[36] Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1460 (1997). William W. Fisher III made a similar point in *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1674 (1988).

[37] *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 (2d Cir. 2004). See also Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935 (2014) for an exploration of intent in fair use, and a distinction between "intent to communicate new meaning," "intent to comply", and "intent to be a good citizen," the latter of which the reasoning in *Harper & Row* falls under. Subotnik identifies intentions of the third kind as "ancillary to the legal bases for copyright and fair use," and thus, "should not be given weight because their relevance is simply too remote from the issue at hand." (p. 968).

[38] The definitions of "profit" are discussed in detail below, in Section D.

however, when the profit motive is particularly glaring, a court may forego any discussion of it and conclude based on the lack of license that the use is commercial. This was the tack taken by the Fourth Circuit in *Bouchat v. Baltimore Ravens* (Bouchat IV):

> "It is customary for NFL teams to license their copyrighted logos for use in any number of commercial products. […] Of course, Bouchat did not receive the customary price for the use of his copyrighted logo in the highlight films. Because defendants' use of Bouchat's logo is non-transformative, we have no hesitation in concluding that the commercial nature of the use weighs against a finding of fair use."[39]

A notable outlier in this regard is *Weissman*, the academic plagiarism case. There, the court expanded not only the definition of profit to include reputation, but also found that the plagiarist did not pay "the usual price that accompanies scientific research and writing, that is to say, by the sweat of his brow."[40] In straining to find that fair use does not apply, the court equated the customary price usually paid *to the owner* which "sweat of the brow," which might be invested in the piece itself. Here, once again, "customary price" stands in for "bad faith" and the connection to the colloquial meaning of "commercial" is all but severed.

Ultimately, what ought to remain of the *Harper & Row* definition is not the namechecking of license-payment as a criterion for commerciality, but rather the instruction to analyze mixed uses in a more nuanced way. While it is true that the crux of the commerciality-noncommerciality distinction is not "whether the **sole** motive of the use is monetary gain" (emphasis added), the presence of a profit motive alongside a nonprofit one should give us pause as to whether we can truly consider the use noncommercial. Nevertheless, the "owner dues" rationale is a mainstay of commerciality analysis under other guises and not always with direct reference to *Harper & Row*. It is to this definition of commerciality that I turn now.

C. Market Harm

The notion that the definition of commerciality ought to include a consideration of the market harm allegedly suffered by copyright owners can be found in many fair use opinions, even when these don't cite directly to *Harper & Row*. This harm can take many forms, only one of which is the loss of potential licensing fees. An alternative harm is often couched in terms of the profit gained by the user who saves the money they would otherwise have spent on purchasing copies of the copyrighted work. This vastly expanded

[39] *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 311 (4th Cir. 2010).
[40] *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989).

definition of commerciality reached perhaps its most elastic conclusion in *Napster*, where the Ninth Circuit found that "commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."[41] The District Court put the matter in similarly blunt terms, suggesting that users "reap economic advantages from Napster use" because they "get for free something they would ordinarily have to buy."[42]

Although framed in terms of user profit, the actual concern here is clearly with the dues owed to the copyright owner. As with the customary price definition, this definition also hinges on circular reasoning, where the exploitative nature of the copying is presumed rather than determined at the end of the fair use analysis. The fact that copies were unauthorized is not indicative of anything in particular for determining fair use, and making copies so as to forego the purchase of additional ones is also not instructive in determining the use to which the work was put, which is the central first factor inquiry. As Jessica Litman has noted, "[i]f any use that allows a person to get for free something she would otherwise need to pay for is a commercial one… then most lawful unlicensed uses would be commercial. Defining commercial use so broadly makes it useless as a sorting tool."[43]

This definition is so expansive that a straightforward application of it across fair use decisions would place in jeopardy even those uses which are explicitly identified as privileged in the statute. For this exact reason, courts have found ways to critique and sideline it in cases where, unlike *Weissman* and *Napster*, the virtuousness of the users is uncontested. For example, the Eleventh Circuit identified the circularity and "limited usefulness" of this type of reasoning in *Cambridge University Press v. Patton*, a case concerning university professors' posting of copyrighted course materials online for their students. Several academic publishers alleged, among other things, that Georgia State University, the defendant in the case, had failed to pay the customary price for copies of the copyrighted works and had "benefitted from providing them to students for free."[44] Further, they argued that the "[d]efendants' motive to "save the expense of purchasing authorized copies," […] cuts against fair use."[45] In rejecting this argument, the court highlights the overarching problems with these definitions, which ought to disqualify them more generally:

> "Of course, any unlicensed use of copyrighted material profits the user in the sense that the user does not pay a potential licensing fee, allowing the user to keep his or her money. If this analysis were persuasive, no use could qualify as "nonprofit"

[41] *A & M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (Court of Appeals 2001).

[42] *A & M Recs., Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal 2000).

[43] Jessica Litman, *Lawful Personal Uses*, 85 TEX. L. REV. 1871, 1913–14 (2007).

[44] Appellant Brief (2013 WL 371814) at 56

[45] *Id.*

> under the first factor. Moreover, if the use is a fair use, then the copyright owner is not entitled to charge for the use, and there is no "customary price" to be paid in the first place."[46]

Clearly, then, the crux of commerciality is not whether or not someone is saving money, or else noncommerciality becomes virtually a sliver of a category. Nevertheless, there are cases in which the preparation of copies in order to save the cost of purchasing more could count as commercial. This would be the case when, for example, the connection between the use to which the work is put is indirectly geared towards generating revenue. That is, the use is in some way tied to a commercial enterprise aimed at generating profit.[47] In these cases the connection to profit is more attenuated, although it remains the crucial link between the commerciality inquiry and the first factor. Another way of thinking about this connection is that what is attenuated is the relationship between the specific use and its purpose – instead of examining the more immediate use, the question is what the *ultimate* purpose of the enterprise is.

As an example of this more nuanced application, consider *American Geophysical Union v. Texaco*. Texaco, a large for-profit corporation, employed research scientists for whom they acquired subscriptions to a variety of (hardcopy) scientific and technical journals. Each issue was circulated among the scientists, who made photocopies of specific relevant articles. In finding this use to be commercial, the Second Circuit emphasized the use's "intermediate" nature.[48] It is not that Texaco gained "direct or immediate commercial advantage from the photocopying at issue in this case—*i.e.,* Texaco's profits, revenues, and overall commercial performance were not tied to its making copies of eight *Catalysis* articles…"[49] Instead, the court found the copying to have, at most, facilitated scientific research, "which in turn might have led to the development of new products and technology that could have improved Texaco's commercial performance."[50] The indirect connection to profitmaking comes close to an evaluation of the *user*, rather than the *use,* a problem which the court is well aware of. However, the panel insisted that it is "overly simplistic to suggest that the "purpose and character of the use" can be fully discerned without considering the nature and objectives of the user."[51]

The *Texaco* court then offers its own reinterpretation of the commerciality definition (emphasis added):

---

[46] *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1265 (11th Cir. 2014).

[47] The difference between direct and indirect profit is complicated, and addressed in depth in the next section.

[48] *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1994).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 922.

> "…a court should examine, among other factors, the value obtained by the secondary user from the use of the copyrighted material. […] **The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.** *See Harper & Row*, 471 U.S. at 562, 105 S.Ct. at 2231 ("The crux of the profit/nonprofit distinction is ... whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").[52]

Although quoting *Harper & Row*, the court here in fact orients the definition around the capture of "significant revenues," thereby significantly narrowing the expansive definition of "profit," and eliminating the customary price requirement. More importantly for the purpose of analyzing the equivalence drawn between commercial use and making copies so as to save expenses, *Texaco* introduces an important qualifier: receiving for free what one would otherwise have to buy is commercial only when one's ultimate purpose is to generate revenue. This reorientation places the crux of the definition once more on *monetary profitmaking*, and in effect allows for an analytically separate consideration of commerciality and the effect on the market of the copyright owner.

In making these points, I stress that they concern the question of commerciality, and not the broader scope of the fair use inquiry. If the main role assigned to commerciality is as a measure of harm to the copyright owner, then it serves little use beyond double counting factors one and four in order to avoid the work of balancing between the two. Many of the issues discussed in this section are very relevant in determining the bent of the fourth factor, but the analysis requires more clarity and disambiguation.

Once the definition of commerciality is narrowed in this way, it also becomes easier to analyze the relationship between scale and commerce. The *Napster* court made reference not only to "exploitative unauthorized copies," but to *repeated* copies. Although the matter isn't addressed directly there, there is room to ask whether the aggregate effect of many noncommercial uses result in a commercial use. In other words, does scale make a difference for a determination of commerciality?

This question is in many ways analogous to the classic commerce clause case *Wickard v. Filburn*, in which the Supreme Court found that Congress had the power to regulate an activity "if it exerts a substantial economic effect on interstate commerce."[53] In *Wickard*, as in *Napster*, certain goods were created so as to avoid the expense of purchasing them on the market (wheat and copies of music files, respectively). Because the wheat was never sold, but kept for Filburn's own consumption, he argued that it could not be regulated as commerce. Crucially, for present purposes (and setting aside relevant differences in the

[52] *Id.*

[53] *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

rivalry of tangible and non-tangible goods), the court's finding regarding Congress's ability to nevertheless regulate Filburn's activity did not require a finding that it was actually commercial.[54] Instead, its possible *effect* on commerce was identified as the relevant hook, and specifically the aggregate effect of many similar uses.[55]

By analogy, then, it is not the aggregate effect of the copying in *Napster* which made it commercial, but it may very well be what makes it *regulable* and thus infringing. Because of the structure of the fair use factors, the fourth factor is better fit for the analysis of aggregate effect on the market, regardless of the fact that an activity may be commercial or noncommercial. There may very well be noncommercial uses whose aggregate effect is so large as to warrant a finding that they are not fair. Both considerations are important in an overall analysis, but there is little conceptual benefit in systematically mixing the two together. For this reason, it would be better to focus definitions of commerciality on user profit. At the same time, there are still several problems with defining the term "profit" so as to make it coherent and useful. The next section addresses these.

D. Commercial Profit

Customary price and market harm are abstractions which are not intuitively part of commerciality. Profit, however, appears in almost any definition, legal or otherwise. Here, too, however, the court must make decisions in difficult edge cases and thus creates new distinctions and extensions. On the one hand, courts have expanded profit to encompass almost any benefit one may gain from the use of copyrighted work. On the other, in order to retain some usefulness in the distinction, some courts have developed an inquiry meant to determine whether the copyrighted work is directly exploited for commercial gain, or only indirectly involved. This subsection covers these two interpretations.

[54] *Id.* ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'")

[55] *Id.* at 127–28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.")

i. Non-Monetary Gain

Determining that a use is commercial is easiest when it is made in order gain some monetary profit. In such cases, courts may superficially namecheck the commerciality criterion before quickly moving on. In *Warhol v. Goldsmith* for example, the Supreme Court found simply that "[t]he use also "is of a commercial nature." §107(1). Just as Goldsmith licensed her photograph to Vanity Fair for $400, AWF licensed Orange Prince to Condé Nast for $10,000."[56] The act of licensing the secondary work – that is, of plainly seeking monetary profit – is straightforward and requires very little articulation.

The analysis becomes more involved and complicated in cases, such as *Weissman*, in which the benefit accrued to the user is non-monetary. Recall that the court there argued that non-monetary gain may also be recognized as profit for the purposes of the commerciality inquiry, and further, that "[t]he absence of a dollars and cents profit does not inevitably lead to a finding of fair use."[57] At the risk of redundancy, I note here again that a finding that a use was noncommercial should not and does not inevitably lead to a finding of fair use. The insinuation that one would invariably lead to the other only muddles the definition of commerciality and makes it less analytically useful.

Moreover, there are several more serious problems with treating non-monetary gain as profit in plagiarism cases. First, in adopting a broad interpretation of "profit," *Weissman* opens a backdoor in U.S. copyright law for what amounts to a right of attribution.[58] If what is being usurped from the copyright owner is professional reputation and recognition, then the acceptance of that standard as part of the fair use inquiry implies that a copyright owner might have a right to the protection of their reputation. Many copyright owners have of course used the copyright system in order to protect their reputation,[59] but their claims, when accepted, were generally based on the rights enumerated within copyright law. More broadly, even in cases which do not concern plagiarism, the implication of adopting a non-monetary standard of commerciality is that copyright owners might have non-monetary interests that can be and ought to be protected by copyright law. This would fundamentally cut against utilitarian theories of copyright which emphasize owners' rights to recoup their investment in the work in market terms and generally exclude moral rights.

The second problem with adopting the *Weissman* definition is that it greatly widens the gap between the legal definition of "commercial" and most lay understandings of the

[56] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 537 (2023).

[57] *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989).

[58] Such a right exists (at least on paper) only very narrowly in the Visual Artists Rights Act (VARA).

[59] See Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 557–64 (2015) (discussing cases in which plaintiffs attempt to secure reputational or privacy interests.).

term. There are many instances where the law takes on a different definition than what is accepted in common parlance,[60] but in fair use law it is particularly problematic. This is because many people rely on fair use in their day-to-day interactions with copyrighted works. Expanding the definition so much makes these interactions much more complicated, even for those intent on acting in accordance with the law, and could potentially chill expressive uses.

More broadly, the problem with adopting a non-monetary definition of "profit" is the same problem attending the adoption of a customary price definition: it risks narrowing the category of "noncommercial uses" to a virtual non-category. Almost any use can be construed as bestowing some non-monetary benefit on the user, even ones which are clearly educational or otherwise protected. Courts do draw distinctions between different kinds of benefits, but without much structure or guidelines.

Consider, for example, two decisions: one by the First Circuit in 2012, and one by the Court of the Northern District of California in 1995. In the first, an archbishop was sued by a monastery for posting portions of its translations of ancient Greek religious texts on his website. The court held that, despite gaining no monetary benefit from this use, the archbishop nevertheless profited from it because he was able "to provide, free of cost, the core text of the Works to members of the Orthodox faith,"[61] and because he stood to gain "at least some recognition within the Orthodox religious community for providing electronic access to identical or almost-identical English translations of these ancient Greek texts."[62] Though it did not cite to it directly, the court thus combined the *Napster* definition with the *Weissman* definition. For present purposes, the implication is that general public recognition may amount to "profit" in the context of commerciality.

Contrast the First Circuit interpretation with *Religious Technology Center v. Netcom On-Line Communications Services,* a 1995 case in which the Church of Scientology went after one of its critics who posted some of its copyrighted works online. There, the District Court found that "there is neither evidence that [the defendant] took credit for any of plaintiffs' works nor that he is personally profiting, professionally or otherwise, as a result of his postings." Recognizing the chilling effect on criticism such a broad interpretation of commerciality would bring about, the court further noted:

> "If mere recognition by one's peers constituted "personal profit" to defeat a finding of a noncommercial use, courts would seldom find any criticism fair use and much valuable criticism would be discouraged. Thus, the court finds that Weissmann is

[60] See generally Daniel J. Hemel, *Polysemy and the Law*, 76 VAND. L. REV. 1067 (2023).

[61] *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012).

[62] *Id.*

> inapplicable here, and that its holding should not be stretched to swallow all nonprofit criticism motivated by concern for status."[63]

It is unclear what distinguishes these two cases, at least in terms of the commerciality inquiry. In both cases, the defendants posted copyrighted material online without seeking to make any monetary profit, and ostensibly with some kind of "productive" purpose in mind. In one case, peer recognition is understood as profit, and in another it is explicitly eschewed. The lack of firm ground here is a feature of an overly expansive definition of profit which does more to confuse the analysis than to clarify it. By contrast, an adoption of a monetary gain interpretation of profit is much easier to apply, comports with lay understandings of fair use, and preserves a category of noncommercial uses, as required by statutory language.

ii. Indirect Profit

One way in which courts have attempted to distinguish *Weissman* has been to read into it an indirect monetary profit requirement. This was what the Fifth Circuit did in *Bell v. Eagle Mountain Saginaw Independent School District*, a case where an author sued a school district for tweeting a page-long motivational passage from one of his books. Relying on *Weissman*, the plaintiff argued that the tweets could be considered commercial because they "[bolstered] the "professional reputation" of [the school district's] athletics programs."[64] The court disagreed, finding that *Weissman* centered on professional reputation because that reputation was "likely" tied to future salary.[65] By contrast, "[t]here is no logical theory for how tweeting Bell's motivational message to inspire students would enhance the reputations of these programs, let alone how that might lead to some tangible benefit for the school district later on."[66]

If the emphasis in the *Weissman* definition is placed on the indirect monetary profit users could potentially gain through their enhanced reputation, it drifts closer to the *Texaco* definition previously discussed. Under this interpretation, what makes a use at least

[63] *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1244 (N.D. Cal. 1995).

[64] *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 322 (5th Cir. 2022).

[65] *Id.* ("Enhanced reputation can be a commercial benefit, such as when a scientist falsely presents another's article as her own. *See Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989). That is because scientists are judged by the quality of their research, so a scientist who takes credit for another's good work enhances her professional status and likely her salary down the road. *Id.* (recognizing that "profit is ill-measured in dollars" in academia because public recognition is what "influences professional advancement and academic tenure").")

[66] *Id.*

partially commercial is monetary profit, even if the connection between the use and the profit is attenuated. Expanding the definition of profit so that it encompasses indirect profit is not without its challenges, but at the very least it requires some connection (even if flimsy) between a use and profitmaking. Burnishing one's reputation, on its own, would not suffice.

A central challenge presented by the indirect profit formulation concerns causality: how attenuated can the connection between a particular use and profit be in order for it to still count as "commercial"? There are cases, like *Texaco*, which appear more straightforward because of the fact that the uses were undertaken under the auspices of a clearly commercial enterprise. Other cases, like *Weissman*, require a longer chain of causality, and are therefore at least in some ways more speculative. Furthermore, this way of conceptualizing profit assumes that a hierarchy of purposes can be discerned. That is, it assumes that we can identify some ultimate profitmaking purpose which somehow cancels out any noncommercial purpose.

In reality, however, commerciality is not a dichotomy, but a spectrum.[67] Many uses are undertaken for *both* commercial and noncommercial purposes, and the "indirectness" of monetary profit is merely another way of discussing these same mixed motives. At the same time, the recognition that commerciality lies on a spectrum does not absolve us of the need to determine whether a particular use leans more towards commerciality or noncommerciality. Identifying in clear terms the commercial purpose alongside the noncommercial purpose, as well as the causal steps needed in order to get to either would go a long way towards creating a more coherent and predictable doctrine. This would not resolve all ambiguity, but it would significantly narrow the bounds of the definitional conundrum obfuscating commerciality inquiries.

***

I return now to the two conundrums *Hachette* exposed, concerning the crux of the definition of commerciality and the weight that should be accorded to it in fair use analysis. This Part has tackled the first, showcasing the different definitions courts attach to

[67] WILLIAM F. PATRY, PATRY ON FAIR USE § 3:4.50 (2025) ("In logic, those who espouse a noncommercial-commercial distinction are invoking a bivalency that doesn't exist; i.e., that for proposition (A), either A is true or A is false. That is, either a use is noncommercial or it is commercial. While this may be true for a light bulb (it is either on or off), it is not true for fair use, where uses may exist as a matter of degree. The logical fallacy of the false dilemma or the excluded middle (there is no third class other than noncommercial or commercial) is common in political rhetoric ("you're either with us or against us in the fight against terror"), but it has no place in a fair use analysis.")

commerciality. As I have tried to show, these do not cohere together and there is good reason to significantly narrow them into a streamlined definition that focuses on monetary profit as the fulcrum of analysis. This does not resolve all ambiguities, especially where mixed purposes are present, but it allows for more clarity and separation between what counts as commercial and what implication that designation ought to carry.

II. WEIGHING NONCOMMERCIALITY

Thus far, the discussion has mostly dealt with the definition of noncommerciality itself. Part of this discussion is clearly normative, but I have tried to sidestep the broader question regarding the weight that should be accorded to a determination of noncommerciality. Instead, I have argued that in order to avoid overly broad definitions, commerciality ought to be interpreted more narrowly and cohesively. Part II tackles the normative backdrop against which determinations of commerciality are made.

The first section explores the inherent normativity that underpins commerciality. I argue that courts are implicitly torn between two competing conceptions: sometimes noncommerciality is almost entirely ad hoc and semantic, determined by whether or not a profit is being made, and other times it is a *category* of uses, which, because they serve the public in some way, are contrasted with the purely commercial (i.e. self-serving). There is no unifying framework for integrating both meanings of noncommerciality, and indeed, very little acknowledgement that both ground discussions of the term. In the second section, I further argue that the equivocal rulings regarding the presumptive force of commerciality or noncommerciality are a result of the overlap between a determination for first factor purposes and for fair use more generally. The key to resolving this tension lies in understanding the connection between noncommerciality as a category of uses and the foundations of copyright law.

A. Two Conceptions

As we have seen, courts spend a substantial amount of time fretting over the definition of gain for the purposes of determining commerciality. This preoccupation stems from a semantic conception of commerciality, rooted in colloquial uses of the word. Indeed, in parsing the definition of commerciality, some courts have cited dictionaries in order to anchor one definition or another.[68] At the same time, part of the reason that courts have

[68] See e.g. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000).

expanded the meaning of profit beyond lay usage is the normative implications of assigning normative weight to uses that appear to be furthering little more than users' own self-interest. Because the statute privileges noncommercial uses over commercial ones, courts must contend with the normative implications of determining commerciality. That is, they must contend with a normative conception that is tied to the goals of copyright and fair use. This conception draws on distinctions between private and public benefit that do not always align with profitmaking.

These two conceptions form the background of many commerciality decisions, but the tension between them usually remains unacknowledged. For a stark example of the two conceptions, compare the Supreme Court's disparate treatment of the list of privileged uses in the preamble of §107 in two separate cases. In *Campbell,* the court rolls back *Sony's* presumption against commercial uses by noting that "If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country.""[69] That is, the definition the *Campbell* court adopts of commerciality is entirely tied to profitmaking. Accordingly, if a particular use is undertaken with a profitmaking purpose, it is commercial, whether or not it carries public benefits. By contrast, in *Google v. Oracle*, the court notes:

> "The text of § 107 includes **various noncommercial uses, such as teaching and scholarship,** as paradigmatic examples of privileged copying. There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are indisputably commercial. For instance, the text of § 107 includes examples like "news reporting," **which is often done for commercial profit**." (emphases added)[70]

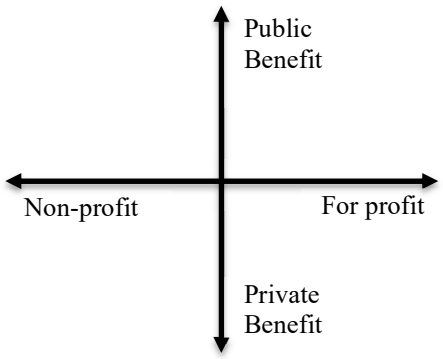
In other words, the court here treats at least some of the examples in the preamble as *categorically* noncommercial, presumably because of their benefit to the public. The qualification several sentences later regarding news reporting muddies this treatment and points to the inherent tension between the two conceptions, because it relies on profitmaking to delineate commerciality. If the *Campbell* court was correct that teaching and scholarship "are generally conducted for profit in this country," they would not be good examples of what the *Google* court calls "various noncommercial uses."

One way of sidestepping the normative conception of commerciality is by treating public benefit as a separate, free-floating component of the first factor. For example, in *Texaco*, the court alluded to a semantic conception of commerciality when it recognized

[69] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).
[70] *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 32 (2021).

that "courts will not sustain a claimed defense of fair use when the secondary use can fairly be characterized as a form of "commercial exploitation," *i.e.,* when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material."[71] It then went on to note that "[c]onversely, courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."[72]

This contrasting of the "broader public interest" with "conspicuous financial rewards" seemingly pits commerciality against a public benefit. However, because both of these constructs are brought to the fore in order to assign them normative weight in the fair use balance, placing them alongside one another implies that they are two sides of the same coin. In reality, there may be noncommercial uses (in the sense that they are not motivated by profitmaking) which confer purely private benefit. This is the case with most personal uses, for example. Similarly, as evidenced by longstanding precedent, uses aimed chiefly at private profit can also have significant public benefit. The *Texaco* court was aware of this and qualified its analysis of commerciality thus: "The greater the private economic rewards reaped by the secondary user *(to the exclusion of broader public benefits),* the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair" (emphasis added).[73] This qualification ends up placing the normative stakes of commerciality not on a spectrum but on a double-axis of both profit/non-profit and public/private, and in fact belies the initial dichotomous contrast between the two.



It is clear that an analysis of commerciality requires some engagement with the question of profit, but it is less clear what relation exactly public benefit has to it. Can it be

[71] *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994).
[72] *Id.*
[73] *Id.*

understood completely separately from noncommerciality, or is it part and parcel of the determination of what makes something commercial or noncommercial? This incoherence stems from a lack of theoretical grounding concerning the importance of noncommerciality to copyright as a system, and can only be addressed by taking a broader view.

B. Presumptive Force

[TBA]

III. GROUNDING NONCOMMERCIALITY

This Part articulates a theoretical connection between noncommerciality as a doctrine and noncommodification as a foundational aspect of copyright law. The first section provides an analysis of this connection, oriented around the dual role noncommerciality plays in preserving noncommodified spaces and the pluralism of values represented within copyright law. This section clarifies why a normative conception of commerciality is needed in commerciality determinations, and provide some guidance on the anchors of this conception. A noncommercial conception grounded in the goals of copyright law can then be integrated into an analytical framework that can be used to guide fair use decisions, as discussed in Section B.

A. The Importance of Noncommerciality

In order to explain why noncommercial uses fulfill an important role as a category of uses within copyright, this section provides an overview which situates noncommodification as a foundational aspects of the copyright landscape. Without it, the system will not work to foster creativity or to advance a plurality of societal values beyond economic incentives. With this grounding in mind, the second subsection explains the connection between noncommerciality and these concepts.

i. Noncommodification in Copyright

The premise of this section is that noncommerciality fulfills an important role within copyright in preserving noncommodified understandings of human activity, and thereby in maintaining copyright as a system that is only incompletely commodified. Defending this

claim requires an elaboration of several interconnected concepts and theories as they relate to copyright. This defense is necessarily limited and does not engage with all aspects of the vast and sprawling literature on commodification. Instead, what I hope to show is that the protection of noncommodified uses is an integral part of copyright law's goals.

Commodification as I am using it here relates both to what is or should be bought or sold, as well as to whether it is or should be exchanged within an institutionalized market at scale.[74] As an example of the difference, consider that we might have good reasons to believe that exact copies of a Jenny Saville painting ought not to be exchanged at scale, though we have few qualms about one copy made by a hobbyist being sold at a neighborhood garage sale. Our objection in this case would be not so much to the painting's being bought and sold as such, but to its sale in an institutional market. Sometimes objections to the over-commodification of the objects of copyright law sound in the register of market objections, and sometimes the critique is against the very valuation of an object as a monetizable commodity.

This latter critique can be more readily understood against the backdrop of what Margaret Jane Radin has called "universal commodification," in which "everything that is desired or valued is an object that can be possessed, that can be thought of as equivalent to a sum of money, and that can be alienated."[75] Such a worldview "[does] violence to our deepest understanding of what it is to be human" because it conceives of many different aspects of one's personhood, including "politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes" as not integral to the self.[76] This kind of commodification has not only a practical component (*are* things being bought and sold?), but also a rhetoric ("the practice of thinking about interactions as if they were sale transactions") and a methodology (the "use of monetary cost-benefit analysis to judge these interactions.")[77] The implications of commodification are therefore broader than just the practicalities of transaction, but carry rippling effects which, at scale, can impact other areas of our life and valuation.[78]

In the context of copyright, universal commodification in practice and in rhetoric has the effect of reinforcing private property and therefore enclosure as the main paradigms for engaging with culture. This view marginalizes and in some cases displaces other important individual and social goals and values. So much so that Niva Elkin-Koren has argued that

[74] I'm borrowing this distinction from Shai Agmon, *The Moral Limits of What, Exactly?*, ECON. & PHIL. 1 (2024) who treats the first as a question of commodification and the second as a question of marketization.
[75] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1861 (1987).
[76] *Id.* at 1906.
[77] Radin, *supra* note 74.
[78] *Id.*

the consequence of "turning our entire culture into a market for goods" is that little room remains "for political action of individuals as citizens rather than as consumers."[79]

One way of combatting the universal commodification worldview is through the delineation and compartmentalization of the market domain. Identifying and cordoning off a separate sphere of human activity in which relationships are not assessed and valued via market methodology – that is, carving out a market sphere on the one hand and a political or personal sphere on the other – is an appealing liberal antidote to commodification.[80] According to Radin, however, this attempt to compartmentalize presents a distorted view, descriptively and normatively, of the relationship between what is and is not commodified. For one, she argues that the theoretical assumptions buttressing liberal compartmentalization "always [threaten] to assimilate to universal commodification."[81] More importantly for present purposes, the metaphoric delineation into spheres or compartments overlooks the ways in which commodities exchanged on the market can also come to be appraised in nonmarket terms. In other words, commodified and noncommodified understandings of objects and transactions are not mutually exclusive, but instead interact in complex ways with one another.

Instead, Radin offers incomplete commodification as an alternative model, in which many things are "neither fully commodified nor fully removed from the market."[82] The reasons for favoring this model are twofold: first, it better reflects real conceptual conflicts we may have over different interactions and objects. To borrow an example from Radin's book, a person "can both feel a painting is priceless and yet have it appraised for insurance purposes. Then neither commodification nor noncommodification can accurately describe the way such a person conceives of an interaction."[83] Second, it allows for regulatory approaches that recognize the benefits of both commodification and noncommodification, and therefore do not necessitate either outright prohibition on market transaction or unencumbered governance through what she calls "private-property-plus-free-contract."[84] For Radin, many questions must be considered ad hoc because the end goal is human flourishing, and there is no predetermined amount of commodification that will best promote it. What her theory points to, however, is the necessity of preserving and enshrining noncommodified understandings alongside commodified ones, without fully disentangling the two into entirely separate spheres.

---

[79] Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, *in* THE COMMODIFICATION OF INFORMATION 105 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).
[80] MARGARET JANE RADIN, CONTESTED COMMODITIES 30 (1996).
[81] *Id.* at 31.
[82] Radin, *supra* note 74, at 1855.
[83] RADIN, *supra* note 79, at 103.
[84] Margaret Jane Radin, *Incomplete Commodification in the Computerized World*, *in* THE COMMODIFICATION OF INFORMATION 4 (Niva Elkin-Koren et al. eds., 2002).

This viewpoint has implications for theorizing and regulating the cultural landscape. In particular, it has implications for our understanding of the constitution and role of the public domain. More specifically, it calls on us to eschew a metaphorical demarcation that would compartmentalize this landscape into overly rigid domains, enclosed by boundaries signifying the commodification status of different artefacts.

This is not a novel proposition. Earlier debates in copyright scholarship led several scholars to envision a much more complex cartography for the public domain. James Boyle, for example, identified a multiplicity of "public domains," which reflect societal contestations over the concept. Some of these correspond to stark compartmentalization (e.g. when the public domain "consists only of complete works that are completely free: free for appropriation, transfer, redistribution, copying, performance, and even rebundling into a new creation"[85]), while others are predicated on public access and use, including through fair use and licensing.

In her work mapping the public domain, Pamela Samuelson similarly identified not only a core public domain, but also its "contiguous terrains," including content that is simply widely available to the public as well as fair uses.[86] In an assessment of this map, Julie Cohen argued that "the terrains inside and outside the core overlap, merge and diverge in ways that we would not expect to see if public and private terrains were formally separate."[87] Cohen further argued that a copyright law that was attuned to the realities of the creative process would include public entitlements which "do not comprise a geographically or ontologically separate entity; instead, they are baseline rights of access to and engagement with the cultural landscape in which we all exist."[88] Without these, we risk losing the very building blocks that allow the promotion of science and art. In other words, it is incomplete commodification, and therefore the necessary protection of noncommodified understandings and uses of copyrighted works, that preserve the legal abstractions that are foundational to the law. Ultimately, noncommodified understandings of culture form an integral part of the social process that brings about the creation of new work. A fully commodified cultural landscape would thus not only be generally harmful for human flourishing, but also take away from one of copyright law's clearest goals.

[85] James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 68 (2003).
[86] Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROBS. 147, 149 (2003).
[87] Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 158 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).
[88] *Id.* at 157.

A second, related, aspect of commodification has to do with commensurability. Radin argues that "universal commodification implies that all value can be expressed in terms of price," and that this allows for a linear comparison between anything of value.[89] The problem with this is that it necessarily creates fungibility that essentially sees no loss of value in the choice of one thing over another if they can both be reduced to the same price.[90]

U.S. copyright is already a system primed toward commensurability in Radin's sense due to its structuring around economic incentive. Creators are granted a limited monopoly on reaping the monetary fruits of their labor, because it allows them to recoup the costs accrued in production and therefore incentivizes further creation. There are serious limitations on our ability to know what the perfect incentive would look like and therefore to limit the scope of the right, but at its core, this is the foundational premise underpinning the granting of exclusive copyright. The incentive structure is generally conceived (and understood by courts) as being concerned with protecting solely the economic incentives of the author. Other motivations the author may have, while important, are not what is protected by the law. Therefore, authors may only curtail uses made of their work insofar as those uses impinge on their *economic incentive.* From here the road to defining uses in terms of their harm to this incentive is short. As I argued in Part I, this becomes apparent in e.g. definitions of commerciality that are tethered to market harm.

This approach carries with it the danger of reducing copyright to a system of laws that is solely concerned with economic value. Anxieties about this possibility are not unfounded, but the law was also structured so as to advance public and non-authorial interests and values. These include free expression, for example, or democratic civil society, or the autonomy of individual consumers.[91] These require an articulation on their own terms and not merely by recourse what the author stands to lose, or else we lose out on what the public stands to gain.

Generally, a copyrighted work in any given case is a bearer of economic value because of the structuring of exclusive rights in copyright. By contrast, secondary uses of that work may, in the context of a legal case, bear a wider variety of values, including economic. The basis of comparison between the two requires that we define the particular goal we are trying to achieve, and only then can we compare the original work and the secondary use within the context of fair use.

The thorny problem with this approach is that copyright law does not have a single, unitary goal or value it seeks to advance. Much depends on the particular theoretical priors

[89] RADIN, *supra* note 79, at 9.
[90] *Id.* at 118.
[91] See generally Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 183 (1996); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 BOSTON COLLEGE L. REV. 397 (2003).

one adopts, which means that many contestations are really about those priors rather than about any particulars.[92] This paper does not purport to finally resolve these disputes, but instead to urge that we become more precise about what it is we're trying to compare and why. At the same time, for reasons rooted in Radin's concern with fungibility, and also because the first factor of fair use analysis offers one of the only places in which to articulate noneconomic values, there is particular importance in fully articulating the noneconomic values at stake when a particular secondary use is considered.

ii. Noncommerciality

It is possible to accept the links presented above between noncommodification and the copyright, and yet wonder what role noncommerciality plays in the overall scheme. After all, doesn't fair use as a whole work to preserve these elements of copyright law? The answer is clearly yes, though different components within it work to a greater or lesser extent to facilitate this. Fair use analysis is the place within copyright law in which different interests are articulated so that they can be more straightforwardly compared. The text of the latter three factors of fair use revolves around the copyrighted work and the potential harm to the owner, which leaves the first factor as the core articulation of the non-authorial interest at stake. For this reason, the first factor is where we should expect to see the most direct representation of noncommodification and incommensurability.[93]

The initial inquiry the first factor posits is: for what purpose did the user make use of the copyrighted work? If the *sole* motivation of the user was to usurp the owner's profits, the use would, by definition, not be fair because that is the core of the exclusive right.[94] By contrast, a claim of infringement rooted in the owner's personality or free expression rights will not succeed in a copyright case, because the owner is not entitled to exclusivity in the exercise of these interests.[95] Thus, the subtests included in the factor, and transformativeness chief among them, seek to identify additional purposes which might give rise to fair use.

[92] David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004).

[93] Radin, *supra* note 83, at 9 ("The first factor… can be read as shoring up noncommodified activity by privileging the noncommercial. Yet the fourth factor… can be read as wholly in the commodified realm of market-based monetary cost-benefit analysis.")

[94] There is a lot of ambiguity in my phrasing here regarding what might count as the *owner*'s profits, especially concerning derivative rights. I do not engage deeply with this issue here. I'm mainly pointing out that the first factor articulates the nonexclusive interests which may be at stake, and that on this basis we should evaluate noncommerciality as well.

[95] VARA is the notable outlier in this regard.

As Rebecca Tushnet has pointed out, however, orienting fair use around transformativeness recasts "pure copying," even for educational or scholarly purposes, as unfair.[96] This is because transformation requires that something more be added to the original work, even if just another context. Consequently, if nothing is added, there appear to be no reasons why a student, for example, shouldn't have to pay the owner a license fee in order to make a copy to study with. Tushnet argues that this not only narrows traditionally privileged uses but also circumscribes and restricts free speech.[97] I agree with this diagnosis, but I believe a related problem with this approach is that it neglects the importance of incomplete commodification for the goals of copyright. It is here that noncommerciality steps in.

After all, the preservation of access to copyrighted works does not necessarily explain why we should privilege the access of those who seek not to make a profit. Transformativeness preserves access because the public gains some new creation. Noncommerciality does something more foundational: it preserves the basic infrastructure that allows this system to work in the first place, because it protects the contested commodification of cultural creations. Their use for nonprofit purposes works against universal commodification and buttresses the plurality of (incommensurable) values that are protected by copyright. This reinforces the most basic foundations of copyright needed to make the system work and deserves normative recognition on that basis. By contrast, licensing copying for scholarly purposes preserves access but strengthens commodification. This reinforces the sharp boundary demarcation between public and proprietary and suggests that there is no loss of value in the choice between requiring licensing and allowing unauthorized copying.

Noncommerciality in this regard works as an important signal on the part of the user that they do not intend to commodify the secondary work, and are thus themselves not valuing it for its monetary value. Of course, secondary users who create transformative work that they profit from (such as a critical commentary video, for example) are also contributing to the incomplete commodification of the *original* work, but those who make noncommercial uses of copyrighted works are signaling their attitude towards both the original and secondary works. In so doing, they eschew private monetary benefit and contribute to a public interest.

This analysis rests on the existence of "purely noncommercial" uses: uses that are strictly and solely undertaken for nonprofit purposes. These uses exist in our everyday lives and are sometimes as mundane as backing up one's music collection onto a harddrive, but

[96] Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 556 (2004).
[97] Tushnet, *supra* note 96.

also include the practices of many fandoms which self-consciously choose communal norms that exclude monetization. These use cases are rarely litigated and therefore form a deceptively narrow subsection of uses copyright owners might be concerned about, but it is only by using them as a starting point that we can grapple with mixed purpose uses.

While there is some benefit to the representation of a plurality of different values, and therefore different uses, mixed purposes do not advance incomplete commodification to the same degree as "purely noncommercial" uses. Their public benefit is therefore not as immediately apparent and we must make more specific inquiries of the particular noneconomic uses they are being put to. Some uses, like education and scholarship, will have a clearer public benefit over other uses such as entertainment. The normative weight we assign to them will therefore depend largely on the particular purpose and its public benefit.

This brings us back to the two conceptions of commerciality in Part II. What I have argued so far is that noncommerciality has a normative role which distinguishes categories of privileged uses. These are privileged because they are directly tied to noncommodification, which plays an important role in copyright law. Importantly, this normativity does not define commerciality, but explains why it must be accorded normative weight in fair use. The public benefit "pure" noncommerciality protects is the maintenance of copyright as an incompletely commodified law. Paradigmatic examples of privileged copying, such as those referred to by the court in *Google v. Oracle*, are identified as such because they are generally only very indirectly tied to profitmaking, and therefore fulfill this normative role. This is not a hard and fast rule, however, and some use cases can morph into mixed purpose uses when, for example, scholarship is conducted for profit. In those cases, the public benefit must be assessed in a different way.

Thus, noncommerciality can provide us with reasons, independent of transformativeness, for finding a use to be fair. In contradiction with the Circuit Court's finding in *Hachette*, this would mean that there ought to be cases in which the mere fact that a use is noncommercial tips the scales of the first factor. At the same time, not all noncommercial uses will lead or should lead to this finding. As the next and final part explores, the first factor is but one factor in fair use analysis, and it may very well be that other factors (particularly the fourth factor) outweigh its considerations.

B. Reconstructing Noncommerciality

[This section will include a discussion of several cases in order to show how the adoption of a narrower definition along with the noncommodification connection can help clarify the stakes. In Hachette, for example, I will argue that the Circuit Court rightly found Internet Archive's use to be

noncommercial, but failed to appreciate the normative weight this determination ought to bear in weighing the first factor in their favor. At the same time, the framework proposed here will not fully predict the outcome of the fair use analysis in its entirety, because the market impact, as represented by the fourth factor, may yet outweigh the first factor. Ultimately, the framework offers a way of disentangling the different components of commerciality and its stakes, but cannot, without an additional (longer) normative discussion fully determine the outcome.]

CONCLUSION

Much ink has been spilled urging courts to drop their presumptions against commerciality. In many ways, this has been a success. In the process, commerciality has grown to eclipse noncommerciality as a category and courts hesitate to find a use to be noncommercial even when no money is being made. This state of affairs has led to confusing precedents and to a commerciality doctrine that lacks firm theoretical grounding. This has ramifications not only for the minutiae of fair use box-checking, but also because a failure to safeguard noncommercial uses risks undermining the foundations of copyright law as a system of laws designed to promote creative works. This article does not offer a path for total predictability in fair use (if such a thing is even possible), but urges more coherence in the definitions and stakes we use when evaluating a claim of fair use. This won't solve all problems, but it will narrow them.