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# Fair Use and First Amendment: Without Fair Use, What Would You Freely Speak About?

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## Abstract

The question this paper tries to answer is: Without fair use, what would you freely speak about? This paper will seek to demonstrate that the Copyright Clause's Fair Use doctrine, and the First Amendment are cousins who help each other, rather than enemies sworn to destroy each other as some believe. First I will give a brief overview and history of each doctrine. Next I will speak about three areas where I believe fair use and the First Amendment cross paths extensively. These areas are: (1) school/education; (2) social media and news; and (3) sports images/broadcasting. Finally, I will demonstrate how fair use is as important if not more important than the First Amendment for these categories that I have listed.



## Keywords

copyright, fair use, free speech

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# FAIR USE AND FIRST AMENDMENT: WITHOUT FAIR USE, WHAT WOULD YOU FREELY SPEAK ABOUT?

*Adam Blaier*

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## I. INTRODUCTION

When the founding fathers wrote the Constitution, they thought about several things. One could surmise one of their conversations compared existing laws in England, to what they thought would be proper in a society free of monarchy. What we do know, is that the founding fathers believed in incentivizing creativity, and cherished freedom of speech, expression, religion, and others. We know this because article 1 section 8 clause 8 states, "The Congress shall have power… " to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" [1] (Copyright Clause) and the First Amendment in the Bill of Rights states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" [2]. The rights granted in this clause and amendment has been used to benefit American society for hundreds of years.

The question this paper tries to answer is: Without fair use, what would you freely speak about? This paper will seek to demonstrate that the Copyright Clause's Fair Use doctrine, and the First Amendment are cousins who help each other, rather than enemies sworn to destroy each other as some believe. First I will give a brief overview and history of each doctrine. Next I will speak about three areas where I believe fair use and the First Amendment cross paths extensively. These areas are: (1) school/education; (2) social media and news; and (3) sports images/broadcasting. Finally, I will demonstrate how fair use is as important if not more important than the First Amendment for these categories that I have listed.

### *A. First Amendment*

The First Amendment is considered by some[3] to be the most important

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[1] U.S. Const. art. I.

[2] U.S. Const. amend. I.

[3] *The First & Second Amendment*, PBS.ORG, http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/first-and-second-amendments/ (last visited Dec. 15, 2015) ("The First Amendment is widely considered to be the most important part of the Bill of Rights. It protects the fundamental rights of conscience—the freedom to believe and express different ideas…. Under the First Amendment, Americans have both the right to exercise their religion as well as to be free from government coercion to support religion. In addition, freedoms of speech, press, and petition make democratic self-government possible by promoting the open exchange of information and ideas. Unpopular ideas are especially protected by the First Amendment because popular ideas already have support among the people.").

amendment and part of the constitution [4]. One could argue this amendment was the reason people fought so hard to win the revolutionary war. As Paul Goldstein states,

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."[5]

This amendment is vital to democracy and the free flow of ideas. The First Amendment was controversial in the first half of the 1900s, and remains controversial to this day. Both world wars along with the rise of communism and fascism put the First Amendment's powers and protections to the test. Arguably, one of the most famous discussions of the First Amendment comes from a dissent in *Abrams v. United States* known as "the most famous dissent in history"[6] written by Justice Oliver Holmes. As Justice Holmes states,

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . . The best test of truth is the power of the thought

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[4] *First Amendment*, HG.ORG, http://www.hg.org/first-amendment-law.html (last visited Dec. 15, 2015) ("The First Amendment to the U.S. Constitution is arguably one of the most important laws in America. It prohibits the enactment of any laws respecting the establishment of religion, impeding the free exercise of religion, abridging the freedom of speech, infringing upon the freedom of the press, interfering with the right to peaceably assemble, or prohibiting citizens from petitioning for a governmental redress of grievances").

[5] Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983, 988 (1970).

[6] Andrew Cohen, *The Most Powerful Dissent in American History*, THE ATLANTIC (Aug. 10, 2013), http://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/ (describing Justice Holmes powerful dissent).

> to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[7]

The "market place of ideas" has been one of staples in American legal philosophy, and has played a valuable role in shaping our history. There are several protections from government, which the First Amendment provides to us. The First Amendment prohibits the government from creating a national religion, in turn, giving the people the free exercise of religion, the ability to petition the government [8], the freedom to assemble[9], and finally which we shall speak about during this paper, the freedom of speech and freedom of the press[10]. The First Amendment was originally intended to protect against the federal government. The First Amendment was incorporated through the 14th Amendment's "due process clause" to apply against the states in *Gitlow vs. New York* [11]. There are several categories of speech that the First Amendment does not protect[12]. These are: (1) Defamation, such as slandering or libeling against another (non-famous) person; (2) Obscenity, such as different types of pornography; (3) Incitement, such as causing a riot which leads to harm; (4) Speech integral to criminal conduct, such as admitting you would murder someone; (5) True Threats,

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[7] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Court used the clear and present danger when Bolshevik supporters dropped leaflets with information about the revolution).
[8] *Schneider v. State*, 308 U.S. 147, 160 (1939) ("Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion").

[9] *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939) ("[I]t is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects").

[10]*Lovell v. Griffin*, 303 U.S. 444, 450 (1938) ("Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action").
[11] *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

[12] *What Types of Speech are Not Protected by the First Amendment*, FIRST AMENDMENT CENTER AT VANDERBILT UNIVERSITY AND THE NEWSEUM (Sept. 22, 2005), http://www.firstamendmentcenter.org/which-types-of-speech-are-not-protected-by-the-first-amendment.

such as threatening to kill the president; (6) Fraud; (7) "Fighting words", such as throwing a penny with a swastika on it at a Jewish person; (8) Child pornography; and finally, (9) Grave and imminent threats to national security as noted in *United States v. Alvarez*.[13] Each of these categories has their own tests and precedent carved out by the courts, which this paper will not get into.

### *B. Copyright and Fair Use*

The history of copyright protection predates the establishment of America[14]. Paul Goldstein describes the birth of copyright in England and eventually America as follows:

> "Control over printing, initiated by the Crown within a decade of the art's introduction into England, was first exercised through royal grants of privileges and patents for printing. Subsequently, in 1557, the regulatory function was largely vested in the printers themselves by the incorporation of the Stationers' Company. The Company discharged its prime task—bringing law and order to the printing trade—by prosecuting printers who published seditious matter or who infringed another's licensed work. Through a series of royal proclamations, Star Chamber decrees, and legislation, censorship and the regulation of piracy became increasingly inseparable; "copyright has the look of being gradually secreted in the interstices of the censorship." With the eventual decline of censorship at the end of the seventeenth century, the stationers, their fortunes tied to those of the censorship regime, were compelled to petition Parliament for statutory security. The response was the enactment of the Statute of Anne, the paradigm for all subsequent copyright legislation in England and the United States. The Company's role under the statute was limited; its only function was to register titles and accept deposit of copyrighted works. Censorship's role ceased, the statute's grant of property rights in printed matter being in no way conditioned upon the propriety of its content."[15]

The Framers of the Constitution believed protection of creativity and

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[13] *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

[14] *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1256 (11th Cir. 2014) ("Promoting the creation and dissemination of ideas has been the goal driving Anglo–American copyright law since the enactment of the first English copyright statute to explicitly vest copyright in a work's creator, the Statute of Anne of 1710, which declared that it was "[a]n Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors ... during the Times therein mentioned").

[15] Goldstein, *supra*, at 983-84.

copyright was important enough to place it in the Constitution (as stated earlier; Article 1 Section 8 Clause 8). The first copyright act in America was codified in the Copyright Act of 1790[16]. It was very basic in its protections, and did not include the fair use doctrine. The Copyright Act of 1909 required works to be published and have a notice of copyright "©" affixed to it in order to receive federal protection. State law protected unpublished works[17]. The Copyright Act of 1976 repealed this Act, and defined the subject matter of a copyrightable works. Under 17 U.S.C.A. § 102(a)[18] Copyright protections subsists… "in *original works* of authorship *fixed* in any *tangible medium of expression*, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"[19].

The categories copyrightable works under modern copyright law are found in 17 U.S.C.A. § 102[20]. These categories are: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Section 17 U.S.C.A. § 102(b) states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"[21]. Section 17 U.S.C.A. § 102(b) distinguishes copyright from other forms of intellectual property such as patents, and trade secrets. It is important to understand the distinction between what is copyrightable, and what is not. For instance, the U.S. Supreme Court held in *Feist Publications Inc. v. Rural Telephone Service Company* that facts are not copyrightable [22]. The *Feist* case was about a publishing company who used telephone company's telephone directory listings without approval. While the court ruled facts are not copyrightable, they stated that compilations of facts could be copyrightable. This will be an important point later in this paper. In copyright law, as we

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[16] *Copyright Act of 1790,* COPYRIGHT, *available at* http://copyright.gov/history/1790act.pdf (last visited Dec. 15, 2015)("An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned").

[17] Copyright Act of 1909, Pub. L. 60–349, 35 Stat. 1075.

[18] 17 U.S.C. § 102 (a)

[19] *Id*.

[20] *Id*. at 15

[21] *Id.* at 15

[22] *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991) "This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable"

have seen, an individual is not able to use another's work without permission. The law has categories of works, which can be protected, and categories, which may not be protected. So the question becomes, how may an individual use someone else's work, without getting sued? The answer to this question lies in an affirmative defense known as the Fair Use doctrine. Fair use is defined in 17 U.S.C.A. § 107:

> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[23]

These protections are what separate the use of another's material without the need of a license, and paying money or getting sued for infringement. With such a broad rule, the courts needed to find a way to curtail it so the doctrine wouldn't encourage piracy or infringement. Section 107 defines how a court will weigh the four factors of fair use. The factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work, such as fact or fiction; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *"The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors"[24]. Each of these factors is looked at on a case-by-case basis[25]. The reason the rule has been tailored to leave some room for discretion can be found in a simple example. If an individual were to use a stranger's entire research article, and claim it as his or her own, it would not be fair use. If that same person used 70 words of a stranger's article, it would be fair use. Without this distinction, the plain language of the rule would have one believe they could use the work for the mentioned categories without limitation.

The importance of fair use may go unnoticed in everyday life, but consider this; it was estimated in 2007 that fair use generated $4.5 trillion in revenue for the United States, employed millions of workers, and was responsible for 1/6 of the US GDP in 2006 [26]. Ed Black, President and CEO

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[23] 17 U.S.C. § 107.

[24] U.S.C. *supra* note 23.

[25] *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 680 (D. Minn. 1995) ("In applying the factors set out in § 107, courts must tailor the fair use analysis to the individual facts presented in each case".)

[26] *Fair Use Economy Represents One-Sixth of U.S. GDP*, COMPUTER & COMMUNICATIONS

of Computers and Communications Industry Association said,

> "Much of the unprecedented economic growth of the past ten years can actually be credited to the doctrine of fair use, as the Internet itself depends on the ability to use content in a limited and nonlicensed manner. To stay on the edge of innovation and productivity, we must keep fair use as one of the cornerstones for creativity, innovation and, as today's study indicates, an engine for growth for our country."[27]

Fair use has been used in several cases involving celebrities and icons such as Jerry Seinfeld[28], the Grateful Dead[29], Harry Potter[30], Muhammad Ali [31], and others. Each of the four fair use factors weighed differently throughout

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INDUSTRY ASSOCIATION, (Sept. 12, 2007) http://web.archive.org/web/20080415213601/www.ccianet.org/artmanager/publish/news/First-Ever_Economic_Study_Calculates_Dollar_Value_of.shtml.

[27] *Id.*

[28] *See Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 146 (2d Cir. 1998). (Where fair use did not permit company to make Seinfeld trivia cards. "Considering all of the factors discussed above, we conclude that the copyright law's objective "[t]o promote the Progress of Science and useful Arts" would be undermined by permitting *The SAT* 's copying of *Seinfeld, see Arica,* 970 F.2d at 1077, and we therefore reject defendants' fair use defense")

[29] *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006). (Company made Grateful dead compilation and court found fair use of materials. "On balance, we conclude… that the fair use factors weigh in favor of DK's use. For the first factor… use of concert posters and tickets as historical artifacts of Grateful Dead performances is transformatively different from the original expressive purpose of BGA's copyrighted images. While the second factor favors BGA because of the creative nature of the images, its weight is limited because DK did not exploit the expressive value of the images. Although BGA's images are copied in their entirety, the third factor does not weigh against fair use because the reduced size of the images is consistent with the author's transformative purpose. Finally, we conclude that DK's use does not harm the market for BGA's sale of its copyrighted artwork, and we do not find market harm based on BGA's hypothetical loss of license revenue from DK's transformative market.")

[30] *See Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008). (Where defendant made lexicon of Harry Potter world & lost fair use argument. For the foregoing reasons, Plaintiffs have established copyright infringement of the *Harry Potter* series, *Fantastic Beasts & Where to Find Them*, and *Quidditch Through the Ages* by J.K. Rowling. Defendant has failed to establish its affirmative defense of fair use.)

[31] *See Monster Communs., Inc. v. Turner Broadcasting Sys.*, 935 F. Supp. 490, 496 (S.D.N.Y. 1996) (Defendants used clips of Ali for documentary and won on fair use: "Thus, although the record is not as complete as it might be, given the very expedited character of these proceedings, the balance of the statutory fair use factors appear to cut heavily in favor of the defendants. Accordingly, the Court concludes that plaintiff is unlikely to prevail on the merits, even assuming that it has protectable rights in the footage in question, because the defendants are likely to establish that their use is a fair one within the meaning of the Copyright Act").

the discussion.

## II. AREAS WHERE FIRST AMENDMENT AND FAIR USE ARE INTERTWINED

In this section, I will discuss three areas where I believe the First Amendment and Fair Use are intertwined. These areas are: (1) school/education; (2) social media/news; and (3) sports broadcasting and statistics. I chose these areas because I believe they are all integral parts of our society, and they are all disseminated in similar ways (i.e. television, internet, and books/research). They all have an important part in the "market place of ideas".

First it must be understood how courts have determined there is harmony in cases, which involve both the First Amendment and the Fair Use Doctrine. As the 11th Circuit stated in *Suntrust Bank v. Houghton Mifflin Co*., "The Copyright Clause and the First Amendment… were drafted to work together to prevent censorship; copyright laws were enacted in part to prevent private censorship and the First Amendment was enacted to prevent public censorship"[32]. The idea/expression dichotomy is something courts generally speak about when discussing the balance of the First Amendment and Fair Use in copyright law, and how to determine what is copyrightable or protected under the First Amendment[33]. The idea/expression dichotomy limits the copyright ability of a work, to being fixed/expressed (i.e. written, drawn or communicated on some medium) rather than allowing ideas/facts, which are in ones mind and not expressed to be copyrightable. This protects the public from being harmed by an individual who would otherwise be able to copyright ideas that have not come to fruition, therefor stifling creation. The 9th Circuit in *SunTrust* acknowledges that, "In copyright law, the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy and the doctrine of fair use"[34]. Once the idea has been fixed in a tangible medium of expression, and published, broadcasted, or distribution, it will enter the market place of ideas as discussed earlier.

> "Copyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow

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[32] *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001).
[33] *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 556 (1985) ("copyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression. No author may copyright his ideas or the facts he narrates").
[34] *Id.* at 25.

> is critical to a free society. The right to control access to one's own expressions before publication does not engender free speech."[35]

The mere fact that an author can copyright his work does not inhibit speech, which some scholars would believe. It can be argued that the author's creativity has enhanced free speech because a new idea has entered this "market place of ideas". The public's interest in protecting the free flow of ideas is crucial, and the First Amendment and fair use together protect this[36].

### *A. School and Education*

This paper I am writing would probably not be legal under copyright law without fair use. I have used quotes from scholars, and cited cases that would likely be found to be infringement but-for the fair use defense. We look to 17 U.S.C.A. § 107 where it states "teaching (including multiple copies for classroom use), scholarship, or research" for purposes of this section. Fair use allows students, professors, researchers and various companies to use copyrightable work by others to learn from or support/criticize ideas[37]. Fair use and the First Amendment are the lifeblood of academia and two of the critical ways to enhance the market place of ideas, which allows students, professors, and researchers in all areas of academia to flourish[38]. As the Supreme Court stated so gracefully in in *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*,

"Our Nation is deeply committed to safeguarding academic freedom,

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[35] L. R. Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 5 (1987).

[36] *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115-16 (9th Cir. 2000) ("The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance").

[37] *SunTrust Bank*, 268 F.3d at 1264. ("The exceptions carved out for these purposes are at the heart of fair use's protection of the First Amendment, as they allow later authors to use a previous author's copyright to introduce new ideas or concepts to the public. Therefore, within the limits of the fair-use test, any use of a copyright is permitted to fulfill one of the important purposes listed in the statute.").

[38] *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957). ("[T]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

> which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, supra, 364 U.S., at 487, 81 S.Ct., at 251. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."[39]

College campus is a place where students may generate public discourse and debate over issues. The campus newspapers are generally copyrightable, but the campus is open to free speech about topics or issues going on in the school or around the world. "As modern doctrine tells us, the right of free speech encompasses the right to hear as well as to speak, to read as well as to publish."[40] A Professor uses copyrighted material to teach students daily. How much material that can be used, goes back to the fair use factors. The 6Th Circuit in *Princeton Univ. Press v. Michigan Document Servs., Inc.* held that a commercial copy shop could not use fair use as a defense when they printed substantial portions of copyrighted work to *sell* to students for a class[41]. How is one supposed to know how much use, is fair use? There have been guidelines published to help teacher, professors, researchers and students use fair use properly, to ensure they are within copyright law[42]. Some of the guidelines to limitations of proper fair use used at Stanford University[43] are:

> "Up to 10% or 1,000 words, whichever is less, of a copyrighted text work. For example, you may use an entire poem of less than 250 words but no more than three poems by one poet or five poems by different poets from the same anthology; Up to 10%, but not more than 30 seconds, of the music and lyrics from an individual musical work; Up to 10% or three minutes, whichever is less, of a copyrighted motion media work—for example, an animation, video, or film image; A photograph or illustration in its entirety but no more than five

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[39] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
[40] Patterson, *sup*ra, at 3.
[41] *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1412 (6th Cir. 1996).
[42] *Reproduction of Copyrighted Works by Educators and Librarians*, U.S. COPYRIGHT OFFICE (Aug. 2014), http://www.copyright.gov/circs/circ21.pdf.
[43] *Educational Uses of Non-coursepack Materials*, COPYRIGHT & FAIR USE – STANFORD UNIVERSITY LIBRARIES, http://fairuse.stanford.edu/overview/academic-and-educational-permissions/non-coursepack/#what_is_an_educational_use (last visited Dec. 15, 2015).

> images by the same artist or photographer. When using photographs and illustrations from a published collective work, you may use no more than 10% or 15 images, whichever is less. Or; Up to 10% or 2,500 fields or cell entries, whichever is less, from a copyrighted database or data table. A "field entry" is defined as a specific item of information, such as a name or Social Security number in a database file record. A "cell entry" is defined as the intersection at which a row and a column meet on a spreadsheet."[44]

The courts have concluded that whole works are not eligible for fair use protection. In *American Geophysical Union v. Texaco*, the 2nd Circuit held that Texaco's researchers were not allowed to fully copy articles from scientific a journal and archive them to use for the future[45]. I believe this is clearly distinct from the average classroom or research scenario, where an individual copies a small portion of a work for an example, quote, or evidence to further his or her own work or discussion. In *Cambridge University Press v. Patton*, the 11th Circuit held a publishing house failed in a copyright infringement suit against a state university system claiming that the university infringed on their copyrights by allowing the unlicensed portions of the copyrighted books to be posted electronically, available for students use[46]. This case is distinguished from *Princeton Univ. Press* because there was no commercial purpose (i.e. no money being exchanged for the copyrighted material). Another interesting case pertaining to fair use and the First Amendment in academia/scholarship is *Authors Guild v. Google Inc*. In this case, Google copied millions of books into an online database and the copyright holder sued. The 2nd Circuit concluded,

> "In my view, Google Books provides significant *public* benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It

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[44] *Id.*

[45] *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994) ("Our ruling is confined to the institutional, systematic, archival multiplication of copies revealed by the record.").

[46] *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1267 (11th Cir. 2014).

> facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits."[47]

If individuals could not use pieces of a copyrighted work, it would most likely resemble England in the 1700s and earlier when only the richest people could afford books or obtain a license. They say that nothing today is original[48], but if it were not for fair use enhancing the First Amendment in schools and academia, the dissemination of information would be stifled and the world would be a much different place. As the court stated in *Cambridge,*

> "The text of the fair use statute highlights the importance Congress placed on educational use. The preamble to the statute provides that fair uses may include "teaching (including multiple copies for classroom use), scholarship, or research" and the first factor singles out "nonprofit educational purposes." 17 U.S.C. § 107. The legislative history of § 107 further demonstrates that Congress singled out educational purposes for special consideration."[49]

### *B. Social media and News*

News sites such as Fox, CNN, MSNBC, NY Times, the Wall Street Journal and others, are all major sources of information. News outlets use a lot of sound recordings, audiovisual, and picture related copyrights. The news stories generated on these sites are copyrighted in themselves. In section 107 we look at "criticism, comment, news reporting" for protection and fair use against copyright infringement. One of the earliest Supreme Court cases, which discussed the First Amendment's purpose and power to protect the dissemination of information (good or bad) through writing, was *Whitney v. California*. As Justice Brandeis states,

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political

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[47] *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).
[48]Melanie H. Axman, *Nothing We Do is Original Anymore, So Find Things Worth Imitating,* BUSINESS INSIDER (Aug. 8, 2012) http://www.businessinsider.com/nothing-we-do-is-original-anymore-so-find-things-worth-imitating-2012-8.
[49] Axman, *supra* note 48, at 46.

> truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[3] They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[50]

The news has an important role in educating the public on current events, issues in society, and politics. Photos, sound bites, and video clips are all integral parts of this function. If these areas of information were all copyrighted without fair use, it would be much harder for the public to stay informed. As they say, a picture is worth 1,000 words. One 1st Circuit Court case, which discusses "news worthy" fair use copying, is *Nunez v. Caribbean Int'l News Corp.* In this case a copyrighted photograph was used in a news broadcast. The copyright holder sued. The 1st Circuit held that, "Unauthorized reproduction of professional photographs by newspapers will generally violate the Copyright Act of 1976; in this context, however, where the photograph itself is particularly newsworthy, the newspaper acquired it in good faith, and the photograph had already been disseminated, a fair use exists under 17 U.S.C. § 107".[51] This is extremely important when considering how often news is disseminated in this fashion. How often does a famous person's picture get used, the news shows it, and describes the event that transpired? Another issue in news reporting would be the reporting of newsworthy information before it is released to the public. In *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P* the 2nd Circuit states, "That kind of activity, whose protection lies at the core of the First Amendment, would be crippled if the news media and similar organizations were limited to sources

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[50] *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (citing Justice Brandeis concurring opinion).

[51] *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

of information that authorize disclosure"[52], and "Although Bloomberg copied the recording without changing it, Bloomberg's use served the important public purpose of disseminating important financial information, without harm to the copyright interests of the author" [53]. The court again refers to the dissemination of information. Another case that dealt with this issue was *Harper & Row Publishers, Inc. v. Nation Enterprises*. In this case the Nation published a substantial portion of President Ford's memoir without the copyright holder's consent before the book was released. The court held against the Nation. The Supreme Court stated,

> "Fair use presupposes good faith. The Nation's unauthorized use of the undisseminated manuscript had not merely the incidental effect but the *intended purpose* of supplanting the copyright holders' commercially valuable right of first publication. (ii) While there may be a greater need to disseminate works of fact than works of fiction, The Nation's taking of copyrighted expression exceeded that necessary to disseminate the facts and infringed the copyright holders' interests in confidentiality and creative control over the first public appearance of the work."[54]

It is important to distinguish between *Bloomberg* and the *Nation* case. In Bloomberg the dissemination of the copyright holder's information did not hurt the copyright holder's interest. The Nation disseminating the most important parts of Ford's memoir, before publication, led to financial loss and harmed the copyright holder.

The news media is at the forefront of political discourse. An important case for this discussion is *New York Times Co. v. Sullivan.* The NYT published an ad[55], which shed a negative light on events taking place in Alabama regarding Martin Luther King Jr.'s arrest. A political figure (Montgomery Public Safety commissioner, L. B. Sullivan) in Alabama sued the New York Times for defamation. The rule that came from this case was public figures couldn't sue for defamation relating to his/her official conduct without proof of actual malice[56]. This rule is important because it allows

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[52] *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014).
[53] *Id.*
[54] *Id.* at 33.
[55] *Heed Their Rising Voices,* N.Y. TIMES (Mar. 29 1960), http://www.archives.gov/exhibits/documented-rights/exhibit/section4/detail/heed-rising-voices.html.
[56] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

media outlets to be aggressive in identifying public figures when reporting controversial news. Individuals have the right to know who's allegedly responsible for an event, as long as the information is not brought about with "actual malice". To bring this together with this paper's discussion, I want to highlight something the Supreme Court stated, "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[57]. So the free dissemination of information is crucial to bringing about social and political change. Journalists themselves have praised the fair use doctrine, which helps them use the First Amendment to disseminate information.

> "For journalists and journalistic enterprises, the copyright doctrine of fair use--the right in some circumstances to quote copyrighted material without permission or payment--is integral to getting work done and distributed. Journalists use it to quote sources and source material, refer to previous incidents, comment or critique, and to summarize, among other uses. The business of journalism is sustained in part by fair use, which enables appropriate, timely, unlicensed quotations and references to newsworthy material. Fair use incorporates journalists' free speech rights within copyright… Journalists' professional culture is highly conducive to a robust employment of their free speech rights under the copyright doctrine of fair use."[58]

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[57] *Id.*

[58] Patricia Aufderheide and Peter Jaszi, *Copyright, Free Speech, and the Public's Right to Know How Journalists Think about Fair Use*, AM. UNIV. (Feb. 2012), http://www.cmsimpact.org/fair-use/best-practices/copyright-free-speech-and-publics-right-know-how-journalists-think-about-fai (explaining that journalists fair use needs include: "(1) *Providing evidence or proof of a news item*. Quoting conclusions of a report; reproducing a damning memo; quoting a source's words; photographing breaking news on the scene; using an audio clip of a press conference; (2) *Illustrating a news item*. Providing audio or visual amplification to a factual statement; providing "color" quotes; adding quotes from bystanders; including photographs twitpic'ed (??) from the scene; recording natural sound for a radio piece; (3) *Including copyrighted material that incidentally appears in the news*. Music, posters, photos, copyrighted designs on T-shirts, and other incidental copyrighted material that merely travels with the core news elements being employed to tell the story; (4) *Providing historical understanding or depth to the news*. Excerpts from earlier reports; archival photographs; a montage of previous magazine and newspaper covers; using UGC archived videos from YouTube; (5)*Enhancing cultural critique*. Using excerpts from books or plays; reproducing art from press kits; including screen shots of a film being reviewed".

The Fair Use Doctrine enhancing the First Amendment contributes to a robust and mostly unimpeded news media. In countries where neither of these two freedoms/doctrines exists, the media is mostly censored or controlled by the government. Individuals in these societies are not able to cultivate their own opinions.

Social media makes things a little tricky. When Fox tweets a photo of a crime scene taken by one of their news teams (in tern they own the copyright), and a twitter follower re-tweets it, is there a copyright issue, or a social media user exercising his First Amendment right with a splash of fair use? I believe the answer is the latter. Just to put the numbers of social media in context. It is estimated that the number of people using social media right now is over 1.7 Billion[59], with these numbers growing every day. As of January 2014, over 70% of online adults use social media sites.[60] Over 30% of Facebook users get their news from Facebook.[61] Social media poses new challenges for journalists and news outlets alike. "But journalists are facing ever-greater challenges to applying the doctrine in daily life. Social media, video, and user-generated content pose new challenges and unfamiliar choices"[62]. Mary Ann Wymore discusses the use of Pinterest and other social media sites and the fair use doctrine[63]. After describing how the social media site works, and using a fair use analysis of social media posting of photos, she ultimately concludes, "Social media has become part of the fabric of our culture and is very likely here to stay. With a bit of careful thought and an ounce of caution, there is no need to shy away from it whether you are pinning, posting, tweeting, or liking for fun or to promote your business"[64]. There are guidelines on how to protect against copyright infringement on social media[65]. The 9th Circuit case referenced by Mary Ann in this article is *Perfect 10, Inc. v. Amazon.com Inc*. In this case, a website owner sued Google (for purposes of this discussion, I consider Google to be social media due to the

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[59] *Social Networking Reaches Nearly One in Four Around the* World, eMARKETER (Jun. 18, 2013) http://www.emarketer.com/Article/Social-Networking-Reaches-Nearly-One-Four-Around-World/1009976.

[60] *Social Networking Fact Sheet*, PEW RESEARCH CENTER (Dec. 27, 2013), http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/.

[61] Monica Anderson & Andrea Caumont, *How social media is reshaping news*, PEW RESEARCH CENTER (Sept. 24, 2014), http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/

[62] *Id.* at 44.

[63] Mary Ann L. Wymore, *Social Media and Fair Use: Pinterest as a Case Study*, BLOOMBERG (Aug 14, 2012), http://www.bna.com/social-media-and-fair-use-pinterest-as-a-case-study-by-mary-ann-l-wymore-greensfelder-hemker-gale/.

[64] *Id.*

[65] Lesley Ellen Harris, *Complying with Copyright When Using Social Media*, COPYRIGHT LAWS, INFORMATION OUTLOOK (June 2013), http://www.copyrightlaws.com/wp-content/uploads/2010/01/IO-article-June-2013-Social-Media-Guidelines.pdf.

creation of Google+ and the search engine's integrated news gather and article 'sharing' system.), Amazon and other websites for copyright infringement of their photographs, in which Google made thumbnail photos of the copyrighted material and posted it on their search engine. The 9th Circuit concluded after a fair use analysis that,

> "In this case, Google has put Perfect 10's thumbnail images (along with millions of other thumbnail images) to a use fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a significant benefit to the public. Weighing this significant transformative use against the unproven use of Google's thumbnails for cell phone downloads, and considering the other fair use factors, all in light of the purpose of copyright, we conclude that Google's use of Perfect 10's thumbnails is a fair use."[66]

It seems that it would be proper for this rule to be applicable to social media postings as long as the use is for any of the section 107 fair use exceptions, and is transformative (changed) upon being disseminated on social media. There are some questions about social media which should be addressed in the next Copyright Act: (1) Is a tweet/Facebook post copyrightable within the 140 character limit; (2) is commenting on a copyrighted photo as a "meme", or tweeting the photo, protected as free speech and fair use under section 107; and (3) Is re-tweeting or reposting on social media considered fair use and protected under the First Amendment? To bring this discussion home we look to an opinion from a New York Court in *Estate of Hemingway v. Random House, Inc,*

> "The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[67]

Social media gives people the power to speak out of sight from the public, but within a public forum. News reporting and social media have changed the landscape for copyright, fair use and the First Amendment. Both the news and social media have proved to be important in the dissemination of information and the people's right to free speech.

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[66] *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).
[67] *Estate of Hemingway v. Random House, Inc.*, 296 N.Y.S.2d 771, 776 (1968).

### *C. Sports Broadcasting and Statistics*

Like education, news media, and social media, the sports industry is lucrative and benefits from fair use and First Amendment protections. It is estimated that the sports industry in America by 2017 will be generating over $65 billion in revenue[68] and the sports industry world wide will have revenue over $145 billion[69]. With this much money, the value of intellectual property such as copyright will surely intersect with the publics need for information, and how it is disseminated. In this section we will look at two aspects of sports: (1) broadcasting; and (2) statistics.

The courts have established that a sport itself is not copyrightable, but the broadcast[70] of the event is[71]. The 8th Circuit has also held that broadcasting of sports information is protected under the First Amendment[72],

> "the California court further held that the First Amendment protects 'recitations of [baseball] players' accomplishments. 'The freedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community.' (citations omitted). 'Certainly, the accomplishments ... of those who have achieved a marked reputation or notoriety by appearing before the public such as ... *professional athletes* ... may legitimately be mentioned and discussed in print or on radio and television.'"[73]

I believe the impact sports have on people lives lead the court to this decision.

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[68] Curtis Eichelberger, *Sports Revenue to Reach $67.7 Billion by 2017, PwC Report Says* BLOOMBERG (November 13, 2013, 12:01 AM), http://www.bloomberg.com/news/articles/2013-11-13/sports-revenue-to-reach-67-7-billion-by-2017-pwc-report-says.

[69] Julie Clark, *Global Revenues Set to Rise to $145bn*, PWC http://www.pwc.com/gx/en/industries/hospitality-leisure/changing-the-game-outlook-for-the-global-sports-market-to-2015.html (last visited Dec. 15, 2015).

[70] *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997) ("As noted, recorded broadcasts of NBA games—as opposed to the games themselves—are now entitled to copyright protection. The Copyright Act was amended in 1976 specifically to insure that simultaneously-recorded transmissions of live performances and sporting events would meet the Act's requirement that the original work of authorship be "fixed in any tangible medium of expression".

[71] See H.R. No. 94–1476 at 52, reprinted in 1976 U.S.C.C.A.N. at 5665 When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship').

[72] *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1093 (E.D. Mo. 2006) *aff'd,* 505 F.3d 818 (8th Cir. 2007).

[73] *Id.*

Sports bring people together; create friendships through fan hood, and teams do amazing charity work. Sports are built into America society, and the dissemination of sports related information is important for the public[74] discourse and the market place of ideas. The 10th Circuit has held that baseball cards are *educational* for the public[75], pointing to a potential fair use of this information if there was a copyright issue that arose. However, sports leagues have been very aggressive in protecting their intellectual property. The NFL in particular has gone after two high profile sports blogs/websites over use of short clips of copyrighted material called "Gifs"[76]. "Sports GIFs have been a thorn in the side of leagues for a few years now: FIFA carpet-bombed websites with takedown notices last year for posting unlicensed highlights of the World Cup. Deadspin's then-Editor-in-Chief Tommy Craggs told Digiday that Deadspin also fields NFL takedown requests more or less every week during football season[77]". What does this aggressive intellectual property enforcement mean for fans? If the leagues controlled all of their content as they wished, an argument could be made that fans would suffer. However, not all sports have the luxury of aggressive protections for their work. Some sports like UFC are trying to get their sport legalized (in the state of New York) using the First Amendment[78].

Another area of sports we look to discuss is fantasy sports and the

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[74] *See Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 314 (2001). "It is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players' accomplishments. "The freedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community"

[75] *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996). ("Baseball cards have been an important means of informing the public about baseball players for over a century. "Trading, collecting and learning about players are the most common reasons for children to purchase baseball cards.... They are, in other words, an education in baseball")

[76] *Deadspin's Twitter Suspension Underlines Leagues Varying Takes On Sports Highlights*, SPORTS BUSINESS DAILY (Oct. 14, 2015), http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/14/Media/Twitter.asp

[77] Brendan James, *Fair Use or Infringement? NFL Sports GIF Fight Raises Legal Questions for Deadspin, SB Nation*, INTERNATIONAL BUSINESS TIMES (Oct. 14, 2015), http://www.ibtimes.com/fair-use-or-infringement-nfl-sports-gif-fight-raises-legal-questions-deadspin-sb-2141415.

[78] Jason J. Cruz, *UFC Appeal Highlights First Amendment Issue for Sports*, STREET & SMITH'S SPORTS BUSINESS (Aug. 24, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/08/24/Opinion/Jason-Cruz.aspx. ("In its appeal brief, Zuffa argues that live entertainment, including live MMA, are presumptively entitled to First Amendment protection." "[T]he very fact that conduct is undertaken before an audience can convert something that might not otherwise be considered First Amendment activity into inherently expressive conduct protected by the Free Speech Clause," argues Clement on behalf of Zuffa).

websites used as mediums. Fantasy sports has a revenue between $40-$70 billion dollars according to Forbes[79]. The question with fantasy sports and statistics is "are facts copyrightable", which the *Fiest* court has stated, no. But when facts are complied in a certain way, which is creative and fixed in a media of expression, the *Feist* case says they are protected[80]. The court in *Nat'l Football Scouting, Inc. v. Rang* held,

> "National's Player Grades, unlike telephone numbers, are not facts; they are "compilations of data chosen and weighed with creativity and judgment." The Player Grades represent National's opinion, based on its data and its expertise, of a player's likely success in the NFL.…But there is no rule that material in the public domain cannot be used to transform copyrighted information. Rang took material in the public domain, the player grades, and his original thoughts to create his original commentary on the players."[81]

In this case, National created grades for players from compilations of data from other copyrighted works. The Washington Court held in the Nationals' favor. Likewise it has been held by the 8th Circuit that using players names on an interactive website, which had players stats, is expression which is protected by the First Amendment. "Thus, to the extent that it can be said that CBC's use of the names and playing records of Major League baseball players on a website is not traditional, this non-traditional expression is not precluded from First Amendment protection."[82] The 8th Circuit in *C.B.C. Distribution* also held this interactive expression and profit derived from that, do not preclude First Amendment protection[83]. Courts are not hesitant to guarantee fair use protection of statistics, and First Amendment principals towards

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[79] Brian Goff, *The $70 Billion Fantasy Football Market*, FORBES (Aug. 20, 2013), http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/.

[80] *See NBA v. Motorola, Inc*., 105 F.3d 841, 847 (2d Cir. 1997) ("Although the broadcasts are protected under copyright law, the district court correctly held that Motorola and STATS did not infringe NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast. The "fact/expression dichotomy" is a bedrock principle of copyright law that "limits severely the scope of protection in fact-based works").

[81] *Nat'l Football Scouting, Inc. v. Rang*, 912 F. Supp. 2d 985, 991 (W.D. Wash. 2012).

[82] *Id*. at 58.

[83] *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1094 (E.D. Mo. 2006) *aff'd,* 505 F.3d 818 (8th Cir. 2007) ("Expression is not disqualified from First Amendment protection because it is *interactive. Interactive Digital Software,* 329 F.3d at 957. Thus, "the breadth of the First Amendment" has been extended to "pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games" and "A defendant's *making a profit* does not preclude its receiving First Amendment protection…The court finds, therefore, that CBC's deriving a profit from its use of the names and playing records of Major League baseball players in its fantasy baseball games does not preclude such use from having First Amendment protection").

sports statistics and broadcasting. They have clearly denied the leagues ability to copyright statistics within the fair use of fantasy sports and statistics. "Court finds, therefore, that, while the players' names and playing records in the context of CBC's fantasy games are arguably within the subject matter of copyright, the players' names and playing records as used by CBC in its fantasy games are not copyrightable."[84] As discussed earlier, but which needs to be restated again, sport broadcasting and statistics are important parts of society, which are entitled to First Amendment and fair use protections[85]. The sports leagues will do all they can to make revenue in the new age of technology. They have even partnered with daily fantasy sports leagues.[86] Just like the musicians and movie industries have lobbied congress to extend protection to their copyrighted works[87], or grant extra protection in certain areas, there could be a time when the sports leagues will attempt once again to have their sports statistics and broadcasting copyrightable, and thus another avenue for profit. This day may come when TV revenue from cable providers disappears and people start to use their computers more than television. Until then, fair use enhances the public's First Amendment right to have access to all the sports statistics and broadcasting they want.

## III. CONCLUSION

This scholarly research article was aimed to persuade the reader that without fair use aiding the First Amendment, there would be less to talk about. This article aimed to show that fair use and the First Amendment are cousins, rather than enemies,[88] as many scholars[89] would argue[90]. First we

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[84] *Id.*

[85] *See Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001) ("[T]he First Amendment requires that the right to be protected from unauthorized publicity "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press").

[86] Dustin Gouker, *DFS Partnership / Sponsorship Tracker*, LEGALSPORTSREPORT.COM, http://www.legalsportsreport.com/dfs-sponsorship-tracker/ (last visited Dec. 15, 2015) (tracks all the sponsorships between the daily fantasy sports websites and sports teams in the US and around the world).

[87] Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[88] Juan Marin, *Copyright Laws and the First Amendment*, ACCENTS – INTERCULTURAL CLUB – KEAN UNIVERSITY, http://www.kean.edu/~eslprog/accents/2007/page2007_9.html (last visited Dec. 15, 2015).

[89] Lee W. Lockridge, *The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech*, 24 SANTA CLARA HIGH TECH. L.J. 31 (2012), http://digitalcommons.law.scu.edu/chtlj/vol24/iss1/2.

[90] Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535-90 (2004), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1797&context=facpub.

briefly discussed the First Amendment and the copyright fair use defense. Then we went over three important areas in society, which the public needs information disseminated unimpeded by government or monopoly, which were: (1) school/education; (2) news/social Media; and (3) sports broadcasting and statistics. In education, we discussed that without fair use and the First Amendment; knowledge would be hard to come by. How would people learn in academia without fair use allowing them to use copyrighted materials? It is acknowledged that,

> "One of the primary goals of intellectual property law is to maximize creative expression. The law attempts to achieve this goal by striking a proper balance between the right of a creator to the fruits of his labor and the right of future creators to free expression. Underprotection of intellectual property reduces the incentive to create; overprotection creates a monopoly over the raw material of creative expression."[91]

It is not disputed in this paper that fair use enhances society by brining new works into the public discourse. The fact people may work off of other works to enhance public discourse under fair use shows how adaptable the constitution was when the founding fathers drafted it. "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas"[92]. When it comes to the news, fair use allows the news to easily disseminate information to the public in order to keep them informed. Likewise, social media is a new area where copyright law has not full grasped yet. Social media as stated earlier, is a medium for First Amendment to thrive, whether or not the information found is accurate or not. There needs to be discourse in order to weed the bad information out. Social media and the news allow this process to happen through fair use and the First Amendment. Finally as discussed, sports statistics and broadcasting enjoy First Amendment and fair use protections. Courts have found these areas of sports educate the public, and that they help the public engaged in dialogue and discourse. All of these areas are important in daily life, and without fair use enhancing the First Amendment, would be completely different today.

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[91] *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996).

[92] *Harper & Row Publrs., Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).