

# . . . AND THE RULING ON THE FIELD IS FAIR: A FAIR USE ANALYSIS OF UPLOADING NFL VIDEOS ONTO YOUTUBE AND WHY THE NFL SHOULD LICENSE ITS MATERIAL TO THE WEBSITE

AMY R. MELLOW\*

YouTube<sup>1</sup> is the hottest thing to hit the Internet since MySpace—just ask one of the 6.3 million people who visit the site each day.<sup>2</sup> YouTube first appeared on the Web in late 2005 and quickly flourished into one of the most popular websites in the world.<sup>3</sup> The site functions as a free video sharing spot on the Internet where users can upload, view, share, comment on, and rate videos.<sup>4</sup> While users across the globe relish the ability to access everything from music videos to the latest clip of “Lost,”<sup>5</sup> copyright owners struggle with how to handle the fact that their work is now readily available, for free, on the Internet.<sup>6</sup> Many are asking the simple question: Is it fair?

Various copyright owners claim YouTube is not fair and have begun to harass the site for copyright infringement.<sup>7</sup> One owner, the National

---

\* J.D. Candidate, Class of 2008, University of Southern California Law School; B.A., Linguistics, 2005, University of California, Berkeley. Many thanks to the current Board and Staff of the Southern California Interdisciplinary Law Journal for all the time and hard work put towards preparing this Note for publication. Thank you to my parents and to my sister Lisa for their helpful thoughts and suggestions, but mostly for their constant love and encouragement. A special thanks to Jeff for his seemingly endless support and for keeping me calm during the writing process when I needed it most.

<sup>1</sup> YouTube, <http://www.youtube.com> (last visited Sept. 21, 2007).

<sup>2</sup> See Demographic Profile Report—YouTube.com (Aug. 19, 2007), YouTube.com, <http://mymetrix.comscore.com/mmx/report.aspx?action=run> (Aug. 19, 2007) [hereinafter *Key Measures Report*] (reporting 188,981,000 unique visitors worldwide to the website in June 2007).

<sup>3</sup> See Alexa-Global Top 500, [http://www.alexa.com/site/ds/top\\_500](http://www.alexa.com/site/ds/top_500) (last visited Aug. 19, 2007) (reporting YouTube as the fourth most popular website in the world, based on traffic data, surpassed only by the three major search engines: Yahoo!, Microsoft Network, and Google).

<sup>4</sup> See Scott Kirsner, *Now Playing: Your Home Video*, N.Y. TIMES, Oct. 27, 2005, at C1 (describing the website as one that “keeps track of most-viewed, most-discussed and best-rated videos.”).

<sup>5</sup> Lost Season 3 Finale: After the Rescue Part 1, <http://youtube.com/watch?v=58aHZopmkWM&mode=related&search=> (added May 27, 2007).

<sup>6</sup> See Phil Rosenthal, *CBS, NCAA Dunk Old Views of YouTube*, CHI. TRIB., Mar. 18, 2007, at C1 [hereinafter *NCAA*] (comparing the opposite responses of CBS and Viacom to the website). CBS Sports launched a channel on YouTube to showcase NCAA basketball tournament highlights whereas just two days earlier, Viacom filed a \$1 billion suit against YouTube. *Id.* (noting that “the two mindsets [of CBS Sports and Viacom] are evidence of just how divided media outfits are on how best to exploit the Internet without being exploited by it”).

<sup>7</sup> See Yuki Noguchi & Sara Kehaulani Goo, *To the Media, YouTube Is a Threat and a Tool*, WASH. POST, Oct. 31, 2006, at D01 [hereinafter *To The Media*] (reporting that many big media companies—such as Comedy Central and NBC Universal—have asked YouTube to take down copyrighted clips from the

Football League (hereinafter the “NFL” or “the League”), recently took severe action to stop online circulation of its material. In the fall of 2006, the NFL demanded that YouTube remove over 3000 video clips of NFL games posted on the website, claiming that the postings constituted copyright infringement.<sup>8</sup> YouTube, a young and compliant company not yet ready to fight the war on copyright, abided by the League’s request and took down the specified clips.<sup>9</sup> Despite YouTube’s compliance with the NFL, the question remains: Did YouTube have to comply with the League’s demands? The answer is probably not. The reason is that the use of many, if not most, of the 3000 clips likely constituted fair use, a legal privilege allowing for the use of copyrighted material without permission from the copyright owner.

Had YouTube not removed the clips, the NFL would have probably sued the website for copyright infringement and in return, the website would have likely asserted the fair use defense. In the hypothetical suit of *The National Football League v. YouTube, Inc.*, a court would be required to weigh several factors to determine whether use of NFL game clips on YouTube does in fact amount to fair use.<sup>10</sup> This Note will weigh those factors and will evaluate whether certain fragments of NFL games, such as brilliant plays, humorous touchdown celebrations, and questionable referee calls may be posted on the website without consent from the NFL in the name of “promoting the Progress of Science and the useful Arts.”<sup>11</sup> The Note argues that because the posted footage functions as the subject of comment and criticism, a court should permit the postings under the fair use doctrine, which exists primarily to protect such functions. The Note further concludes that allowing the clips to appear on YouTube’s website results in as many benefits to the NFL as it does to users, and should therefore be sanctioned not only by courts and policymakers, but also by the League itself.

Part I briefly explains copyright law and describes fair use, why it exists, and how it evolved from a judge-made doctrine into a full-fledged federal statute. In addition, Part I emphasizes the vagueness of the doctrine by pointing out how each fair use case requires a customized analysis. Part II describes the history and current aspects of the YouTube website, documenting the Internet phenomenon from its inception in early 2005 to its status today as a household name. Part II concludes by summarizing the events of late 2006, which led to the removal of over 3000 NFL clips from

---

website). See also James Montgomery, *YouTube Slapped With First Copyright Lawsuit For Video Posted Without Permission*, MTV NEWS, July 19, 2006,

[http://www.mtv.com/news/articles/1536695/20060719/id\\_0.jhtml](http://www.mtv.com/news/articles/1536695/20060719/id_0.jhtml) (commenting on the first copyright infringement suit brought against YouTube by Robert Tur on July 14, 2006 for footage he shot from a helicopter during the Los Angeles riots in April of 1992); See also Joe Nocera, *Awaiting a Compromise on YouTube*, N.Y. TIMES, Mar. 17, 2007, at C1 [hereinafter *Awaiting a Compromise*] (reporting that Viacom filed a \$1 billion copyright infringement suit against YouTube).

<sup>8</sup> See John Ryan, *Forced to Drop ‘The Catch’*, MERCURY NEWS, Nov. 7, 2006, available at <http://mercurynews.com/mld/mercurynews/sports/football/nfl> [hereinafter *Mercury News*].

<sup>9</sup> See *id.*

<sup>10</sup> See 17 U.S.C. § 107 (1992) (listing the four main factors evaluated in a fair use analysis). See generally ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 715–847 (7th ed. 2006) [hereinafter *Copyright*] (offering background and explanation of the fair use doctrine).

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 8.

the website. Part III separately examines each of the four fair use statutory factors as they apply to the NFL-YouTube hypothetical suit, concluding that posting of the footage likely meets the criteria for fair use. Part IV explores the potential benefits to the NFL if the League allowed the clips on YouTube, and argues that it would be in the interest of the NFL to make its material available on the site. Lastly, the Note concludes that in the case of posting NFL clips on YouTube, fair use cannot be ruled out as a potentially successful defense; thus, the NFL should avoid debating the issue in court and embrace YouTube as a vehicle for promotion by licensing its footage to the website.

## I. THE FAIR USE DEFENSE

### A. WHAT IS A COPYRIGHT?

A copyright is a property right in an original work giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.<sup>12</sup> Contrary to popular knowledge, the purpose of granting these exclusive rights is not for the primary benefit of the author, but for the benefit of the public.<sup>13</sup> Accordingly, when situations arise in which copyright restrictions inhibit dissemination, learning, or creativity, the interests of copyright owners must yield to the public.<sup>14</sup> In this way, copyright owners face numerous limitations, mostly statutory, on their exclusive rights, including perhaps the most noteworthy limitation: fair use.<sup>15</sup>

### B. FAIR USE: WHEN IS COPYING OKAY?

Fair use is a privilege that allows someone other than the copyright owner to use the copyrighted material in a reasonable and limited manner without the author's permission, notwithstanding the monopoly granted to the owner.<sup>16</sup> Fair use is an affirmative defense,<sup>17</sup> employed to counter a copyright infringement claim. Without the fair use defense, federal copyright law would become exceedingly harsh by giving authors<sup>18</sup> too much power and thereby limiting future creations.<sup>19</sup> The Second Circuit has

---

<sup>12</sup> BLACK'S LAW DICTIONARY 361 (8th ed. 2004) [hereinafter *Black's Law*].

<sup>13</sup> See ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 374–75 (4th ed. 2006) [hereinafter *Intellectual Property*] (stating that “[T]he predominant philosophical framework undergirding American copyright law, however, is utilitarian”). See also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[T]he sole interest of the United States and the primary object in conferring the monopoly [in the authors]. . . lie in the general benefits derived by the public from the labors of authors”). See also H.R. REP. NO. 60-2222 (1909) (discussing how the ultimate purpose of copyright legislation is for the public's benefit).

<sup>14</sup> See *Copyright*, *supra* note 10, at 15.

<sup>15</sup> See *id.* at 715.

<sup>16</sup> See *Black's Law*, *supra* note 12, at 634.

<sup>17</sup> Fair use has traditionally been treated as an affirmative defense; however, some believe fair use should no longer be considered an infringement to be excused, but rather a right granted by the 1976 Copyright Act. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

<sup>18</sup> The term “authors,” in the context of the Copyright Clause, refers not only to creators of written works, but also to creators of any copyrightable work.

<sup>19</sup> Compare the utilitarian theory underlying copyright law with the central theory behind patent law, which is an economic-incentive theory. See *Intellectual Property*, *supra* note 13, at 127 (explaining the

said that the affirmative defense of fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>20</sup> For example, by virtue of fair use, a critic is able to quote certain passages from a book to use in a review without obtaining prior consent by the author. Federal copyright law favors this use because it allows for the creation of a new work: a book review.

Fair use developed in the courts as a judge-made rule of reason. In the mid-nineteenth century, Justice Joseph Story introduced the concept of fair use or, as he called it, fair abridgment, in *Folsom v. Marsh*.<sup>21</sup> In *Folsom*, the defendant copied nearly seven thousand pages from plaintiff’s twelve-volume biography on George Washington.<sup>22</sup> The defendant did not copy the entire work, for this would have clearly been copyright infringement. Rather, the defendant extracted portions of the work verbatim, 353 pages in all, in order to produce a shortened version of the biography—only two volumes in length.<sup>23</sup> The defendant proceeded to sell his condensed version at a considerably lower price than plaintiff’s twelve-volume work. Relying on earlier English cases concerning fair abridgment, Justice Story described the procedure used to evaluate these types of situations: “In deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.”<sup>24</sup> In the end, Story found for the plaintiff, basing his finding on the presumption that allowing the sale of the condensed version would greatly reduce the economic incentive for others to produce original biographies.<sup>25</sup> Moreover, Justice Story stated that finding fair abridgment would not serve a specific public interest in the dissemination of art and knowledge since the defendant was not creating a new work or putting the original work to a new use.<sup>26</sup>

Justice Story’s description of the factors he used in assessing fair use became the framework employed by courts across the nation in every subsequent fair use case. Congress eventually codified Justice Story’s framework in the 1976 revision of the federal copyright act.<sup>27</sup> It is easy to see how Justice Story’s commentary on fair use shaped the modern day

---

economic-incentive theory behind patent law and highlighting the fact that under patent law, the inventor gains full economic rewards of her invention).

<sup>20</sup> *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980). The Supreme Court has quoted this language several times. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>21</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901). The term “fair use” was coined nearly thirty years after *Folsom v. Marsh*. *See Lawrence v. Dana*, 15 F. Cas. 26, 40 (C.C.D. Mass. 1869) (No. 8136).

<sup>22</sup> *Folsom*, 9 F. Cas. at 345.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 348.

<sup>25</sup> *Id.* at 349 (stating that if the defendant may legally take from the plaintiff’s work, there is no reason why others will not follow suit).

<sup>26</sup> *See id.* at 345.

<sup>27</sup> 17 U.S.C. § 107.

statute, as the numbered factors correspond almost precisely to the Justice's suggested analysis.<sup>28</sup>

Although Congress's statutory recognition of the fair use doctrine provides some guidance to both users and courts, the statute fails to define the doctrine or shed any new light on the boundaries of the defense. Instead, the intent behind the codification was merely "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."<sup>29</sup> The House of Representatives explained its loose articulation of fair use:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question [of fair use] must be decided on its own facts.<sup>30</sup>

Three decades and countless cases later, the judicial system still lacks a bright line rule dictating when fair use may be used. One case declared that the doctrine actually "defies definition."<sup>31</sup> Accordingly, fair use requires a delicate balancing process in which the four statutory factors<sup>32</sup> help determine whether public benefit outweighs an author's rights. This Note will analyze each of the four factors, like a court would, as they relate to the hypothetical case between the NFL and YouTube.

## II. THE YOUTUBE PHENOMENON

In December of 2006, *Time Magazine* revealed its annual Person of the Year cover, which featured a YouTube screen and a foil mirror.<sup>33</sup> The cover showcased the twenty-first-century individual for being "the person who most affect[s] the news and our lives, for good or for ill."<sup>34</sup> A computer

---

<sup>28</sup> The Fair Use statute reads in full:

Notwithstanding the provisions of sections 106 and 106A [17 U.S.C. §§ 106 AND 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyright 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 of the above factors.

<sup>17</sup> U.S.C. § 107.

<sup>29</sup> H.R. REP. NO. 94-1476, at 66 (1976).

<sup>30</sup> *Id.* at 65.

<sup>31</sup> *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968).

<sup>32</sup> A fair use analysis is not limited to the four identified statutory factors. *See* 4 NIMMER ON COPYRIGHT, at § 13.05[A] (2007) [hereinafter *Nimmer*] (stating, "the factors contained in Section 107 are merely by way of example, and are not an exhaustive enumeration.").

<sup>33</sup> *TIME*, Dec. 25, 2006, cover.

<sup>34</sup> 'You' Named Time's Person of 2006, BBC NEWS, Dec. 17, 2006, <http://news.bbc.co.uk/2/hi/technology/6187113.stm>.

displaying the recognizable YouTube screen proved the best way for *Time* to convey the concept of the influential user. The website itself was named *Time Magazine's* "Invention of the Year" for 2006.<sup>35</sup> At the forefront of interactive websites,<sup>36</sup> YouTube has become one of the most familiar Internet destinations that allow users to comment on the world around them.

On February 15, 2005, three young entrepreneurs activated the domain name "YouTube.com" and began developing the website. Chad Hurley, Steve Chen, and Jawed Karim envisioned a place where people could engage in new ways by sharing and commenting on videos.<sup>37</sup> In November of 2005, their vision became reality—virtual reality. YouTube made its official debut as a personal video sharing service and quickly evolved into an Internet hot spot that users frequent not only for entertainment, but for information and opinion as well. YouTube stresses the importance of feedback,<sup>38</sup> which is why users often visit the site to read what others have said about a certain video clip. Each YouTube video includes a section entitled "Comments & Responses," where users can post a text or video comment in response to the featured posting.<sup>39</sup> In addition, users can rate the video, flag it as a "favorite," or share it with fellow YouTube members, rendering the site more than a mere viewing service.

By the summer of 2006, YouTube reached a popularity even its creators never fathomed. According to *Hitwise*, an online competitive intelligence service, in July of 2006, YouTube video clips accounted for sixty percent of all videos viewed online.<sup>40</sup> That same month, the Nielsen//NetRatings, another Internet audience measurement firm, found that the site played host to almost twenty million visitors each month.<sup>41</sup>

As the site continued to grow, concerns surrounding copyright infringement surfaced. Although YouTube asks its users to "respect copyright,"<sup>42</sup> infringing content inevitably appears on the site. The content on YouTube consists largely of amateur videos such as videoblogging<sup>43</sup> and

---

<sup>35</sup> Lev Grossman, *The People's Network*, TIME, Nov. 13, 2006, at 62.

<sup>36</sup> Other popular interactive websites include The Facebook (<http://www.facebook.com>), MySpace (<http://www.myspace.com>), and Wikipedia (<http://www.wikipedia.org>).

<sup>37</sup> About YouTube, <http://youtube.com/t/about> (last visited Sept. 21, 2007). See also Brad Stone, *Video Napster?*, NEWSWEEK, Mar. 1, 2006, available at <http://www.msnbc.msn.com/id/11617588/site/newsweek/> (reporting that the YouTube founders were tired of having to download "bulky" clips in order to watch a video on the Internet and wanted to make it easier for people, without the "clunky experience").

<sup>38</sup> YouTube Community Guidelines, [http://youtube.com/t/community\\_guidelines](http://youtube.com/t/community_guidelines) (last visited Oct. 25, 2007) [hereinafter *Community Guidelines*].

<sup>39</sup> The majority of YouTube video postings are accompanied by numerous comments and some boast as many as 5232 text comments. See *Age of Consent*, <http://www.youtube.com/watch?v=DdXpY9PjwJA> (last visited Oct. 25, 2007). Some videos even spur other users to post responses in video form. See *id.*

<sup>40</sup> *YouTube Serves up 100 Million Videos a Day*, USA TODAY, (July 16, 2006), [http://usatoday.com/tech/news/2006-07-16-youtube-views\\_x.htm](http://usatoday.com/tech/news/2006-07-16-youtube-views_x.htm).

<sup>41</sup> *Id.* As of June 2007, the site plays host to over 188 million visitors per month. See *Key Measures Report*, *supra* note 2.

<sup>42</sup> *Community Guidelines*, *supra* note 38.

<sup>43</sup> A method of visual communication usually in the form of an online personal diary. Ellen Lee, *Video Bloggers Claim Spotlight; Online Diarists Looking a lot Like Television*, S.F. CHRON., May 1, 2006, at C1 (explaining how online diarists use video clips in place of text). See also JAY DEDMAN & JOSHUA PAUL, *VIDEOBLOGGING 4* (Wiley Publishing, Inc. 2006) (describing videoblogging as a way "each person can express herself in a personal and highly effective manner").

short original movies. However, a sizable portion of the site's content includes copyrighted material such as television show clips, commercials, and complete music videos. Generally, unless a copyright owner reports illegally uploaded material, YouTube discovers the infringing content through self-policing. That is, YouTube employees identify the infringing content through search terms that uploaders associate with the clips and then delete the videos from the site.<sup>44</sup>

In late 2006, the NFL joined the ranks of content owners complaining to YouTube about copyright infringement. On November 6, 2006, the NFL, dubbed the "No Fun League" by many aggravated fans,<sup>45</sup> demanded that YouTube remove over 3000 clips featuring NFL game footage.<sup>46</sup> The site complied,<sup>47</sup> maintaining its safe harbor through the Digital Millennium Copyright Act ("DMCA").<sup>48</sup> While removing the NFL clips from YouTube was a prudent move, such action may not have been necessary given that most of the postings probably constitute fair use, as will be argued here, and therefore can be uploaded without the NFL's consent.

### III. IS IT FAIR? A FAIR USE ANALYSIS OF UPLOADING NFL MATERIAL ONTO YOUTUBE

#### A. PURPOSE AND CHARACTER OF USE

The first factor in the four-part analysis requires an evaluation of "the purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes."<sup>49</sup> The statute refrains from specifying which purposes, beyond "nonprofit educational" purposes, render a given use "fair"; however, the preamble to Section 107 notes several purposes most suitable for a finding of fair use: ". . . [use of a copyrighted work] for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright."<sup>50</sup> The preamble in no way represents an exhaustive listing of fair uses and courts should consider all four factors even if the use at issue does not fall within

---

<sup>44</sup> As a way to circumvent the self-policing system employed by YouTube, some users have taken to creating alternative, less obvious words as search terms associated with a specific file so that a video can remain hidden inside the YouTube database available only to those who know the secret tag words.

<sup>45</sup> See e.g., *NFL Goes After YouTube and Temporarily Wins (But Not For Long!)*, (Nov. 9, 2006) <http://thebiglead.com/?p=1315>.

<sup>46</sup> See *Mercury News*, *supra* note 8.

<sup>47</sup> *Id.*

<sup>48</sup> See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). Title II of the DMCA, titled the Online Copyright Infringement Liability Limitation Act ["OCILLA"], creates a safe harbor for online service providers against copyright liability if they promptly block access to or remove from their systems any allegedly infringing material. See also *Awaiting a Compromise*, *supra* note 7 (discussing Viacom's point of view that the DMCA is not meant to protect companies like YouTube and actually results in harming the copyright owners by forcing them to spend money "hunting [clips] down and asking that they be removed").

<sup>49</sup> 17 U.S.C. § 107.

<sup>50</sup> *Id.*

the preamble enumeration.<sup>51</sup> The first factor investigation entails a two-part analysis: (1) evaluating the “transformative” use of the new work and (2) evaluating the “commercial” use of the new work.

1. “Productive” or “Transformative” Use

In 1990, Judge Pierre Leval proposed the term “transformative” to describe a work that employs copyrighted material in such a manner that it creates a new work with a different purpose than the original.<sup>52</sup> Hence, a work may be considered transformative if it does not “merely supersede” the original creation, but instead “adds something new, with a further purpose or different character [than the original]. . . .”<sup>53</sup> A leading fair use case discussing transformative use is *Campbell v. Acuff-Rose Music, Inc.*, summarized below.

a. *Campbell v. Acuff-Rose Music, Inc.*

In *Campbell v. Acuff-Rose Music, Inc.*, the owners of the 1964 song “Oh, Pretty Woman” sued the rap group 2 Live Crew for copyright infringement after the group released a song entitled “Pretty Woman.”<sup>54</sup> Besides bearing essentially the same title, the group’s song parodies the idealistic image of a woman that the original song evokes by “substituting [the original] predictable lyrics with shocking ones.”<sup>55</sup> At the outset of its analysis, the Supreme Court stated that an important step in a fair use investigation is to ask whether and to what extent the new work is transformative.<sup>56</sup> The Court stressed the importance of criticism in society and reminded other courts that using existing material is often necessary to create criticisms.<sup>57</sup> In its decision, the Supreme Court held that a parody, such as 2 Live Crew’s “Pretty Woman,” like other comments or criticism, has transformative value because it provides a “social benefit” by “shedding light on an earlier work.”<sup>58</sup>

b. *Analysis*

YouTube’s use of NFL clips is arguably transformative. Even though the footage remains largely unchanged, once posted on the website, the clips take on new meaning in a new setting, to be viewed in a different light than before, not only to be watched, but to be critiqued, praised, compared, and distinguished. Certainly, a football highlight serves the purpose of

<sup>51</sup> See 17 U.S.C. § 101 (2005) (noting that the purposes listed in the preamble of Section 107 are preceded by “such as,” indicating that the listing is “illustrative and not limitive.”).

<sup>52</sup> See Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1111 (1990) [hereinafter *Leval*].

<sup>53</sup> *Campbell*, 510 U.S. at 579.

<sup>54</sup> See *id.* at 573.

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* at 579. See also *Castle Rock Entm’t v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting Leval) (stating that Leval frames this question as being whether “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”).

<sup>57</sup> See *Campbell*, 510 U.S. at 579.

<sup>58</sup> *Id.*



entertainment on YouTube just as it did in the original broadcast; however, once posted online, the footage begins to perform additional purposes: to stimulate discussion, inspire commentary, and spark debate.

The YouTube website plainly states such purposes, emphasizing that videos are uploaded as a means of creating a forum for dialogue.<sup>59</sup> The “YouTube Team” reminds users to “[L]et folks know what you think” and encourages them to “leave comments, rate videos, [and] make [their] own responses to videos that affect [them].”<sup>60</sup> According to the website, “[F]eedback’s part of the experience.”<sup>61</sup> Furthermore, once posted on YouTube, a clip is rated by viewers,<sup>62</sup> positioning the highlight within the context of similar highlights, thus giving new meaning to the clip itself.

No longer is a spectacular end zone catch by Chad Johnson merely enjoyable to watch; once on YouTube, it becomes “the best catch in team history,” “the #3 best catch of all time,” or even the basis for one fan’s theory of why Johnson is the most talented player in the League. Some NFL highlights trigger debates on issues far larger than the individual clip itself. For example, a single clip spurred debate about which sport requires more talent: American football or European soccer.<sup>63</sup> In situations like this, the clip acts as a springboard for dialogue not only between friends, but also among strangers around the world.<sup>64</sup> The clip no longer solely entertains, but now serves as “raw material” from which to create “new insights and understandings.”<sup>65</sup>

Just as the parody in *Campbell* provided a “social benefit” by “shedding light on an earlier work,”<sup>66</sup> NFL clips on YouTube enrich society by evoking assessment and producing commentary on the initial broadcast of a game. A good understanding as to why people post these clips will lead one to recognize that the clips are not being copied for archival purposes,<sup>67</sup> but to generate thought and reaction. Therefore, just as the Supreme Court deemed the parody in *Campbell* as having transformative value, a court is likely to find such a value in YouTube postings of NFL clips.

---

<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* (explaining that rating videos is one of the many “ways to participate [on YouTube].”). *See also* YouTube Help Center–Featured Videos, <http://www.google.com/support/youtube/bin/answer.py?answer=55751&query=rating&topic=&type=> (explaining that after YouTube members rate the videos they like, the company reviews the highly-rated videos for consideration in the “Featured Videos” section of the home page and the featured videos on the “Categories” page).

<sup>63</sup> *See* NFL Clips, <http://www.youtube.com/watch?v=HI3i7ZvDiu8&mode=related&search=> (last visited Sept. 21, 2007) (displaying comments such as, “Rugby is tougher than the NFL” and retorts like, “[T]he NFL is the pinnacle of sports in the world.”).

<sup>64</sup> *See id.* (including comments from users in Switzerland, Croatia, and Germany, among other countries around the world).

<sup>65</sup> *Castle Rock Entm’t*, 150 F.3d at 142 (quoting Leval).

<sup>66</sup> *Campbell*, 510 U.S. at 579.

<sup>67</sup> *Cf. Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994) (finding that the defendant’s use of copyrighted works was not fair use since the defendant’s purpose in using plaintiff’s works was motivated by establishing a personal library).

c. *Clips of Controversial Referee Calls*

Clips featuring controversial referee calls perfectly illustrate fair use. Such clips are by nature a form of criticism, which is one of the few examples the statute explicitly cites as a fair purpose.<sup>68</sup> Any sport that employs umpires or officials to referee a game involves inevitable disputes over certain calls. Professional football is no exception. During football games, officials occasionally make calls with which a coach, team, or set of fans does not agree. The League attempted to alleviate some of this controversy in 1999 when it instituted the “Instant Replay” challenge system.<sup>69</sup> This system allows coaches to “challenge” a call, thereby requesting the referees to watch a replay of the play at issue and possibly reverse the original ruling on the field.<sup>70</sup> Even with the addition of this system, controversial calls remain common.

In response to a “bad” call, a fan might post a clip of the relevant play on YouTube with a comment criticizing the officials and the League. In doing so, the fan tempts others to comment on the situation, either to agree or disagree with his original critique. Perhaps the fan hopes to generate enough comments on the play to act as a sort of petition directed at the NFL to improve its officiating. Whatever the outcome of such postings, clips featuring controversial referee calls are inherently a form of criticism and should therefore be permitted on YouTube under the fair use statute.

2. *Commercial Use*

Commercial use in the legal context means precisely what it does in everyday language: a way to make money. Although earning a profit off another’s copyrighted work may seem inherently wrong, commercial use does not, by itself, defeat a fair use argument.<sup>71</sup> Despite this, many courts, including the Sixth Circuit *Campbell* Court, have tried, incorrectly, to employ the element as a decisive factor in the analysis,<sup>72</sup> repeatedly citing the Supreme Court’s language in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>73</sup> In *Sony*, the Court stated: “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. . . .”<sup>74</sup> Taken literally, this statement destroys a fair use analysis in all but a few cases and

---

<sup>68</sup> 17 U.S.C. § 107.

<sup>69</sup> See Lonnie White, *Instant Replay; Football: NFL Gives It a Second Look, and Tagliabue Says New Computerized System Is Huge Improvement Over Version Used in the Late ‘80s*, L.A. TIMES, Sept. 12, 1999, at D15 [hereinafter *Instant Replay*] (discussing the League’s new computerized system and stating that while the system is not designed to cure all of the NFL’s officiating problems, it will probably help improve the problems).

<sup>70</sup> See *id.* (explaining the rules of the replay system and how the system will work with the addition of coaches’ challenges).

<sup>71</sup> See *Nimmer*, *supra* note 32, at § 13.05[A][1][c] (stating that “labeling a use as ‘commercial,’ in other words, should not end the [fair use] analysis”).

<sup>72</sup> *Campbell*, 510 U.S. at 574 (stating that the Court of Appeals incorrectly held that the commercial nature of defendant’s parody rendered it presumptively unfair under Section § 107). See also *Am. Geophysical Union*, 60 F.3d at 921 (finding that the District Court placed undue emphasis on the fact that defendant was a “for-profit corporation”).

<sup>73</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>74</sup> *Id.* at 451.

eliminates the need to consider other factors, surely not what the Court intended to convey.<sup>75</sup>

The Second Circuit recognized this possible misinterpretation and, in an effort to explain the meaning of the sentence from *Sony*, stated, “only an unduly narrow reading of the language in *Sony Corp.* and an inattention to the context could lead to the conclusion that the Court intended to attach heightened significance to the element of commerciality.”<sup>76</sup> The Supreme Court then clarified its statement from *Sony* in perhaps the best way it could: by reversing the Sixth Circuit’s decision in *Campbell* on the grounds that the circuit court misinterpreted the *Sony* sentence.<sup>77</sup> By reversing the decision, the Court made clear that the commercial nature of a work is merely one element under consideration and warrants no more weight in a fair use analysis than any other factor.<sup>78</sup>

The reason why many courts and even some circuits have begun to deemphasize the commercial factor is perhaps due to the undeniable fact that motives of profit pervade our capitalist society.<sup>79</sup> As the Second Circuit explained, “[s]ince many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use.”<sup>80</sup> Rather than be applied as a conclusive factor, the presence of commercial use, after considering the degree of earnings, should simply tilt the scale slightly against a finding of fair use.<sup>81</sup>

In the case of NFL clips on YouTube, it would be difficult to justify tilting the scale too much on account of commerciality. Despite the high price tag Google paid for the online video website in late 2006,<sup>82</sup> the value of the site is in its potential, not based on any actual current earnings.<sup>83</sup> As recent as October of 2006, newspapers labeled the company as an “unprofitable start-up” and “a gamble” to purchase.<sup>84</sup>

---

<sup>75</sup> See generally *Nimmer*, *supra* note 32, at § 13.05 (discussing how the four fair use factors should be weighed equally, given that Congress has never explicitly stated that one factor is more important than another).

<sup>76</sup> *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986).

<sup>77</sup> *Campbell*, 510 U.S. at 583–84.

<sup>78</sup> See *id.* (“[T]he Court of Appeals inflated the significance of this fact [the commercial nature of the song] by applying a presumption ostensibly culled from *Sony* . . . . In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred. The language of the statute makes clear that the commercial or non-profit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”).

<sup>79</sup> See *id.* See also *Maxtone-Graham*, 803 F.2d at 1262 (noting that if “commercial” nature of a secondary use is over-emphasized in the analysis, “fair use would be virtually obliterated”).

<sup>80</sup> *Am. Geophysical Union*, 60 F.3d at 921.

<sup>81</sup> See *id.* at 922 (“[T]he 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.”).

<sup>82</sup> Eric Benderoff, *Google, YouTube Deal is a Wrap*, CHI. TRIB., Oct. 10, 2006, at C1 (reporting that Google Inc. purchased the YouTube website for \$1.65 billion).

<sup>83</sup> Sara Kehaulani Goo, *Google Gambles on Web Video*, WASH. POST, Oct. 10, 2006, at A01 (describing Google’s purchase of YouTube in late 2006 for \$1.65 billion as “a deal that leaves the search giant betting on the future of online video.”).

<sup>84</sup> See, e.g., *id.* (calling YouTube an “as-yet-unprofitable Silicon Valley start-up with two founders in their twenties.”). See also *The Trouble with YouTube; Internet Video*, THE ECONOMIST, Sept. 2, 2006 (reporting one estimate that YouTube loses more than \$500,000 per month).

At this time, the main way for YouTube to make a profit from posted NFL clips is to advertise within the page on which the clip plays.<sup>85</sup> While the clips are technically generating some money for the site, “for all its popularity, YouTube’s revenue is relatively small.”<sup>86</sup> One *Fortune* reporter points out that “[e]ven though YouTube profits from the traffic its videos draw, its model is more like that of a newspaper or magazine, where people exchange ideas with one another; the purpose, one can argue, is editorial rather than commercial.”<sup>87</sup>

In January of 2007, YouTube announced its plans to begin sharing revenue with the website’s users.<sup>88</sup> This change in the site’s financial model appears to tilt the scale a little more against fair use, given the increase in people who will be profiting from posted videos. However, before the scale tips too far, one should note that a large reason for the change is based on promoting creation and dialogue, not on exploiting copyrighted materials.<sup>89</sup> Hurley, co-founder of YouTube, Inc., commented on the proposal at the World Economic Forum saying, “[w]e are getting an audience large enough where we have an opportunity to support creativity, to foster creativity through sharing revenue with our users.”<sup>90</sup>

Those who currently benefit financially consist of the company’s owners and management, but will soon include many users. For these reasons, YouTube is a commercial business. Nevertheless, in a fair use analysis, the question is not whether a commercial use exists because, as the Second Circuit noted, commercial gain is inevitable and usually present;<sup>91</sup> rather, the question is how heavily the commerciality should weigh against a finding of fair use.<sup>92</sup> Furthermore, depending on how

<sup>85</sup> There are other ways for YouTube to make money from the clips: “pre-roll” ads and “interstitial” ads. “Pre-roll” ads start at the beginning of a video whereas “interstitial” ads are those within a video, neither of which can be skipped through, thus forcing the user to watch the advertisements. YouTube has historically stayed away from this type of advertising, which is widely used by competing video sites such as AOL, MSN, and Yahoo. See Brian Morrissey, *YouTube Shuns Pre-Roll Video Advertising*, AD WEEK: NATIONAL NEWS, Aug. 22, 2006, [http://www.adweek.com/aw/national/article\\_display.jsp?vnu\\_content\\_id=1003020609](http://www.adweek.com/aw/national/article_display.jsp?vnu_content_id=1003020609) (quoting one of YouTube’s founders stating that “[P]re-roll ads interrupt the experience on our site. . . . [W]e wanted to create a model where our users can engage with content and create a two-way communication between advertisers and users.”). See also Posting of Paul Kapuska to NewTeeVee, <http://newteevee.com/2007/02/01/google-looks-past-pre-roll-for-video/> (Feb. 1, 2007, 04:00 PST) (describing how Google will probably enter into content-sharing partnerships and utilize contextual ads rather than employ pre-roll advertising).

<sup>86</sup> Bambi Francisco, *YouTube’s New, New Model*, MARKET WATCH, Jan. 30, 2007, <http://www.marketwatch.com/news/story/youtubes-new-new-model/story.aspx?guid=%7B89805E2D-6AFF-45C4-8CDA-D93C7A6F0495%7D> (noting that “[YouTube’s] contribution is minimal to search kingpin Google.”).

<sup>87</sup> Jia Lynn Yang, *Where YouTube’s Legal Problems Lie*, FORTUNE, Oct. 25, 2006, available at [http://money.cnn.com/2006/10/24/technology/google\\_youtube\\_lawsuits.fortune/index.htm?postversion=2006102506](http://money.cnn.com/2006/10/24/technology/google_youtube_lawsuits.fortune/index.htm?postversion=2006102506).

<sup>88</sup> See, e.g., Associated Press, *YouTube to Share Revenue with Users*, L.A. TIMES, Jan. 29, 2007, at C2 (reporting that the successful website will start sharing revenue with its millions of users).

<sup>89</sup> See *id.* (stating that the website’s co-founders originally chose not to share revenue with users because they “believed that revenue sharing would build a community of users motivated by making money rather than their love of videos.”).

<sup>90</sup> *Id.* The article also states that the co-founders of YouTube “have come to see financial remuneration as a means of improving content.” *Id.*

<sup>91</sup> *Am. Geophysical Union*, 60 F.3d at 921.

<sup>92</sup> See *Nimmer*, *supra* note 32 at § 13.05 [A][1][c] (“[A]ny presumption that a commercial use is *ipso facto* unfair should be regarded as rebuttable by the characteristics of a particular commercial use.”).

“transformative” a court finds a new work, the commercial element may turn out to be immaterial.<sup>93</sup> Here, the fact that YouTube earns some money through postings of NFL clips should not negate a fair use defense. If the Supreme Court can sanction something as commercial as a rap song under the doctrine of fair use,<sup>94</sup> surely the incidental profit that NFL clips yield should not alone render the YouTube usage unfair.

#### B. NATURE OF THE COPYRIGHTED WORK

The second factor asks a court to examine “the nature of the copyrighted work”<sup>95</sup> because not all copyrighted works are entitled to the same level of protection.<sup>96</sup> “[A] work will always be found ‘original’ for copyrightability purposes before the fair use analysis is applied. The second statutory fair use factor, then, refers to the ‘nature’ of the work beyond this initial inquiry.”<sup>97</sup>

In applying this factor to a copyrighted work, it is useful to consider a continuum from an *informational/factual* work on the left end, as with a statistical collection, to a *highly creative* work on the right end, as with an original song. Creative works enjoy maximum protection from copying whereas informational works are subject to a broad application of fair use.<sup>98</sup> In analyzing the second statutory factor, a court must place the copyrighted work at issue somewhere on the continuum. The Supreme Court explained, “This factor calls for recognition that some works are closer to the core of intended copyright protection [the right end] than others, with the consequence that fair use is more difficult to establish when the former works [highly creative works] are copied.”<sup>99</sup>

NFL games in their entirety probably fall somewhere in the middle of this “informational-creative” continuum. Unlike a composer who writes original melodies, the NFL does not create football games from scratch. Instead, when a professional football game airs on television, the NFL simultaneously makes a videotape recording of the game and then registers it with the United States Copyright Office.<sup>100</sup>

To hold that a football game is an original and creative work produced by the NFL may seem counterintuitive since it is in fact a combination of the players, coaches, referees, and even fans that make a football game a unique production. Congress’s position is that the copyrighted work is not

---

<sup>93</sup> *Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

<sup>94</sup> See generally *Campbell*, 510 U.S. 569 (holding for the defendant rap group who produced a song parodying a previous work, finding that the song constituted fair use of the original work).

<sup>95</sup> 17 U.S.C. § 107(2).

<sup>96</sup> *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992).

<sup>97</sup> *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 410 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 1742 (2005).

<sup>98</sup> *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) (stating that informational works may be more freely published under the fair use statute than those of a creative nature).

<sup>99</sup> *Campbell*, 510 U.S. at 586.

<sup>100</sup> *Nat’l Football League v. Primetime 24 Joint Venture*, 211 F.3d 10, 11 (2d Cir. 2000).

the players' performances, but the actual telecast of those performances, composed of a director's chosen images and selected camera angles.<sup>101</sup>

The idea that a football game is "authored" by the NFL by means of decisive camera angles, for example, is present in today's world of sports more than ever before. By way of slow motion ("X-Mo"), advances in camera technology, and the invention of the SkyCam,<sup>102</sup> a football telecast is no longer a simple recording of a live occurrence, but a creative method of displaying athletic performances. For this reason, entire NFL-produced football games, while not at "the core of intended copyright protection," probably occupy the midsection of the continuum, as stated above.

Despite a football game's middle position on the continuum, the content in question here is not rebroadcasts of entire games,<sup>103</sup> but rather rebroadcasts of short fragments from the games. The material in the short postings does not enjoy the same middle position on the continuum as the entire game itself. Rather, the fragments fit more toward the "informational" side of the continuum with a much lower level of copyright protection. The deliberate editing and splicing of various cameras' footage and the addition of slow-motion replays are generally absent from the clips posted on YouTube. In fact, most clips taken from football games are short shots from a single camera angle. Therefore, the creative components that render a complete telecast copyrightable hardly exist in a brief clip.

No one can reasonably refute the argument that NFL-produced games are copyrightable subject matter, as many courts have validated this claim.<sup>104</sup> The question is whether small portions of a game, once lifted from the whole, retain the same amount of copyright protection as they do when intact. The answer is probably not. Extracting several moments of play from a four-hour game does not mean the captured moments become uncopyrightable, but it might just mean that protection of the fragment becomes thinner and therefore, use of it in the right context tips the scale in favor of fair use.

### C. AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

The third statutory factor requires a court to assess "the amount and substantiality of the portion used in relation to the copyrighted work as a

---

<sup>101</sup> H.R. REP. NO. 94-1476, at 52 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5665 [hereinafter *House Report*] ("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 which order, there is little doubt what the cameramen and the director are doing constitutes 'authorship.'").

<sup>102</sup> See Eric Fischer, *Birds-eye View Grounded in Debate*, WASH. TIMES, Jan. 25, 2004, at C03 (describing the SkyCam as a cable-supported overhead camera used to provide a better sense of the quarterback's viewpoint).

<sup>103</sup> See *Primetime*, 211 F.3d at 10, for a discussion as to why rebroadcasts of entire games is clearly copyright infringement.

<sup>104</sup> See, e.g., *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (stating that "Although there may have been some question at one time as to whether simultaneously recorded live broadcasts were copyrightable, this is no longer the case."). See also *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 729 (8th Cir. 1986) (finding that football telecasts are copyrightable under Section 102 of the Copyright Act).

whole.”<sup>105</sup> Generally, reproducing an entire work is not fair use.<sup>106</sup> However, copying a small portion of a large work may still fail under fair use if the portion copied amounts to “the heart” of the whole.<sup>107</sup> In other words, in considering this third factor, a court must take into account not only the quantitative, but also the qualitative substantiality of the copying.<sup>108</sup>

To do this, a court must closely analyze the particular work in question: What is the theme of the work? How many words does it have? How many minutes in length is the work? What parts are trivial and which represent the “heart” of the work itself? These questions reveal why fair use is always determined on a case-by-case basis. They also help to explain why courts can find it fair to copy an entire magazine cover<sup>109</sup> but unfair to quote 300 words from a 200 thousand word book.<sup>110</sup> In sum, when examining the third factor, a court must keep in mind that every case is unique and thus deserves a specially tailored third factor analysis.

### 1. *Quantity*

The first step in such a tailored analysis is to assess the amount taken from the quantitative perspective: How much of the work did the alleged infringer use? Although there are no absolute rules as to how much of a copyrighted work may be copied before fair use will fail,<sup>111</sup> as most would instinctively assume, the more work taken, the more unlikely fair use. Accordingly, in cases where an entire work has clearly been duplicated, defendants ordinarily do not attempt the fair use defense. The following case illustrates an example of a situation where the defendant satellite company did not raise the fair use defense probably because it had plainly copied entire NFL games, rendering the defense futile.

#### a. *NFL v. Primetime 24 Joint Venture*

*NFL v. Primetime 24 Joint Venture* involves unauthorized transmissions of NFL football broadcasts, which the NFL claimed infringed its rights under the Copyright Act.<sup>112</sup> Primetime is a satellite carrier that provides secondary transmissions of copyrighted television network programming to satellite dish owners.<sup>113</sup> Primetime obtained a license to provide such programming to its subscribers in the United States; however, without securing permission from the NFL, Primetime also provided the transmissions of football broadcasts to its satellite subscribers in Canada.<sup>114</sup> After repeatedly requesting that Primetime discontinue the unauthorized

<sup>105</sup> 17 U.S.C. § 107(3).

<sup>106</sup> See *Nimmer*, *supra* note 32, at § 13.05[A][3] for a discussion of the third statutory factor.

<sup>107</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 544 (1985) (finding that the material quoted was the “heart” of the original work).

<sup>108</sup> *Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 229 (S.D.N.Y. 1988).

<sup>109</sup> *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 (5th Cir. 1980).

<sup>110</sup> *Harper & Row*, 471 U.S. at 566.

<sup>111</sup> *Maxtone-Graham*, 803 F.2d at 1263 (pointing out that questions of fair use “may turn on qualitative assessments.”).

<sup>112</sup> *Primetime*, 211 F.3d at 10–11.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

transmissions to Canadian households, the NFL brought a suit of copyright infringement against Primetime.<sup>115</sup> The district court granted the NFL a permanent injunction barring Primetime from retransmitting the football games in Canada.<sup>116</sup> On appeal, the Second Circuit affirmed the district court's holding, finding that Primetime infringed the NFL's copyright by displaying the football games in Canadian homes without authorization.<sup>117</sup>

b. *Analysis*

The clips at issue on YouTube are generally a few minutes worth of footage taken from a nearly four-hour recording.<sup>118</sup> Common sense dictates that such an amount is not, quantitatively speaking, substantial. In contrast to the satellite service in *Primetime*, YouTube users do not broadcast entire football games via the Internet. Rather, they upload small portions of games for the benefit of fans, most of whom have already viewed the original NFL broadcast and simply want to see a player's comical victory dance one more time. In fact, YouTube ensures that users do not upload full games by setting a ten-minute length limit on most videos.<sup>119</sup> Since the uploaded clips are only fragments of a full game, the situation appears to lend itself to the fair use defense. In light of this, the question becomes whether the clips are substantial in quality; do they constitute the "heart" of the broadcast or amount to just minor happenings within a given game?

2. *Quality*

When faced with the daunting task of evaluating the qualitative substantiality of a copied portion, courts often look to the voluminous amount of case law on the topic. One of the leading and perhaps the most cited fair use case is *Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>120</sup> The opinion focuses a good deal on the third statutory factor and offers a worthy analysis on determining whether a portion of a work is qualitatively substantial.

a. *Harper & Row Publishers, Inc. v. Nation Enterprises*

In February of 1977, soon after leaving the White House, former President Gerald R. Ford contracted with Harper & Row to publish his soon-to-be written autobiography.<sup>121</sup> The book was to include previously unpublished material concerning the Watergate events and most importantly, Ford's own explanation as to why he pardoned former

---

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 13.

<sup>118</sup> Although an NFL game has only sixty minutes of actual playing time (four fifteen-minute quarters), the copyrighted work includes the entire broadcast. See *House Report*, *supra* note 101. The broadcast includes replays, images of the commentators, and footage of players even when the game clock is stopped. See *id.*

<sup>119</sup> See YouTube Help Center—How Long/Large Can My Video Be?, <http://www.google.com/support/youtube/bin/answer.py?answer=55743&topic=10527> (last visited Sept. 20, 2007) (explaining that in addition to the ten-minute time limit on videos, all videos are subject to a 100MB file size limit and most videos are under five minutes long).

<sup>120</sup> 471 U.S. 539 (1985).

<sup>121</sup> *Harper & Row*, 471 U.S. at 542.



President Richard M. Nixon and the moralities involved with that decision.<sup>122</sup> In addition to the right to publish Ford's autobiography in book form, the contract gave Harper & Row the right to license prepublication excerpts, which were to be used to promote interest in and boost sales of the book prior to its release.<sup>123</sup> In 1979, Harper & Row exercised this right when it negotiated a prepublication licensing agreement with *Time Magazine*.<sup>124</sup> *Time* agreed to pay Harper & Row a total of \$25,000—\$12,500 in advance and \$12,500 at publication—in exchange for the right to quote 7500 words from the chapters of Ford's book.<sup>125</sup>

Before *Time* published the excerpts, an unidentified person shared a copy of the Ford manuscript with Victor Navasky, editor of *The Nation*, a political commentary magazine.<sup>126</sup> In turn, Navasky wrote an article for *The Nation*, repeating quotes and facts from the Ford manuscript.<sup>127</sup> Navasky did not include any independent commentary or criticism on the story, but instead simply paraphrased Ford's writing.<sup>128</sup> *The Nation's* article appeared on April 3, 1979, just weeks before the *Time* article's scheduled release.<sup>129</sup> As a result, *Time* cancelled its piece on the Ford book and refused to pay Harper & Row the remaining \$12,500 since the excerpts, now disseminated to the public, would no longer attract large sales for the magazine.<sup>130</sup>

Harper & Row brought suit against *The Nation* claiming that *The Nation's* use of the manuscript constituted an infringement under the Copyright Act § 106(1)–(3), protecting, respectively, the right to reproduce a work, the right to license preparation of derivative works, and the right to first distribution of a copyrighted work to the public.<sup>131</sup> The District Court for the Southern District of New York found infringement on the part of *The Nation* and rejected the argument that *The Nation's* piece constituted fair use.<sup>132</sup> The district court pointed out that *The Nation's* piece was published for profit and took “the heart” of the work.<sup>133</sup> The court awarded \$12,500 in actual damages.<sup>134</sup> The United States Court of Appeals for the Second Circuit reversed and entered judgment in favor of *The Nation* on the finding that a fair use defense was properly established.<sup>135</sup> In support of its decision, the court stressed the fact that *The Nation's* article contained, at most, around three hundred copyrighted words, and that those words were insubstantial in relation to the Ford autobiography as a whole.<sup>136</sup>

---

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 543.

<sup>126</sup> *Id.*

<sup>127</sup> *Harper & Row*, 471 U.S. at 542

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 543–44.

<sup>132</sup> *Id.*

<sup>133</sup> *Harper & Row*, 471 U.S. at 544.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 545–46. The book itself was over 200,000 words in length. *Id.* at 579.

On appeal, the Supreme Court reversed the Second Circuit's judgment and held that *The Nation's* unauthorized use of quotations from Ford's manuscript did not constitute fair use.<sup>137</sup> In support of its decision, the Court emphasized that the words copied, though a quantitatively insubstantial portion of the book,<sup>138</sup> amounted to a substantial portion of the book qualitatively.<sup>139</sup> According to one *Time* editor, the portions taken by *The Nation* concerning the Nixon pardon were "the most interesting and moving parts of the entire manuscript."<sup>140</sup> The Court agreed with the district court, which previously noted, "[T]he Nation took what was essentially the heart of the book."<sup>141</sup>

b. *Analysis*

The portions of NFL games that users post on YouTube range in variety from momentous catches to amusing post touchdown performances. Perhaps clips similar to the latter example warrant the fair use defense more than clips that capture significant plays in a game. However, just because a portion of a whole is significant, it does not follow that the portion necessarily constitutes the "heart of the work."<sup>142</sup>

In *Harper & Row*, a *Time* editor described the copied selections as the "heart" of Ford's autobiography and alluded to the notion that people would purchase the book exclusively to read those exact selections that *The Nation* printed. A court would be hard-pressed to find Randy Moss's "faux mooning" touchdown celebration as the "heart" of that particular Vikings-Packers game.<sup>143</sup> Yet, the NFL forbids anyone to view the video of the jesting act, even if just to conjure up a smile. On the other hand, a court might conceivably hold that the "back-breaking touchdown"<sup>144</sup> which preceded the "mooning" does amount to the "heart" of the game since the score contributed to the Viking's win. Given, however, that a football game consists of hundreds of different plays, a court would be in a tough position to determine which play directly caused a victory or resulted in a loss. Since a football game is essentially a string of many plays, except in very specialized circumstances, it is unlikely that one defensive tackle or a single offensive run could constitute the "heart" of a game. Given this fact, perhaps the closest thing to the "heart" of a football game would be a video montage of several highlights from a single game or of a single player.

<sup>137</sup> *Id.* at 539.

<sup>138</sup> *Id.* at 566. *The Nation's* article contained only three hundred words from the book, which amounts to less than one percent of the entire book. *Id.* at 544–45.

<sup>139</sup> *Harper & Row*, 471 U.S. at 565.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 205 (4th Cir. 1998) (noting that "[I]f all quoted [or in this case, duplicated] material were deemed significant enough to preclude a fair use just because it was significant enough to be quoted [or replayed], no one could ever quote [or duplicate] copyrighted material without fear of being sued for infringement.").

<sup>143</sup> See Don Banks, *The Amazing Randy*, SPORTS ILLUSTRATED, Jan 9, 2005, available at [http://sportsillustrated.cnn.com/2005/writers/don\\_banks/01/09/moss.reax/](http://sportsillustrated.cnn.com/2005/writers/don_banks/01/09/moss.reax/) (stating that during a Minnesota Vikings-Green Bay Packers NFL game on January 9, 2007, Randy Moss "mooned" the Green Bay crowd after scoring his second touchdown of the day).

<sup>144</sup> *Id.*

Ironically, such videos remain posted on YouTube and were not included in the NFL's mandated removal of clips.<sup>145</sup>

Most clips removed from YouTube captured a single play; however, American football fans do not tune in on Sundays and Monday nights to see one play. Rather, they watch a professional football game for the entire experience. After a magnificent play, fans do not leave the stadium or turn off the television and say, "I saw one great play today, so no need to watch the rest of the game." In this way, the YouTube situation differs from the situation in *Harper & Row*. The Court's decision in that case revolved around the fact that most potential consumers of Ford's autobiography would no longer read the entire book or *Time's* piece given that they could read the best part in *The Nation's* article. Professional football fans however, consistently continue to watch entire football games despite the availability of clips on YouTube.

In sum, the third statutory factor seems to weigh in favor of fair use. Regarding the analysis of quantity, nearly all courts would agree that the amount of copyrighted material used in posted clips is far from excessive, especially given that almost all the clips on YouTube are less than ten minutes in length. Regarding the qualitative aspect of the third factor analysis, the majority of courts would decline to conclude which single plays qualify as the "heart" of a game and which do not, for a football game is made up of numerous plays, none of which, individually, unequivocally constitute the "heart" of a game. Furthermore, the fact that many videos on YouTube show footage off the field of play, such as touchdown celebrations, tips the scale in favor of fair use.

#### D. THE EFFECT UPON THE PLAINTIFF'S POTENTIAL MARKET

The fourth factor listed in Section 107 directs a court to consider "the effect of the [new] use upon the potential market for or value of the copyrighted work."<sup>146</sup> If a new work serves as a market replacement for the original, then it is likely that considerable market harm to the original will occur. Similarly, when a new work is transformative, market harm may not be so readily inferred.

*Harper & Row* also serves as a good example for the fourth factor of a fair use analysis. As explained above in the case summary, after *The Nation* published significant portions of Ford's manuscript in its magazine, *Time* cancelled its upcoming piece on Ford's autobiography since *The Nation* had already distributed to the public the "most interesting" part of the book. The terms of the prepublication licensing contract between Harper & Row and *Time* called for two installments of \$12,500--one in advance and one upon publication. In addition to canceling the Ford piece, *Time* also refused to pay the second installment of \$12,500, which Harper & Row cited as

---

<sup>145</sup> A video montage of Randy Moss's extraordinary catches using only NFL footage has been available on YouTube since May 2006. See "Randy Moss as a Raider,"

<http://youtube.com/watch?v=LpOYkVdCMXU&mode=related&search=> (last visited Sept. 5, 2007).

<sup>146</sup> 17 U.S.C. §107(4).

actual damages.<sup>147</sup> The case is unique in that it presents clear-cut evidence of actual damages.<sup>148</sup> In contrast, most copyright infringement cases require a court to speculate how the alleged infringing work might impair the marketability of the original copied work. Such is the case with the NFL-YouTube situation. In other words, since the NFL cannot claim any actual harm as a result of the YouTube postings, a court would be forced to consider whether such postings would harm areas of the market that the League currently occupies. In order to prevail on this factor, YouTube must also show that even given the great popularity of the website, the postings will not adversely affect the *potential* market for the NFL copyrighted game broadcasts.<sup>149</sup> This *potential* market includes any area of the market that the NFL might eventually enter into, even though it has yet to do so.

The burden YouTube must carry under this fourth factor appears rather high; however, in the end, the short clips of NFL footage posted on the site probably do not materially impair the League's marketability of the original broadcasts in today's market or that of the future. The following segment will evaluate the effects of the YouTube postings on three market areas the NFL currently occupies: original broadcasts, sports television programs, and highlight films. The segment concludes with a look at how the postings might affect a market area the NFL does not yet occupy: licensing footage to video-sharing websites.

#### 1. *Original Broadcasts*

The short NFL clips posted on YouTube will not affect the marketability of live game broadcasts. That is, people will not stop watching Sunday and Monday night games just because brief clips from the games are accessible on YouTube. Weekly football games have become a habit for Americans, special events to which the population regularly looks forward.<sup>150</sup> Michael Mandelbaum, a lifelong sports fan and author of the book, *THE MEANING OF SPORTS*, compares football to organized religion.<sup>151</sup> In his chapter entitled *A Variety of Religious Experience*, Mandelbaum explains how people divert themselves from the burdens of normal existence by setting aside certain blocks of time for a temporary escape from the daily routine.<sup>152</sup> He notes that in the past, such periods of escape were for religious activities, but today they are occasions to enjoy a football game.<sup>153</sup> Certainly, viewing a five-minute clip on YouTube cannot substitute for these afternoon-long escapes from reality. If anything, the

---

<sup>147</sup> *Harper & Row*, 471 U.S. at 567.

<sup>148</sup> *Id.*

<sup>149</sup> *Sony*, 464 U.S. at 451.

<sup>150</sup> See MICHAEL MANDELBAUM, *THE MEANING OF SPORTS: WHY AMERICANS WATCH BASEBALL, FOOTBALL, AND BASKETBALL AND WHAT THEY SEE WHEN THEY DO* 176 (Public Affairs 2004) [hereinafter *THE MEANING OF SPORTS*] (noting the fact that professional football games occur only once a week creates a build-up of excitement prior to the game, larger than other major professional sports: "The regular season in professional football has sixteen games, in basketball eighty-two, in baseball 162, which means that in its contribution to the outcome of the season, each football game is five times as important as each basketball game and ten times as significant as each baseball game.").

<sup>151</sup> See *id.* at 1-39 (remarking that the time Americans set aside in their daily lives to watch football games has religious origins and religious significance).

<sup>152</sup> See *id.* at 4.

<sup>153</sup> See *id.*

clips ease the workweek for Americans by providing them with quick spurts of excitement that they can access at their office desk, causing them to look forward to the upcoming weekend broadcast even more than before.

Besides watching football games to distract from daily life, Americans enjoy watching because the games reflect the traits and values of this country. Football embodies teamwork and emphasizes toughness, two qualities the United States constantly promotes. As one sports television consultant remarked, “I think the game in some ways sums up the American experience.”<sup>154</sup> Surely, bite-sized morsels of a single match-up cannot offer the same type of experience that Americans crave when they turn on the television to watch an entire game.

Furthermore, with the advancements in television technology, people will never choose to watch a professional football game through YouTube on a seventeen-inch computer monitor when they can enjoy the same action on a fifty-two-inch high-definition television (“HDTV”).<sup>155</sup> HDTV recently improved the television-viewing experience: it offers a much better picture quality than standard television, which means greater clarity, smoother motion, and richer colors.<sup>156</sup> Complementing the life-like pictures is true surround sound of CD-quality digital audio.<sup>157</sup> What better piece of programming to watch on HDTV than sports? Indeed, most television showrooms tune their floor models to athletic games in order to best display the high-definition viewing experience. Moreover, sports fans actually account for the majority of HDTV owners.<sup>158</sup> According to one survey, nearly fifty percent of owners cited HD sports programming as the primary force behind their purchase.<sup>159</sup> Considering the money spent on these new televisions, it is hard to imagine any football fan willfully choosing to watch a game on a computer screen.

One need only consult the trends in the NFL’s television audience market share to realize that NFL footage posted on YouTube is not adversely affecting marketability of the original broadcasts. In 2006, 222 million Americans—or approximately three-quarters of the United States

---

<sup>154</sup> Mark Maske & Leonard Shapiro, *Leagues Ahead of the Rest*, WASH. POST, Sept. 8, 2005, at E01 (quoting Neal Pilson, former president of CBS Sports turned sports television consultant: “I think a lot of people see their daily lives and the history of the country in the NFL because the game is also linked to the personality and attitude of the country. There’s a high degree of teamwork, an emphasis on toughness.”). See also THE MEANING OF SPORTS, *supra* note 150, at 127 (describing the similarity between football and war and how Americans watch football games to connect with the longstanding human desire to fight, protect, and win: “Of the three major American team sports [baseball, football and basketball] the game of football is the one that bears the closest resemblance to the age-old human practice of armed conflict.”).

<sup>155</sup> Although improvements in computers are inevitable, like an HD computer screen, television sets will most likely always be technologically further advanced and thus will remain the leading viewing apparatus for sports fans.

<sup>156</sup> See Internet Broadcasting, *What is HDTV?*.

<sup>157</sup> <http://www.newsnet5.com/technology/1455530/detail.html> (last visited Sept. 5, 2007).

<sup>158</sup> See *id.*

<sup>158</sup> See Tom Keating, *Sports Fans Drive HD TV Sales*, VOIP & GADGETS BLOG, Jan. 25, 2006, <http://blog.tmcnet.com/blog/tom-keating/home-entertainment/sports-fans-drive-hd-tv-sales.asp> (stating that according to a new survey titled “Inside the Mind of the HD Sports Fan,” conducted by the Consumer Electronics Association and the Sports Video Group, nearly sixty percent of HDTV owners consider themselves sports fans).

<sup>159</sup> See *id.*

population—watched NFL games, up from 195.8 million in 2005.<sup>160</sup> NFL games on network television (CBS, FOX, and NBC) averaged 16.3 million viewers per game in 2006, up four percent from 2005.<sup>161</sup> Similarly, NFL games on ESPN averaged 12.3 million viewers per game, up forty-one percent from 2005.<sup>162</sup> Furthermore, NFL games were the top-ranked program locally a record eighty percent of the time, up from sixty-nine percent in 2005 and surpassing the previous record of seventy-three percent set in 2003.<sup>163</sup> This means that since the inception of YouTube in 2005, the number of people watching live televised games has actually risen, causing NFL games to account for nine of the top ten programs among men ages eighteen to forty-nine.<sup>164</sup> It seems empirically clear that NFL clips on YouTube have had no adverse effect on the original broadcasted games.

## 2. Sports Television Programs Featuring NFL Highlights

The NFL generates considerable revenue by licensing the use of its copyrighted material to various sports-related television programs.<sup>165</sup> *SportsCenter*, arguably the most popular of sports news shows, airs multiple times a day on ESPN. The show replays the day's scores and highlights from major sporting events, including NFL games. Game highlights vary in length but are always accompanied with a voice-over summary by a *SportsCenter* anchor. Sometimes the highlights include quotations from relevant athletes or other sports figures concerning the game at hand. Other programs devoted to conveying sports highlights to the public include ESPNNews, Fox Sports, NBC Sports, and CBS Sports. It is not difficult to see why the short postings on YouTube cannot replace these programs.

<sup>160</sup> *NFL: America's Choice*, [www.coldhardfootballfacts.com/Documents/NFL\\_all\\_about\\_SB\\_1-07.pdf](http://www.coldhardfootballfacts.com/Documents/NFL_all_about_SB_1-07.pdf) (last visited Mar. 19, 2007) [hereinafter *Cold Hard Football Facts*] (citing to statistics according to Nielsen Media Research).

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See id.* at 5. (displaying the following chart taken from NFL, Nielsen Media Research, 9/7/06–12/31/06 of the 2006 season's top 10 programs on network television for men aged 18–49).

Program	Rating
1. FOX Sunday National Game	11.3
2. CBS Sunday National Game	9.7
3. NBC Sunday Night Football	9.1
4. FOX Sunday Single Game	7.9
5. CBS Sunday Single Game	7.2
6. The OT (FOX NFL Postgame)	6.8
7. FOX Sunday Regional Game	6.4
8. Heroes	6.1
9. NBC Sunday Night Pre-Kick	5.9
10. CBS Sunday Regional Game	5.8

<sup>165</sup> *See* Gail Schiller, *Super Bowl Drives NFL's Rising Revenues*, THE HOLLYWOOD REP., Feb. 2, 2007, available at

[http://www.hollywoodreporter.com/hr/content\\_display/television/features/e3ic9dc7ecac0f2a973f3c4e7cbbafe945f](http://www.hollywoodreporter.com/hr/content_display/television/features/e3ic9dc7ecac0f2a973f3c4e7cbbafe945f) (stating that in 2005, the NFL generated approximately \$285 million from sponsorship and licensing deals).

First, highlight shows such as *SportsCenter* incorporate commentary by seasoned sportscasters like Stuart Scott,<sup>166</sup> John Anderson,<sup>167</sup> Mike Greenberg,<sup>168</sup> and Steve Levy.<sup>169</sup> Sometimes the programs feature former players who comment on and breakdown the day's big events in sports. Football fans undeniably tune in to these shows not only to view the featured NFL highlights, but also to listen to what the experts have to say about the day's key plays. Although YouTube users attach commentary to the videos they post, the site differs from the shows in that the commentary on the website comes from ordinary sports fans rather than experts. These user comments and opinions generate interest; in fact, this commentary is precisely what renders the use of NFL clips transformative, as explained above;<sup>170</sup> however, such remarks are no substitution for the expert analyses offered on the above-mentioned television programs. Therefore, watching NFL footage on YouTube will not stop people from watching NFL highlight shows.

The second reason why clips of NFL footage on YouTube will not harm the viewership of highlight shows is that the shows offer more than just highlights. Often, special segments on issues like game predictions are interspersed between the highlight videos. *SportsCenter* airs a variety of specialty segments relating to professional football such as "Chris Berman's Two-Minute Drill," "Open Mike," and perhaps the most anticipated segment of each show, the "Top Ten." The "Two-Minute Drill" is a weekly segment that airs on Fridays during the NFL season. The segment consists of Berman,<sup>171</sup> a renowned sportscaster, previewing the week's top NFL match-ups and giving his picks for that week's key games. "Open Mike" appears early in the week during the NFL season and features former Chicago Bears head coach Mike Ditka and former Dallas Cowboys wide receiver Michael Irvin providing their respective takes on the NFL games from the past week. Finally, the "Top Ten" is a video montage of the ten best plays of the day across all sports. Viewers tune in to programs like *SportsCenter* not only for the highlights but for these specialty segments as well. Since the clips on YouTube lack specialty segments, viewers will not find NFL footage on the website to be a suitable alternative for highlight programs.

Lastly, postings of select NFL footage on YouTube will not serve as a market replacement for highlight shows, because in addition to professional football, the shows often include many other sports.<sup>172</sup> Generally, sports

<sup>166</sup> E.g., Stuart Scott—Biography, [http://www.espnmediazone.com/bios/Talent/Scott\\_Stuart.htm](http://www.espnmediazone.com/bios/Talent/Scott_Stuart.htm) (last visited Sept. 20, 2007).

<sup>167</sup> E.g., John Anderson—Biography, [http://www.espnmediazone.com/bios/Talent/Anderson\\_John.htm](http://www.espnmediazone.com/bios/Talent/Anderson_John.htm) (last visited Sept. 20, 2007).

<sup>168</sup> E.g., Mike Greenberg—Biography, [http://www.espnmediazone.com/bios/Talent/Greenberg\\_Mike.htm](http://www.espnmediazone.com/bios/Talent/Greenberg_Mike.htm) (last visited Sept. 20, 2007).

<sup>169</sup> E.g., Steve Levy—Biography, [http://www.espnmediazone.com/bios/Talent/Leve\\_Steve.htm](http://www.espnmediazone.com/bios/Talent/Leve_Steve.htm) (last visited Sept. 20, 2007).

<sup>170</sup> See discussion *supra* Part III.A(1).

<sup>171</sup> Berman no longer regularly anchors *SportsCenter* and has gone on to host *Monday Night Countdown*. See, e.g., Chris Berman—Biography,

<http://sports.espn.go.com/espn/espntv/espnBio?type=name> (click on "A-E" tab; then click "Chris Berman").

<sup>172</sup> Some television programming, such as *NFL Live* is exclusively devoted to professional football game highlights and does not feature highlights from any other sports; however, these programs include

highlight shows will provide a well-organized recap of all the major sports events on a given day. Many football fans are also loyal college football, basketball, hockey, or baseball fans. At the very least, most professional football fans enjoy staying informed on other leagues around the world of sports. While YouTube can supply users with highlight videos from many different sports, it cannot do so as efficiently as a television program. If a YouTube user views an NFL highlight clip and then later wishes to see highlights from the National Basketball League (the “NBA”) and the National Hockey League (the “NHL”), the user would be forced to browse through thousands of videos, peruse through different categories or use key search terms to find each clip. In contrast, highlight shows like *SportsCenter* provide viewers with a nicely packaged program that covers the must-see plays of the day from all corners of the sports world.

By and large, sports fans will watch *SportsCenter*, or a similar program, after noteworthy games. Those same fans might also log onto YouTube, but usually not until days later—either to relive a momentous play or to show a friend what he or she missed on game day. The bottom line is that even if NFL highlight videos exist on YouTube, such postings will not replace highlight television programs.

### 3. *Highlight Films*

A highlight film can take on many forms, such as a video synopsis of a team’s entire season, an assemblage of the most impressive touchdowns, or a compilation of the greatest tackles ever made. The NFL creates various highlight films, such as Super Bowl Championship Digital Video Discs (“DVDs”), using its own copyrighted footage. For example, in February of 2006, soon after the Pittsburgh Steelers won the Super Bowl, the NFL released a special DVD commemorating the team and its winning season. The DVD includes highlights from the Steelers’ regular season, playoffs, and Super Bowl win, all NFL-copyrighted footage. The League creates other derivative works<sup>173</sup> with its footage, such as “Greatest Super Bowl Moments” and “Favre 4 Ever.” In a fair use case involving NFL footage on YouTube, a court would be required to determine whether the postings on the website would harm the NFL’s market for these films.<sup>174</sup>

A court would probably find that the NFL footage appearing on YouTube does not harm the market for NFL DVD sales for reasons similar to the argument concerning highlight television programs. That is to say, the real value of the NFL’s DVDs is the way it packages the games by adding player and coach interviews, media coverage clips, and even NFL commercials. The footage posted by users on YouTube lacks all of these qualities, leaving users with just raw, nonetheless copyrighted, NFL footage.

---

expert commentary and special segments, like *SportsCenter*, and thus cannot be replaced by YouTube postings.

<sup>173</sup> A “derivative work” is defined as: “A copyrightable creation that is based on a preexisting product; a translation, musical arrangement, fictionalization, motion-picture version, abridgment, or any other recast or adapted form of an original work.” *Black’s Law*, *supra* note 12, at 1636.

<sup>174</sup> See *Harper & Row*, 471 U.S. at 568 (stating that “[T]he enquiry [of fair use] must take account not only of harm to the original but also of harm to the market for derivative works.”).



Given that the footage on YouTube contains several minutes, sometimes just several seconds, of a single play from a single game, such available footage cannot substitute for a professionally assembled three-hour DVD documenting one team's season-long road to Super Bowl victory.<sup>175</sup> Furthermore, the average football fan whose favorite team conquers the League will undoubtedly covet a specialized DVD that relives the team's rise to the top. Although that same fan might occasionally log onto YouTube to relive a play from the championship game, he will not settle for the opportunity to surf the website as a reminder of his team's victorious season. On the contrary, he will desire a commemorative DVD not only to view on occasion, but also to display proudly in his DVD collection. YouTube will never take the place of memorabilia and therefore will not harm the potential market for highlight films.

#### 4. *Potential Market: Licensing Footage to Video-Sharing Websites*

Although the NFL does not currently engage in any licensing agreements with video-sharing websites, this type of licensing is one marketable use of the original broadcast that the League might eventually employ.<sup>176</sup> Clearly, allowing clips to be available on YouTube with no licensing fee would affect the marketability of such licenses. Given, however, that the website already contracts with several other companies to display copyrighted footage on the site,<sup>177</sup> there is a high likelihood that YouTube would accept a similar deal with the NFL.<sup>178</sup> Such a deal would eliminate any sort of adverse affect on the League's licensing market.

Considering the above discussion, YouTube appears to come out on top under the fourth factor because its use of NFL clips does not adversely affect the NFL's marketability of original broadcasts, derivative works of the footage, or even potential marketable uses of the footage. Given that many courts have characterized this fourth factor as the most important out of the four,<sup>179</sup> YouTube emerges victorious under its analysis. The scale now weighs heavily in favor of fair use.

---

<sup>175</sup> See, e.g., NFL SUPER BOWL XL: PITTSBURGH STEELERS (Warner Home Video 2006).

<sup>176</sup> The League should employ this use. See discussion *infra* Part IV.A–B.

<sup>177</sup> See Dan Mitchell, *Fickle Investors Bobbing in Sea of Subprime Loans*, N.Y. TIMES, Mar. 17, 2007, at C1 (stating that Google, as parent company to YouTube, has struck licensing deals with many small media companies and some larger ones).

<sup>178</sup> YouTube also stands to benefit from such licensing deals, which increases the likelihood of the website agreeing to a deal with the NFL. See Sara Kehaulani Goo, *NBC Taps Popularity of Online Video Site*, WASH. POST, June 28, 2006, at D01 [hereinafter *NBC Taps Popularity*] (reporting that the terms of the NBC-YouTube deal include the term that NBC will endorse YouTube on television with a contest that encourages viewers to submit funny videos of their office environments to YouTube.com for a chance to be shown in conjunction with the sitcom "The Office").

<sup>179</sup> See, e.g., *Harper & Row*, 471 U.S. at 566 (stating, "[T]his last factor is undoubtedly the single most important element of fair use."). See also *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 843 (S.D.N.Y. 1995) (calling the fourth factor of the fair use analysis "vital"); *Sony*, 464 U.S. at 450 (stating that "the purpose of copyright is to create incentive for creative effort" and thus, "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create.").

#### IV. A WIN-WIN SITUATION: HOW LICENSING CAN BENEFIT THE NFL

##### A. REAPING REWARDS FROM YOUTUBE

All signs point to a finding of fair use in the case of NFL footage on YouTube, but that is not all bad news for the League. Allowing short clips from professional football games to exist on YouTube will expand the appeal of the sport. As the NFL continues to build its female fan base, the League may want to look at YouTube as an easy advertising device where females account for over forty percent of unique visitors to the site each day.<sup>180</sup> The League might also be interested to know that children ages twelve to seventeen—the NFL's most underrepresented audience demographic—represents the main age group visiting the website.<sup>181</sup> By making NFL clips available on a website frequented by women and children, the League may be able to increase its market share by sparking an interest in professional football with potential fans. The NFL would not be the first to employ YouTube as a means of garnering new viewers. In November of 2006, CBS announced that it believes by posting clips of its programs on YouTube, it has increased the number of people who watch CBS shows.<sup>182</sup> The NHL has also embraced YouTube as a way to increase public interest in the sport.<sup>183</sup>

As for clips featuring controversial calls, some may argue that too much inspection and debate over the calls could take away from the fair and upstanding aspects fans expect from an NFL game, thereby diminishing the respectability of the sport. Although this is a reasonable fear, the outcome is highly unlikely. Allowing users to post the clips adds a new dimension to the game of professional football. After a game littered with shocking referee calls airs, fans will flock to their computers to read how others reacted to the controversial decisions made on the field. While some might feel uncertain about granting people the right to dissect and scrutinize every questionable play, it is precisely this type of scrutiny that could improve the League's officiating. Indeed, the NFL introduced the

---

<sup>180</sup> *The Score: Bush Boosts YouTube Traffic*, (Aug. 3, 2006), <http://www.imediaconnection.com/content/10652.asp> [hereinafter *The Score*] (displaying a chart of the demographic profile of visitors to YouTube.com in the United States in June 2006). See also Demographic Profile Report—YouTube.com, *supra* note 2 (reporting that out of the 20.2 million people who visit the website per day, 8.5 million are female).

<sup>181</sup> See Press Release, Suzy Bausch & Leilani Han, Nielsen//NetRatings, *YouTube U.S. Web Traffic Grows 75 Percent Week Over Week*, July 21, 2006, available at [http://www.netratings.com/pr/pr\\_060721\\_2.pdf](http://www.netratings.com/pr/pr_060721_2.pdf) (stating that visitors between 12-17 years old index the highest among various age groups, at 142, where anything over 100 means the demographic group is overrepresented). See also *The Score*, *supra* note 180 (“YouTube.com visitors are fifty-four percent more likely than average to be between the ages of twelve and seventeen.”).

<sup>182</sup> See Phil Rosenthal, *CBS Attributes Ratings Boost to YouTube*, CHI. TRIB., Nov. 29, 2006, at C3 (reporting that CBS posted over 300 clips on YouTube, which were viewed 29.2 million times in just forty-three days). The audience for “Late Show with David Letterman” grew five percent (about 200,000 viewers) and “The Late Late Show with Craig Ferguson” enjoyed a seven percent surge in viewership (up 100,000 viewers). *Id.*

<sup>183</sup> See Greg Johnson & Lance Pugmire, *NHL, YouTube Reach Video Agreement*, L.A. TIMES, Nov. 15, 2006, at D3 (reporting that by means of an agreement between YouTube and the NHL, the NHL will upload game highlights onto YouTube's website and will share in the revenue generated by online advertising appearing on the pages that feature the game videos).

new replay challenge system as a way to address the highly publicized erroneous calls made in seasons past.<sup>184</sup> Perhaps the exposure YouTube provides for such calls will spur the League to further correct the problem.

The free advertising does not stop at YouTube.com. Often, online junkies will view videos on YouTube and then embed them into personal blogs, MySpace profiles, and private websites. This diffusion widens the potential viewing audience making it more likely that a non-NFL fan will see an exciting clip and become attracted to the intensity and surprise that surrounds a professional football game.

Skeptics to the idea of embracing YouTube as an advertising vehicle call attention to the fact that professional football already enjoys the title of America's favorite sport.<sup>185</sup> However, such skeptics must look to the future and realize that we live in a world where online accessibility of a product is vital to its survival. The youth of America depend on the Internet for entertainment, information, and suggestions as to what constitutes trendy and what will never pass as acceptable. One respected media blogger points out that YouTube.com even has a greater reach among some United States audiences than MTV.<sup>186</sup> Web interaction also plays a large role in a young person's online experience. If the League wants to appeal to its next generation of consumers, it would be best served by making the game an interactive experience for the new, Internet-savvy fan base. Kids spend hours choosing which clips to feature on their MySpace profiles. When they choose to post a highlight from last night's nail-biting game, the NFL should sit back and bask in the free marketing of their product.<sup>187</sup> Not only might one teen's posted clip draw in more viewers for next week's game, perhaps his friends will tune into a highlight show later that night for more excitement, thereby increasing viewership not only in the original, but in the derivative works as well.

## B. THE LICENSING SOLUTION

Considering the wide array of benefits YouTube can offer the NFL, it would seem in the League's interest to embrace the website as a vehicle for its own promotion.<sup>188</sup> Rather than fight the legal battle over fair use,

<sup>184</sup> See *Instant Replay*, *supra* note 69.

<sup>185</sup> See *Cold Hard Football Facts*, *supra* note 160, at 10 (stating that according to the Harris Poll in January 2007, twenty-nine percent of sports fans cite professional football as their favorite sport; Football has been the most popular sport in America for more than four decades after overtaking baseball as the fan favorite for the first time in 1965).

<sup>186</sup> Gary Bourgeault, *YouTube.com, has Greater Reach Among Some U.S. Audiences Than MTV*, THE ALPHA MARKETER, June 24, 2006,

[http://www.thealphamarketer.com/2006/06/youtubecom\\_has\\_greater\\_reach\\_a.html](http://www.thealphamarketer.com/2006/06/youtubecom_has_greater_reach_a.html).

<sup>187</sup> See Mike Musgrove, *Viacom Decides YouTube Is a Foe*, WASH. POST, Feb. 3, 2007, at D01 [hereinafter *Viacom*] (reporting that YouTube stated companies could benefit from the website's "passionate audience" which has already helped to promote many shows). See also *To The Media*, *supra* note 7 (reporting how one user considers companies who remove their fare from YouTube as a move they "will come to regret." He says that "all the people who posted videos are volunteer marketers for [the featured company] . . . the [company] benefits from people talking about their programming, becoming the water-cooler chatter at the office. [The companies who remove their material] have shot themselves in the foot.").

<sup>188</sup> See *Awaiting a Compromise*, *supra* note 7 (reporting that a law professor at Stanford, who specializes in copyright issues, commented on the YouTube situation by stating that if companies

particularly because the League would presumably fail,<sup>189</sup> the NFL should enter into a licensing agreement with YouTube. The website is evidently willing to do so, seeing as it has done so with several other entertainment companies.<sup>190</sup> The terms of such an agreement might invite the NFL to allow clips on the website in exchange for advertising revenue or other promotional rewards.<sup>191</sup> In addition to gaining fans and collecting licensing revenue, there exists the opportunity to profit further from a licensing deal.<sup>192</sup> Moreover, posting official NFL footage onto YouTube will dispose of low-quality video from personal camcorders and cell phones that may not exhibit the game in the professional light the NFL most likely desires.<sup>193</sup> Overall, the NFL seems best served to license its footage and delight its fan base because as one news reporter remarked, “. . . if you can't beat 'em, co-opt 'em.”<sup>194</sup>

## V. CONCLUSION

The founders of this country bestowed upon Congress the authority to promote creativity. At times, being creative involves using the work of another.<sup>195</sup> When such use is reasonable and generates new creation or thought, the courts excuse such “copying” under the doctrine of fair use. The decision to sanction a use as fair is not made in haste. Courts carefully consider four crucial factors when determining whether use of an original work should be legally permitted. After a thorough analysis of each fair use statutory factor, this Note concludes that uploading and posting limited-sized video clips from NFL games onto YouTube.com qualifies as fair use.

---

“thought about how to leverage the value [of YouTube] instead of trying to stop it, they would be better off.”).

<sup>189</sup> See discussion *supra* Part III.A–D.

<sup>190</sup> See Alex Veiga, *YouTube May Benefit from Tech Upgrade but Copyright Could Hurt Content*, CHI. TRIB., at C12 [hereinafter *Benefit*] (noting that YouTube currently has licensing deals with CBS Corp., Warner Music Group, Vivendi's Universal Music Group, and Sony BMG Music Entertainment). See also *NCAA*, *supra* note 6 (reporting on the deal between CBS Sports and YouTube announced in early March 2007 of which CBS said its deal to show NCAA basketball tournament highlights has been beneficial as “a form of viral marketing.”). The big media companies, including the NFL, must understand that the Internet offers a new method for distributing material, which carries with it both “great possibilities and great pitfalls.” See *Awaiting a Compromise*, *supra* note 7 (stating that licensing deals are virtually inevitable seeing as the media companies “are not going to be able to litigate YouTube off the face of the earth.”). Many media analysts expect large media companies to follow in the footsteps of others who have already made licensing deals with YouTube. See *Viacom*, *supra* note 187 (reporting that a Forrester Research media analyst said, “he would expect Viacom and YouTube to eventually strike a similar deal [as that of CBS]” because “it's a great way to drive eyeballs.”).

<sup>191</sup> See *NBC Taps Popularity*, *supra* note 178 (reporting that YouTube agreed to set up an NBC page on which viewers can watch promotional material for six programs on NBC's fall lineup, as well as other programs including “Saturday Night Live” and “The Tonight Show with Jay Leno”).

<sup>192</sup> See *Benefit*, *supra* note 190 (noting that entertainment companies who have contracted with YouTube receive a cut of YouTube advertising revenue each time a user views a video licensed by them).

<sup>193</sup> See *To The Media*, *supra* note 7 (reporting that users actually prefer to see licensed material because it gives them assurance of the video's accuracy and truth. Julie Supan, a YouTube spokesperson, stated that YouTube encourages companies, movie studios and big advertisers to upload videos under their company names because “users want to know it's legitimate content.”).

<sup>194</sup> *NCAA*, *supra* note 6 (suggesting that the need to license is unavoidable because if media companies do not post their own material onto the website, users will just do it themselves).

<sup>195</sup> See *Campbell*, 510 U.S. at 575 (citing Justice Story's idea that “in truth, in literature, in science, and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”).

First, users post NFL material on the website not just for entertainment, but for the purpose of comment and criticism as well—two of the statute’s explicit examples of fair use. Once posted on YouTube, the purpose of the clip transforms from merely entertaining to stimulating discussion. Second, the nature of the posted clips renders them susceptible to fair use. The clips are short fragments from a whole and therefore do not maintain the same highly copyrightable aspects of an entire game. Third, because the footage used on YouTube constitutes a very small portion of the complete games seen on television, the clips cannot constitute the “heart” of a game since football games are composed of too many plays for only one to be considered the “heart.” Touchdown celebrations and contested referee calls, which occur outside the boundaries of the game clock, are probably not the “heart” of any game. Lastly, and perhaps most important, the clips of NFL footage on YouTube will not diminish the marketability of the original broadcast or any derivative works the NFL creates from it. The clips on YouTube simply cannot compete with organized montage shows or tangible memorabilia, let alone the original four-hour broadcast, complete with commentary, visual effects, halftime shows, and most importantly, an excuse to spend four hours on the couch.

Despite these conclusions, not all is lost for the NFL. Rather than isolating itself from YouTube and potential fans, the League should follow in the footsteps of other major media companies and welcome the website as a newfound form of advertising. The League must strike a balance between protecting its copyrighted content and garnering free publicity. YouTube, with its length restrictions and widespread audience, appears to be the solution to the problem. Although today the NFL may not be desperate for viewership, it must look to the future and realize not only the benefits it could reap from properly utilizing YouTube, but the costs of overlooking the website as the next essential business tool.

