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Katherine M. Lieb
Washington University School of Law

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Can the Television and Movie Industries Avoid the Copyright Battles of the Recording Industry? Fair Use and Visual Works on the Internet

Katherine M. Lieb*

INTRODUCTION

Against an underscore of the opening lyrics of *I Fought the Law*, a female teenager appears on the screen and announces, “Hi, I’m one of the kids who was prosecuted for downloading music free off of the internet, and I’m here to announce in front of 100 million people that we are still going to download music free off of the internet. And there’s not a thing anyone can do about it.”¹ Premiering during Super Bowl XXXVIII, this scene, taken from an Apple Computer advertisement, mocks the music industry’s attempts to prevent illegal downloads of music from the internet.²

The music industry has been vigorous in its attempts to defend its copyrights against infringement by sharers of MP3s.³ Against this onslaught of litigation, music sharers have utilized the fair use defense, which creates an exception under which a person may

* B.A., Theatre and History (2002), College of William and Mary; J.D. Candidate (2005), Washington University School of Law.

1. silicon.com, *The Weekly Round-Up: 06.02.04*, at <http://comment.silicon.com/weeklyroundup/0,39024756,39118223,00.htm> (last visited Feb. 12, 2005).

2. See Stuart Elliott, *During Breaks in Game, Satire and Silliness*, N.Y. TIMES, Feb. 2, 2004, at C1.

3. See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). An MP3 is a digitally compressed audio file that is easily transferable via email or other electronic transfer medium. See *A & M Records, Inc.*, 239 F.3d at 1011. Through a process called ripping, a computer owner can compress the audio information stored on a compact disc into the MP3 format, and the MP3 files can then be stored on or transferred from the computer’s hard drive. *Id.*

legally copy and sample works for purposes “such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁴

As video clips increasingly appear on the internet,⁵ alleged copyright infringers of this medium have also begun to use the fair use defense. This situation justifiably creates concern for the movie and television industries as the availability of their copyrighted work on the internet increases.⁶

Two recent federal court of appeals decisions attempted to formulate standards for permitting the fair use defense to be used in the internet context. In *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*,⁷ the Third Circuit held that Video Pipeline’s online internet display of “clip previews,” unauthorized compilations of segments of the defendants’ movies, did not constitute “fair use.”⁸ Video Pipeline, an independent distributor of videos, created its own trailer-like previews of copyrighted works for viewing on the internet.⁹ Various entertainment companies who owned the copyrights to these works brought a copyright infringement action against Video Pipeline.¹⁰ Video Pipeline argued that its use of the clip previews constituted fair use because the previews substantially transformed the original films and the purpose of the clips was

4. 17 U.S.C. § 107 (2000).

5. The movie industry estimated it had about eighteen months “before high-speed Internet access and high-capacity hard drives make grabbing a movie almost as quick and easy as grabbing a song.” John Schwartz, *In Chasing Movie Pirates, Hollywood Treads Lightly*, N.Y. TIMES, Dec. 25, 2003, at C1. Despite the current longer download periods, internet users have been downloading movies for the past few years. See Lee Gomes, *Now, the ‘Napsterization’ of Movies*, WALL ST. J., July 17, 2000, at B1. Because digital files for movies are significantly larger and take longer to download than music files, the movie and television industries believed that they would be immune from such dangers. However, due to the ability to compress files and the increase in broadband networking and file sharing, the movie industry quickly began to face the same problems as the music industry. As Lee Gomes succinctly declared: “Hollywood, your nightmare is here.” *Id.*

6. See Robert S. Boynton, *The Tyranny of Copyright*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 42 (“In less than a decade, the much-ballyhooed liberating potential of the internet seems to have given way to something of an intellectual land grab.”).

7. 342 F.3d 191 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 1410 (2004).

8. *Id.* at 203.

9. *Id.* at 195–96.

10. *Id.* at 196.

different than the original works.¹¹ Video Pipeline based its argument on the successful employment of the fair use defense in *Kelly v. Arriba Soft Corp.*¹² In *Kelly*, the Ninth Circuit held that the online display of thumbnail-size pictures for a search engine constituted fair use.¹³ Video Pipeline compared its display of the clip previews to the use of pictures on Arriba Soft's search engine.¹⁴

Video Pipeline emerged against a backdrop of debate concerning current copyright laws and their applicability to the internet.¹⁵ Proponents of more liberal copyright laws justify their position by the extensive amount of information available on the internet and the need for an abundant public domain. They also advocate the expansion of the fair use defense for copyright infringers on the internet.¹⁶ Opponents of liberal copyright laws counter that the traditional copyright scheme will sufficiently protect authors whose copyrighted works surface on the internet.¹⁷

This Note examines *Video Pipeline* in the context of this debate. Part I examines the history of the fair use doctrine and how it has evolved with the emergence of the internet. Part II discusses *Video Pipeline* and compares it to other fair use cases involving visual works and the internet. Part III focuses on both the entertainment industry's and scholars' arguments for and against enhanced copyright protection on the internet. Part IV, concludes that, given the current statutory arrangement and previous case law, *Video Pipeline* constitutes an appropriate curb on the fair use defense. It also concludes that while the decision was a major victory for the movie and television industry, it also served as an appropriate protection of authors' rights.

11. *Id.* at 198.

12. 336 F.3d 811 (9th Cir. 2003).

13. *Id.* at 822.

14. *Video Pipeline*, 342 F.3d at 199.

15. See Boynton, *supra* note 6, at 40.

16. *Id.*

17. See *infra* notes 106–07 and text accompanying note 107.

I. HISTORY OF FAIR USE

A. *Four-Factor Test*

The fair use defense emerged as a response to the “tension in the need simultaneously to protect copyrighted material and to allow others to build upon it.”¹⁸ In the 1976 Copyright Act,¹⁹ Congress codified prior fair use case law that established the fair use defense and created four statutory factors used to determine whether the defense applied.²⁰ Since this codification, the Supreme Court has handed down a line of four major fair use decisions that provide a framework for examining these four factors.²¹ Analysis of these factors “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”²² The factors must therefore be viewed “in light of the purposes of copyright”²³ to encourage “creative activity.”²⁴

The first factor examines “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”²⁵ The critical analysis involves an investigation of whether the work adds a new purpose or character and changes the message or meaning of the original work, thus making the work “transformative.”²⁶ As the transformative nature of the work increases, the remaining three factors become less important.²⁷

18. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

19. Act of Oct. 19, 1976, Pub. L. No. 94-553, § 101 (codified as amended as 17 U.S.C.).

20. See 17 U.S.C. § 107 (2000).

21. See *Campbell*, 510 U.S. at 569; *Stewart v. Abend*, 495 U.S. 207 (1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

22. *Campbell*, 510 U.S. at 577; see also *Harper & Row*, 471 U.S. at 560.

23. *Campbell*, 510 U.S. at 578.

24. *Sony Corp. of Am.*, 464 U.S. at 429.

25. 17 U.S.C. § 107(1) (2000); see also *Harper & Row*, 471 U.S. at 562 (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”).

26. *Campbell*, 510 U.S. at 579.

27. *Id.*; see also, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003). In *Mattel*, Walking Mountain photographed Mattel’s well-known and copyrighted doll, Barbie. *Id.* at 796. The photographs featured Barbie in a series of “various absurd and often sexualized positions” in an attempt to “critique[] the objectification of women associated with

The second factor examines “the nature of the copyrighted work.”²⁸ This factor considers the work’s medium and whether such medium “falls within the core of the copyright’s protective purposes.”²⁹

The third factor examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”³⁰ This examination is not concerned with the quantity of the materials sampled, but instead focuses on the quality or importance of the copied materials.³¹

The fourth factor examines “the effect of the use upon the potential market for or value of the copyrighted work.”³² This factor involves an examination of both the potential for economic harm to the copyrighted work caused by the infringer and the likely accumulated effect on the market if others participated in similar widespread conduct.³³

[Barbie], and [] [to] lambast[] the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies.” *Id.* (alteration in original). Walking Mountain featured the photographs in art exhibits, on business cards, and on its webpage. *Id.* at 796–97. The court found its photographs to be “extremely transformative” and found that the first factor weighed heavily for a finding of fair use. *Id.* at 803. The court found that the second factor also weighed for a finding of fair use because the nature of the copied work was expressive and publicly known. *Id.* Despite a finding against fair use for both the third and fourth factors, the court emphasized the creative and transformative aspect of Walking Mountain’s photographs and held that its use of the copyrighted dolls was fair. *Id.* at 803–06.

28. § 107(2).

29. *Campbell*, 510 U.S. at 586. “This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” *Id.* Additionally, the published or unpublished quality of the work is an important consideration in assessing this factor. See *Harper & Row, Publishers*, 471 U.S. at 564.

30. § 107(3).

31. See *Harper & Row, Publishers*, 471 U.S. at 564–66.

32. § 107(4).

33. *Campbell*, 510 U.S. at 590. Additionally, this factor must be viewed in light of the purpose and character of the work. If a court finds that the work is greatly transformative, a court will likely hold that the copied work will not function as a market replacement or cause a diminution in value of the first work. *Id.* at 591. Under this factor, the *Mattel* court also looked to whether the plaintiff would normally license the use of its copyright to the defendant to engage in the defendant’s activities. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 805 (9th Cir. 2003). The court found that it was highly unlikely that Mattel would allow Walking Mountain to create art using its dolls in sexualized positions. Therefore, market competition and loss of profits could not be presumed from the plaintiff’s failure to license. *Id.*; see also *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.* 964 F.2d 965, 971 (9th Cir. 1992) (“[T]he likelihood of future harm may not be presumed.”). David Nimmer analyzes all of the

B. Fair Use and Edited Film

The author of a copyrighted work is allowed to copy and integrate the work into derivative works.³⁴ Previous cases recognized that movie trailers constitute derivative works.³⁵ Even if the copyright holder of the full-length movie does not copyright the trailer individually, the trailer will still acquire copyright protection as a derivative work of the full-length movie.³⁶

However, courts have generally allowed the fair use defense with copied video clips when such use is for the public interest. Courts typically find fair use when the copied clips are used in documentaries,³⁷ biographies,³⁸ and news programs.³⁹

copyright cases decided since the last Supreme Court decision analyzing fair use. See David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263 (2003). Of these holdings, Nimmer found that:

- (1) The first factor corresponds to the conclusion of fair use fifty-five percent of the time;
- (2) The second factor corresponds to the conclusion of fair use forty-two percent of the time;
- (3) The third factor corresponds to the conclusion of fair use fifty-seven percent of the time;
- (4) The fourth factor corresponds to the conclusion of fair use fifty percent of the time;
- (5) The cumulative correspondence for all four factors is slightly under fifty-one percent.

Id. at 280. However, ninety percent of the time, judges will find fair use when three out of four factors point to such a finding. Nimmer finds that such a difference in numbers is derived from the malleability of the four-factor test. *Id.*

34. See *Stewart v. Abend*, 495 U.S. 207, 220 (1990). Congress defines a derivative work as a "work based upon one or more preexisting works, such as a . . . motion picture. . . . [a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

35. See *Lamb v. Starks*, 949 F. Supp. 753, 756 (N.D. Cal. 1996).

36. *Id.* In *Lamb*, Starks copied Lamb's movie trailer, which had not been copyrighted. *Id.* at 755. However, Lamb copyrighted the full-length movie, from which the movie trailer was derived. In rejecting Stark's fair use argument, the court found that the movie trailer was a derivative work of the full length movie and Stark's commercial profit from the use of the trailer, the commercial purpose of the work, and the copying of the movie trailer in its entirety weighed against a finding of fair use. *Id.* at 757.

37. See generally *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001). In *Hofheinz*, the court found fair use when AMC used clips of Hofheinz's copyrighted films in a documentary. *Id.* at 141. The documentary discussed the lives of B-movie actors, Sam Arkoff and James Nicholson. *Id.* at 130. The court focused on the varying purposes of the movie and the documentary. *Id.* at 137. The court reasoned that while Hofheinz's films intended to entertain their audiences, AMC's documentary aimed "to educate the viewing public of the impact that Arkoff and Nicholson had on the movie industry." *Id.*; see also *Monster Communications, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996) (denying plaintiff's motion for a preliminary injunction against defendant, thus holding that defendant's unauthorized copying of plaintiff's film footage for a television documentary was likely fair use

C. Fair Use and Visual Images on the Internet

The posting of copyrighted motion pictures and visual images on the internet infringes the copyright holders' exclusive right to display and to distribute copies of the copyrighted work to the public.⁴⁰ Courts have specifically dealt with this issue in the context of the unauthorized posting of edited clips of adult videotapes and other photographs on the internet.

In *Michaels v. Internet Entertainment Group, Inc.*,⁴¹ Michaels sought to enjoin the Internet Entertainment Group (IEG) from posting segments of videotapes containing images from Michaels's adult

because the film's subject, Muhammed Ali, was of significant public interest).

38. In a companion case to *Hofheinz*, the court similarly held that the use of film clips featuring actor Peter Graves in a biography aired on A&E's cable television station constituted fair use. *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442 (S.D.N.Y. 2001). The film clips were originally featured in a movie trailer and were later copied into A&E's biography program. *Id.* at 443–44. Although A&E produced the work for a commercial audience and for a profit, the court found that the work constituted fair use because of its educational purpose. *Id.* at 446. The court also recognized that the appearance of Graves in the film constituted a fact of his life and therefore enriched the biography. *Id.* at 446–47. However, the Ninth Circuit limited the biography exception in *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003). Although the court recognized some transformative elements of the video clips in the biography, it did not find fair use because: Passport Video's use of the clips was purely commercial; Passport Video repeated the copyrighted clips throughout the documentary; and widespread use of the clips without Elvis Presley Enterprise's grant of a license would cause a decline in the market for such licenses. *Id.* at 627–31.

39. The court reaffirmed this doctrine in *Video-Cinema Films, Inc. v. CNN, Inc.*, 2001 U.S. Dist. LEXIS 15937 (S.D.N.Y. Sept. 28, 2001). In *Video Cinema*, the defendants were television corporations who aired sections of Video Cinema's copyrighted movie, *G.I. Joe*, in an obituary segment on actor Robert Mitchum. *Id.* at *5–14. Because news reporting is clearly a fair use exception delineated in the copyright act, the court found that there was a strong presumption in favor of fair use. *Id.* at *19. Additionally, the court found that the defendants' inclusion of the clip in the obituary was for a purpose distinguishable from Video Cinema's use in the original movie. "While Plaintiff's copyrighted work intended to entertain its audience, as well as to inform them of the reality that American infantrymen faced in World War II, Defendants' obituaries aimed to inform the viewing public of Mitchum's death and educate them regarding his impact on the arts." *Id.* at *20–21; *see also* Nat'l Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. BUCI Television, Inc., 118 F. Supp. 2d 126 (D. Mass. 2000). However, the fact that a news program uses an edited clip is not always determinative of the issue. *See, e.g.*, *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1123 (9th Cir. 1997) (holding evidence sufficient to find that broadcast of the Reginald Denny beating did not constitute fair use of copyrighted videotape because defendant's use did not transform the work or use the work in a different way than if the defendant had actually licensed the film from the plaintiff).

40. *See Playboy Enters., Inc. v. Webworld, Inc.* 991 F. Supp. 543 (N.D. Tex. 1997).

41. 5 F. Supp. 2d 823 (C.D. Cal. 1998).

videotapes on the internet.⁴² IEG argued that the clips would be used “in connection with reporting and comment on the newsworthiness of” their content.⁴³ In rejecting IEG’s argument, the court found that IEG’s use of the tapes was solely commercial and that any commentary within the tapes did not change the commercial character of the use.⁴⁴ Furthermore, the court found that IEG’s use of the copyrighted materials in short segments or still images was a common practice within the adult entertainment industry⁴⁵ and that therefore such use would be “consistent with its commercial purpose.”⁴⁶ The remaining three factors also weighed against IEG’s proposed use.⁴⁷

In *Kelly v. Arriba Soft Corp.*,⁴⁸ Arriba Soft created a search engine that displayed thumbnail images for each query.⁴⁹ A user could gain full access to the featured webpage after clicking on the thumbnail

42. *Id.* at 828–29.

43. *Id.* at 834–35.

44. *Id.*

45. *Id.* at 835.

46. *Id.* The court distinguished IEG’s use with that of clips of motion pictures used on television for the purpose of criticism by stating:

Display of such short segments is fair use because it does not conflict with the form of display that is valuable to the copyright owner—display of the entire motion picture in a theater. Here, on the other hand, because of the nature of the adult entertainment business on the Internet, the commercial value of the Tape lies as much in the display of brief images as in display of the entire Tape.

Id.

47. *Id.* at 836. The court stated that because the work was unpublished and because “it does not seem likely that the portrayal of two people engaged in sexual relations on the Tape constitutes a set of facts or ideas whose discussion requires seeing the Tape,” the second factor weighed against IEG. *Id.* at 835. Furthermore, the court found that the third and fourth factors weighed against a finding of fair use because the tape’s value as adult entertainment derived from the still images and because the nature of the internet could lead to the clip’s widespread dissemination. *Id.* at 835–36.

48. 336 F.3d 811 (9th Cir. 2003).

49. *Id.* at 815. Unlike most search engines, Arriba Soft’s engine did not display text to accompany the query. *Id.* To obtain these pictures, Arriba Soft created a computer program to scan the internet for available images. *Id.* The program downloaded the images onto its server to create the thumbnail versions. *Id.* Once the thumbnail image was created, the program deleted the image from its hard drive. *Id.* When a user linked to another webpage through the thumbnail image, the new webpage would be displayed with additional attributes from the Arriba Soft site (including the Arriba banner and Arriba advertising). *Id.* at 816. This practice, in-line linking, incorporates the additional webpage into the search engine’s own content, hiding the fact that the accessed image is on an entirely separate webpage. *Id.*

image.⁵⁰ Kelly, a photographer holding the copyrights to some of the featured images, brought an action for copyright infringement against Arriba Soft for its use of his photographs.⁵¹

The court held that the fair use doctrine covered Arriba Soft's actions.⁵² Although Arriba Soft operated the web site for commercial purposes, the court found that its use was not exploitative because it did not use the images to promote its website or to make a profit through the images' sale.⁵³ The court observed that the use was transformative because Arriba Soft used lower-resolution images that served a separate purpose from Kelly's original works.⁵⁴ It also reasoned that the use of the images was consistent with the purposes

50. *Id.*

51. *Id.*

52. *Id.* at 822. Following the lead of the district court, the Ninth Circuit divided Kelly's claims into two separate issues. *Id.* at 817. First, whether the reproduction of the thumbnail images on the search engine violated Kelly's copyright. The court examined this issue in detail and held that the fair use exception applied. *Id.* at 822. Second, whether after the user has double-clicked on the thumbnail image, Arriba Soft's banner and advertising surrounding the larger image violated Kelly's right "to display the work publicly" and if yes, whether Arriba Soft's use was fair. *Id.* at 817. The district court granted summary judgment to the defendant as to this second question and held that the use of the in-line linking was fair. In reversing the district court's summary judgment on this issue, the Ninth Circuit initially found Arriba Soft violated Kelly's right of public display. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 947 (9th Cir. 2002). Sitting en banc, the Ninth Circuit withdrew this opinion because neither party moved for summary judgment on this second holding in the district court proceedings. *Kelly*, 336 F.3d at 822. Subsequently, the Ninth Circuit reversed and remanded the case for further proceedings to focus on the in-line linking. *Id.*

53. *Id.* at 818. The Ninth Circuit also compared the commercial nature of the search engine to other kinds of commercial use, finding that the search engine was "more incidental and less exploitative in nature than more traditional types of commercial use." *Id.* The court emphasized that Kelly's images were among thousands of images available to the search engine user. The court concluded that the commercial nature "weighs only slightly against a finding of fair use." *Id.*

54. *Id.* at 818. The court found that the purpose of Kelly's original works was to provide an "aesthetic experience" for the viewer. *Id.* In contrast to this aesthetic purpose, Arriba Soft's use served "to help index and improve access to images on the internet and their related web sites." *Id.* Because of the lower resolution and the resulting lower clarity of the thumbnail images, viewers were unlikely to enlarge the thumbnails for aesthetic viewing. The court rejected Kelly's argument that because the images were replicated without additional modifications, Arriba Soft's use could not be transformative. *Id.* at 818-19. Despite its holding, the Ninth Circuit recognized that most courts reject a fair use defense where the work is identically reproduced in a different medium. *Id.* at 819; *see also, e.g.*, *L.A. News Serv. v. Reuters T.V. Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998) (finding no transformation when there is an absence of editing, commentary, or explanatory statements); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (holding that the transmission of audio recordings through MP3 format was not transformative).

of the Copyright Act because the thumbnails neither “stifle[d] artistic creativity”⁵⁵ nor “supplant[ed] the need for the originals.”⁵⁶

Even though the works were already published on the internet, the court found that the second factor, “the nature of the copyrighted work,” weighed slightly in favor of Kelly because of the creative nature of the photographs.⁵⁷ The court noted that the third factor favored neither party because, although Arriba Soft copied the image in its entirety, the extent of the copying was necessary to advance the usefulness of the webpage.⁵⁸ Finally, under the fourth factor, the court noted that while Arriba Soft commercially benefited from the use of the images on its webpage,⁵⁹ there was no commercial harm to Kelly.⁶⁰ Finding that the first and fourth factor weighed heavily for Arriba Soft, the second factor weighed slightly for Kelly, and the

55. *Kelly*, 336 F.3d at 820.

56. *Id.* The court found that the indexing function of the thumbnail images actually enhanced the public’s ability to access information. *Id.*

57. *Id.* As this factor considers how near the core of copyright protection the infringed medium stands, photographs that “are meant to be viewed by the public for informative and aesthetic purposes, such as Kelly’s, are generally creative in nature.” *Id.* Additionally, the court argued that another’s use of the work is more likely to be fair when the work has already been published, based on *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985). Because Kelly’s photographs had already appeared on the internet prior to Arriba Soft’s use of them, the published nature of the work weighs against fair use. *Id.* at 820.

58. *Kelly*, 336 F.3d at 821. While the court recognized that copying the work in its entirety usually weighs heavily against a finding of fair use, the purpose of the copying here—to allow the user to recognize the image—required that the full image be copied. The usefulness of the thumbnail would have greatly decreased if Arriba Soft had copied less of the image. *Id.*; see also *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000) (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (“While wholesale copying does not preclude fair use per se,’ copying an entire work ‘militates against a finding of fair use.’”)).

59. *Kelly*, 336 F.3d at 821. Kelly used the photographs to attract visitors to his website. On his webpage, Kelly sold advertising space, books, and travel packages. Kelly also sold and licensed his photographs to other websites and stock photo databases. *Id.*

60. *Id.* By displaying Kelly’s photographs, the search engine actually brought more users to Kelly’s webpage. First, by viewing the image on the results page, a user is more likely to visit Kelly’s webpage. Second, if a user is only interested in the image, the user is still more likely to visit Kelly’s webpage for viewing. Because the thumbnail images lose their clarity when enlarged, the thumbnail image would not serve as a substitute for the full-size image available from Kelly’s webpage. The court noted that “it is extremely unlikely that users would download thumbnails for display purposes,” *id.* at 821 n.37, and that “[t]here would be no way to view, create, or sell a clear, full-sized image without going to Kelly’s web sites,” *id.* at 822. Kelly was not limited in his ability to sell or license the images on his webpage by Arriba Soft’s use. *Id.* at 821. As Arriba Soft or any other third party was not able to sell or license the full-sized images, the market for Kelly’s images remained unchanged. *Id.* at 821–22.

third factor was neutral, the court held that Arriba Soft's use of the images was fair.⁶¹

II. VIDEO PIPELINE, INC. V. BUENA VISTA HOME ENTERTAINMENT⁶²

Video Pipeline relied heavily on *Kelly* to advance its fair use argument.⁶³ Video Pipeline was a distributor of motion picture trailers.⁶⁴ In 1998, Video Pipeline and Disney entered into an agreement establishing Video Pipeline's right to distribute its movie trailers.⁶⁵ Video Pipeline later created two web pages that displayed the trailers.⁶⁶ Subsequently, Disney asked to have its trailers removed

61. *Id.* at 822.

62. 342 F.3d 191 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 1410 (2004).

63. *Id.* at 199; *see also Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512 (7th Cir. 2002). Ty, a manufacturer of beanbag stuffed animals, brought a copyright infringement action against Publications International (PI), a publisher of collectors' guides. *Id.* at 515. PI published a series of books featuring photographs of the beanie babies without a license from Ty. PI acknowledged that the photographs were a derivative work, but it successfully defended its actions under the fair use doctrine. Ty conceded that analogous to a "book review," a collectors' guide is not a derivative work, but it argued that PI's photographing of the entire line of beanie babies was excessive. *Id.* at 521. In his decision, Judge Posner emphasized the purpose of the fair use doctrine and found that the critical inquiry is "whether it would be unreasonable to conclude, with reference to one or more of the enjoined publications, such as the *Beanie Babies Collector's Guide*, that the use of the photos is a fair use because it is the only way to prepare a collectors' guide." *Id.* at 522. In answering this inquiry, Posner emphasized the lack of other means available for producing a collectors' guide without a license (as Ty had previously refused to grant a license to PI to manufacture the guide) and that PI copied only what would be necessary to produce a "marketable collectors' guide." *Id.* at 521. The court reversed the district court's grant of summary judgment for Ty and remanded the case for further factual findings about the collectors' guides. *Id.* at 523-24; *cf. Batesville Servs., Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011-DFH-TA, 2004 WL 2750253, at *8-10 (S.D. Ind. Nov. 10, 2004) (rejecting the fair use defense argued by a distributor of caskets who used thumbnail images on its webpage taken from plaintiff's advertising materials).

64. *Video Pipeline*, 342 F.3d at 195. To obtain distribution rights, Video Pipeline entered into licensing agreements with entertainment companies. It then compiled the individual movie trailers onto videotapes to display in retail stores. *Id.* at 194-95.

65. *Id.* at 195.

66. *Id.* The first webpage, VideoPipeline.net, contained a database of its movie trailers. Visitors to online retail chains selling movies could access this webpage through the retail website in order to view the movie trailer prior to buying. The online retailers paid a fee for access to the site, and because the tapes were streamed to the viewer, a viewer was unable to download or store the trailer on her computer. The second webpage, VideoDetective.com, allowed visitors to search for a specific movie by the movie's features. *Id.* Once the visitor conducted the search, the webpage matched movies to the search criteria and provided the option to view the movie trailer. The website also allowed visitors to link to an online retailer to purchase the full-length movie. *Id.*

from these web pages and Video Pipeline complied with this request.⁶⁷ Video Pipeline later filed a complaint asking for a declaratory judgment that the use of the movie trailers did not violate copyright law.⁶⁸ It also replaced the removed trailers with its own “clip previews.”⁶⁹ Video Pipeline amended its complaint to allow posting of the clip previews, and Disney counterclaimed for copyright infringement.⁷⁰ Video Pipeline defended its actions as protected by the fair use doctrine.⁷¹ In its petition for a writ of certiorari to the Supreme Court, Video Pipeline argued that the collection of clip previews constituted a research guide and type of catalog that enabled the public to wade through a massive amount of material.⁷² It stated that the sampling of the copyrighted material was

67. *Id.*

68. *Id.* After Video Pipeline removed the trailers and filed the complaint against Disney, Disney terminated the license agreement. *Id.*

69. *Id.* at 195–96. Video Pipeline’s “clip previews” consisted of two minutes of copied clips from at least sixty-two Disney movies. *Id.* “Clip previews” began by showing the Miramax or Disney trademark and the movie’s title. *Id.* at 195. The “clip previews” then featured one or two clips from the first half of the movie and closed with the movie’s title. *Id.* Unlike Disney’s own trailers, Video Pipeline’s “clip previews” did not contain marketing techniques like narration, editing, or music. *Id.* at 195–96.

70. *Id.* at 196.

71. *Id.* at 197. In amici briefs submitted by both the Video Software Dealers Association and National Association of Recording Merchandisers, the trade associations argued that the public interest in acquiring information about a movie prior to purchase weighed against Disney’s recovery. *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 192 F. Supp. 2d 321, 345 (D.N.J. 2002). The district court found this argument to be unwarranted because the consumer had other means of accessing information about movies prior to viewing or purchasing. *Id.* at 345–46.

72. Appellant’s Petition for a Writ of Certiorari at 12, *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191 (3d Cir. 2003) (No. 03-763). Video Pipeline compared its service to other indexing services that utilize portions of copyrighted works. For example, *The Columbia Granger’s Index to Poetry in Collected and Selected Works* is considered the definitive source for indexing poetry. Its online subscription equivalent, Grangers Online, includes brief excerpts of over 55,000 poems to enable readers to find and access information. *Id.* at 12–13. Additionally, Video Pipeline argued that with the increase of the information available on the internet, digital indexing services would become necessary to help the public maneuver through the vast amount of information. *Id.* at 13–14. Video Pipeline also argued that certiorari was appropriate given a circuit split over research catalogs. Analogizing the clip previews to the collectors’ guides in *Ty* and the search engine in *Kelly*, Video Pipeline argued that the Third, Seventh, and Ninth Circuits reached contradictory holdings on the fair use doctrine and its applicability to “guides incorporating copyrighted images.” *Id.* at 9. In response to Video Pipeline’s research guide theory, Disney chided Video Pipeline for its introduction of a new theory unsupported by the record. Appellee’s Brief in Opposition at 11–12, *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191 (3d Cir. 2003) (No. 03-763).

necessary because it provided the public with a truer representation of the material that the public sought.⁷³

A. Fair Use Analysis

Prior to its fair use analysis, the court noted that unlike most fair use analyses, the copied work must be viewed in comparison to both the full movie and to the originally produced trailer.⁷⁴

1. Purpose and Character of the Work

Because Video Pipeline charged a fee for viewing the trailers, the court found that Video Pipeline's purpose in putting the clip previews online was commercial.⁷⁵ Although the court acknowledged that the purposes of the clip previews and the full-length movies may diverge,⁷⁶ it found that the purposes of the clip previews and the original trailers were similar.⁷⁷ The court also rejected Video Pipeline's analogy to *Kelly* concerning the storage and searching capabilities.⁷⁸ Moreover, the court found that the clip previews failed to add any supplementary creative aspects to Disney's original expression.⁷⁹ Finally, the court distinguished Video Pipeline's use of

Disney argued that Video Pipeline originally defended its use as a means of providing an advertising function for retailers to market home videos, and at the intermediate appellate level, Video Pipeline defined the clip previews service as a search engine. *Id.* at 12–14.

73. Appellant's Petition For a Writ of Certiorari at 13–14.

74. *Video Pipeline*, 342 F.3d at 198. In a typical fair use case, the copied work need only be compared with the original work. *Id.*

75. Video Pipeline received payment from the online video retailers. *Id.* at 195. The fee was based on the number of megabytes shown to site visitors. *Id.*

76. *Id.* at 198–99. According to Video Pipeline, the original movies served an “aesthetic and entertainment purpose” whereas the clip previews provided information to the viewers. *Id.*

77. *Id.* at 199. Disney's trailers were derivative works of its copyrighted movies. Both the clip previews and the movie trailers served promotional and informational purposes. *Id.* The court found that the clip previews “likely serve[d] as a substitute for the trailers.” *Id.* at 200.

78. *Id.* at 199. The court found that the functions of Arriba Soft's search engine and Video Pipeline's database differed because the latter did “not improve access to authorized previews located on other web sites.” *Id.* The court recognized that Video Pipeline enabled its viewers to link to legitimate web pages to purchase authorized copies, but ultimately ruled that this was not indicative of fair use. *Id.*

79. *Id.* The court found that the selection of the scenes for the clip previews at most constituted a creative decision. *Id.* at 199–200. Video Pipeline itself acknowledged the lack of creative elements in the clip previews. *Id.* at 200.

the clip previews from that of a movie review that incorporates movie segments into it. In a movie review, the reviewer's criticisms and observations adds transformative and expressive elements to the movie clips.⁸⁰

2. Nature of the Copyrighted Work

In regards to the second factor, the court noted that as creative works, movies were closer to the heart of works that require copyright protection.⁸¹ While the court acknowledged that Disney had made both the movies and the previews available to the public, it held that the expressive and creative nature of the original full-length movies and trailers outweighed a finding of fair use.⁸²

3. Amount and Substantiality of the Work Copied

The court found that the third factor demonstrated a finding of fair use.⁸³ The court noted that Video Pipeline copied a total of a two-minute segment from the original movie.⁸⁴ As Video Pipeline only reproduced clips from the first half of each movie, the copied segments did not reveal the "heart" of the movie and instead provided a mere preview of the characters and plot.⁸⁵

4. Effect on Potential Market or Value

The court found that the fourth factor weighed against a finding of fair use.⁸⁶ The court addressed this factor solely by comparing the

80. *Id.*

81. *Id.* at 200–01. The court found that Disney's movies were "paradigms of creative, non-factual expression" and that the trailers shared the "imaginative aspects" with the full-length movies. *Id.*

82. *Id.*

83. *Id.* at 201.

84. *Id.* The full-length movies that typically lasted from one and a half to two hours. *Id.*

85. *Id.* The district court found that the clip previews, "for the most part, were used to provide the potential customer with some idea of the plot of each motion picture, its overall tone, and a glimpse of its leading characters." *Id.* (quoting *Video Pipeline, Inc. v. Buena Vista Home Entm't*, 192 F. Supp. 2d 321, 339 (D.N.J. 2002)). The clips "are meant to whet the customer's appetite, not to sate it." *Id.*

86. *Id.* at 203.

clip previews with the movie trailers.⁸⁷ Because websites paid Video Pipeline for their use of the database, the court found that there was a market for the video trailers.⁸⁸ The court stated that if Video Pipeline continued to stream the clip previews over the internet, the clips would “‘serve[] as a market replacement’ for the trailers, ‘making it likely that cognizable market harm to the [derivatives] will occur.’”⁸⁹ If other people engaged in similar conduct, Video Pipeline’s actions would have a substantial negative impact on the market for trailers.⁹⁰

B. Holding

The court held that three of the four fair use factors weighed against Video Pipeline’s claim of fair use.⁹¹ The court’s curbing of

87. *Id.* at 202. The court decided against a comparison of the clip previews with the original movies because it believed the analysis with Disney’s trailers would be simpler. *Id.*

88. *Id.* Video Pipeline argued that there could be no damage to the market for movie trailers because there was simply no market for movie trailers. Video Pipeline reasoned that no one “ever paid or will ever pay any money merely to see trailers.” *Id.* The court replied that compensation may take a variety of forms. For instance, Disney had made agreements where its trailers were cross-linked with the Apple Computer home page. *Video Pipeline*, 342 F.3d at 196. Additionally, Disney used “the draw of the availability of authentic trailers to advertise, cross-market, and cross-sell other products, and to obtain valuable marketing information from visitors who chose to register at the site or make a purchase there.” *Id.* at 202 (quoting Appendix); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 446 n.28 (1984) (“[C]opyright law does not require a copyright owner to charge a fee for the use of his works, and . . . the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier.”).

89. *Video Pipeline*, 342 F.3d at 202–03 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994)). If Video Pipeline continued in this fashion, owners of websites wishing to feature the previews would enter into licensing agreements with Video Pipeline. *Video Pipeline*, 342 F.3d at 203. These agreements could restrict Disney’s ability to obtain similar licensing agreements. The court found that twenty-five retailers had already entered into licensing agreements with Video Pipeline. *Id.* Additionally, the court noted that individual internet users may stream Video Pipeline’s clip previews instead of Disney’s trailers. This practice deprived “Disney of the opportunity to advertise and sell other products to those users.” *Id.*

90. *Id.* at 203.

91. *Id.* Only the third factor promoted a finding of fair use. *Id.* at 201. Additionally, Video Pipeline used a copyright misuse theory, arguing that licensing agreements entered into by Disney with other companies operating web sites misused the copyright laws. *Id.* at 203. Although the court recognized the possibility of such a defense (neither the Supreme Court nor the Third Circuit had previously addressed the issue), the court ultimately concluded that this defense failed. *Id.* The court found that Disney would likely suffer “incalculable losses from the clip previews’ competition with the trailers.” *Id.* at 206. This determination was made in light of

Video Pipeline's use of the clip previews on the internet further refined the fair use doctrine and served as a victory for the movie and television industries as they attempt to avoid the same battles that the music industry has fought. In his testimony before the Permanent Subcommittee on Investigations, former Motion Picture Association of America (MPAA) President Jack Valenti said "we will not allow the movie industry to suffer the pillaging that has been inflicted on the music industry."⁹² Valenti also acknowledged the MPAA's efforts to avoid future piracy,⁹³ noting that despite its proactive approach, he did not envision following the recording industry's lead in filing lawsuits against individuals.⁹⁴

the goals of copyright law that seek to prevent "the verbatim copying, lack of creative ingenuity, and profit-driven purpose of the clip previews." *Id.* at 207. The court affirmed the entry of the preliminary injunction, preventing further display of the clip previews on Video Pipeline's website. *Id.* at 206.

92. *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry, Hearing Before the Permanent Subcomm. on Investigations of Comm. on Governmental Affairs*, 108th Cong. 88–89 (2003) (statement of Jack Valenti, President and Chief Executive Officer, MPAA). Valenti noted that the industry is already losing approximately \$3.5 billion annually through analog and optical disc piracy and that approximately 400 to 600 thousand films are illegally spread daily. *Id.* at 90–91. Often film pirates use the internet to distribute illegal films made by using camcorders in movie theaters. The outlook for continued piracy is bleak for the motion picture industry. For example, in 1997, officials apprehended 9.5 million items tied to piracy, and in 2002, there were over 58.2 million items seized, representing an increase of 510% over five years. MOTION PICTURE INDUSTRY ASSOCIATION OF AMERICA, 2003 PIRACY FACT SHEET OVERVIEW (2003), at <http://mpaa.org/piracyfactsheets/piracyfactsheetoverview.pdf>. For a more comprehensive look at piracy issues facing the motion picture industry, including ten countries with greater incidence of piracy, see MOTION PICTURE INDUSTRY OF AMERICA, MPA WORLDWIDE MARKET RESEARCH (Dec. 2003), available at <http://mpaa.org/piracyfactsheets/content.htm>. Additionally, the MPAA launched a "Contact/Reward" program to encourage those with knowledge of suspected video piracy operations to report such activities. See Motion Picture Association of America, Contact/Reward Program, at <http://mpaa.org/anti-piracy/contact> (last visited Mar. 20, 2005). Awards are available to those who report activities that result in either a conviction of a person involved with video piracy or the discovery of a video piracy lab that contains over thirty VCRs. *Id.*

93. Among these efforts, the MPAA has launched educational efforts aimed at educating the public as well as technological research to serve as a countermeasure to digital piracy. See Patrick Goldstein, *Hollywood Deals With Piracy, A Wary Eye on CDs*, L.A. TIMES, Sept. 9, 2003, at E1. The members of the MPAA also launched Respect Copyrights, an organization dedicated to educating the public in copyright law, piracy, and the dangers faced by the motion picture industry. See Respect Copyrights, Who We Are, at <http://www.respectcopyright.org/whoware.html> (last visited Oct. 19, 2004); A.O. Scott, *These Are Your Movies on Piracy*, N.Y. TIMES, Nov. 16, 2003, at 15.

94. Instead, the movie industry has sent hundreds of thousands of cease-and-desist emails to people who downloaded illegal movies. See Schwartz, *supra* note 5, at C1. Jack Valenti,

III. COPYRIGHT INFRINGEMENT AND THE INTERNET

The issue of copyright infringement on the internet gained, and continues to gain, national attention due to the plight of the recording industry. Although the recording industry achieved a major victory with its shutdown of Napster,⁹⁵ the industry is still in the midst of considerable amounts of litigation with its attempt to sue schools, individuals, and other internet web pages that permit the trading of music files.⁹⁶ Because these lawsuits are in their early phases, it is

citing the backlash of public opinion against the record industry as an influential factor, stated that "I'm not ruling out anything, but at this moment we don't have any specific plans to sue anyone. . . . I think we have learned from the music industry." *Id.*

95. In 2001, Napster, an extremely popular online music swapping service, went bankrupt after a federal judge found the company guilty of copyright infringement. *See A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *see also* Matt Richtel, *Upheaval at Bertelsmann May End Plans for Acquisition of Napster*, N.Y. TIMES, July 31, 2002, at C1.

96. While a full history of the record industry's fight against illegal file sharing is beyond the scope of this Note, the Recording Industry Association of America (RIAA), the record industry's trade organization and major lobbyist, has been involved with litigation against file-swapping services Napster, Morpheus, Grokster, and others. *See A & M Records, Inc.*, 239 F.3d at 1004; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480). Additionally, the RIAA sued over 261 individual file-sharers in September 2003. Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES, Sept. 9, 2003, at A1. In attempt to sue more individual file sharers, the RIAA issued subpoenas against several major internet service providers asking for the names of individual infringers. The subpoenas are available to the RIAA under the Digital Millennium Copyright Act, which compels internet service providers to turn over the names of individual file swappers without the signature of a judge. *Id.*; *see* 17 U.S.C. § 512 (2000); *see also* Amy Harmon, *In Court, Verizon Challenges Music Industry's Subpoenas*, N.Y. TIMES, Sept. 17, 2003, at C2. RIAA also issued subpoenas to over ten universities seeking the names of student file-swappers. Vivian Marino, *Campus Eye on Music Swapping*, N.Y. TIMES, Sept. 7, 2003, Business, at 10. The RIAA suffered a setback when the Court of Appeals for the District of Columbia held that the subpoena provision of the Digital Millennium Copyright Act is inapplicable to those internet service providers that act "only as a conduit for data transferred between two internet users, such as persons sending and receiving e-mail or . . . sharing P2P files." *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004). Despite this, the RIAA remains steadfast in its attempt to curb copyright infringement on the internet. *See* Press Release, Comment of Cary Sherman, President, Recording Industry Association of America, RIAA on Verizon Appeals Court Decision (Dec. 19, 2003), available at <http://riaa.com/news/newsletter/121903.asp> ("We can and will continue to file copyright infringement lawsuits against illegal file sharers."). In its third round of lawsuits, the RIAA filed another 532 lawsuits against potential copyright infringers utilizing the "John Doe" subpoena. John Schwartz, *Music Industry Returns to Court, Altering Tactics on File Sharing*, N.Y. TIMES, Jan. 21, 2004 at C2. As of January 2005, the RIAA had filed over 7,300 "John Doe" lawsuits. *See* Peter Shinkle, *Court Says Judge Erred in Charter Music Case*, ST. LOUIS POST-DISPATCH, Jan. 6, 2005, at C1.

difficult to determine how successful the recording industry will be.⁹⁷ Some data suggests that the lawsuits successfully act as a scare tactic, although other data shows that there has been a substantial increase in the number of music downloads.⁹⁸ With the increase in peer-to-peer file sharing or collective models for sharing information, some doubt that the recording industry can subsist with technology advances.⁹⁹

Despite its initial reluctance to file lawsuits against sharers of copyrighted film, the MPAA filed two recent waves of lawsuits. The first round sought civil damages from individuals that illegally shared copyrighted films,¹⁰⁰ and the second brought criminal charges against individuals, both domestically and abroad, who have used file-sharing programs to enable pirates to download movies.¹⁰¹

The movie and television industries are also acting proactively by lobbying Congress and the FCC for technological advancements to

97. The Supreme Court will decide later this year, *see* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-480) whether to hold online service providers liable for copyright infringement where such services are used by users to violate copyrights. *See* Linda Greenhouse, *Justices Agree to Hear Case on File Sharing*, N.Y. TIMES, Dec. 11, 2004, at C1. Although the case will focus on peer-to-peer services (those that enable users to exchange files directly without holding the files themselves), the holding will serve as one of the most important copyright cases since the 1984 ruling that held that makers of VCRs were not infringing copyrights when VCR owners made copies at home. *See supra* note 88.

98. *See* Pew Internet & American Life Project, Pew Internet Project and Comscore Media Metrix Data Memo (Jan. 2004), at http://www.pewinternet.org/reports/pdfs/pip_file_swapping_memo_0104.pdf. In its research, Pew looked at the effects of the RIAA lawsuits on music file sharers. Pew estimates that during March to May and November to December 2003, the percentage of people downloading music files dropped from twenty-nine percent (thirty-five million total) to fourteen percent (eighteen million total). Moreover, "a fifth of those who say that they continue to download or share files say they are doing so less often because of the suits." *Id.*; *see also* John Schwartz, *In Survey, Fewer Are Sharing Files Or Admitting It*, N.Y. TIMES, Jan. 5, 2004, at C1. Other internet marketing research groups determined that there was actually an increase in the downloading of music files after the RIAA lawsuits, a rise of six percent in October 2003 and a rise of seven percent in November 2003. *Id.* For a comparison of the studies, *see* Brian Hindo, *Music Pirates: Still on Board*, BUS. WK., Jan. 26, 2004, at 13.

99. *See* Boynton, *supra* note 6, at 42-46. Yale law professor Yochai Benkler states, "All [the recording industry] does is package and sell goods . . . which is technically an unfeasible way of continuing. They are trying their best to legislate the environment to change, but that doesn't mean we have to let them." *Id.* at 45.

100. *See* Frank Ahrens, *MPAA to Sue Over Movie File Sharing; Industry Following the Lead of Music Companies*, WASH. POST, Nov. 5, 2004, at E1.

101. *See* Jube Shiver Jr., *MPAA Steps Up War on Piracy*, L.A. TIMES, Dec. 15, 2004, at C3.

limit future piracy.¹⁰² In 2003, the FCC passed rules requiring an anti-piracy device for digital broadcast televisions.¹⁰³ Hailed by the movie and television industries as a major achievement,¹⁰⁴ these rules prevent mass distribution of digital programs over the internet.¹⁰⁵ However, critics of the rules, mainly those of consumer advocacy groups, believe that the rule will prohibit consumers from making at-home recordings of flagged programs and will prevent the distribution of video clips that belong in the public domain.¹⁰⁶

102. During 2004, the MPAA lobbied heavily for the following bills: a bill that would make it a felony to make an unauthorized videotape of a movie while in a movie theatre and that would lower the applicable standard for copyright infringement, Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2004), a bill that would make it illegal to “intentionally induce” others to break copyright law, Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004), and a bill that would allow the Justice Department to file civil lawsuits against copyright infringers, Protecting Intellectual Rights Against Theft and Expropriation Act of 2004, S. 2237, 108th Cong. (2004). See generally Press Releases, Motion Picture Association of America, available at <http://mpaa.org/mpaapress> (last visited Feb. 13, 2005). The MPAA also opposed a bill that would provide an affirmative right for individuals to fast-forward or skip over parts of a videotape. See Testimony of Jack Valenti Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Judiciary Comm. on the “Family Movie Act of 2004” (June 17, 2004), available at <http://www.mpaa.org/mpaapress>.

103. Digital Broad Content Protection, 18 F.C.C.R. 23,550 (2003). The FCC rule calls for an adoption of “the broadcast flag” for insertion into digital broadcast television by 2005. This mechanism is “a digital code that can be embedded into a digital broadcasting stream.” Press Release, Federal Communications Commission, FCC Adopts Anti-Piracy Protection for Digital TV 3 (Nov. 4, 2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-240759A1.pdf. The new rule only affects “products that are capable of receiving DTV signals over-the-air,” which does not include “[o]ther products such as digital VCRs, DVD players and personal computers that are not built with digital tuners.” *Id.* at 1. Existing television and video equipment will also not be affected by the new rules. The broadcaster of the program maintains discretion over the use of the broadcast flag in blocking programming. *Id.*

104. Stephen Labaton, *F.C.C. Acts Against Pirating of TV Broadcasts*, N.Y. TIMES, Nov. 5, 2003, at C1. MPAA President Jack Valenti commented, “The FCC scored a big victory for consumers and the preservation of high value over-the-air free broadcasting with its decision on the Broadcast Flag. This puts digital TV on the same level playing field as cable and satellite delivery. All the way around, the consumer wins, and free TV stays alive.” Press Release, Motion Picture Ass’n of Am., Statement by Jack Valenti on the Broadcast Flag (Nov. 4, 2003), available at <http://mpaa.org/jack>.

105. See *Digital Broad. Content Prot.*, 18 F.C.C.R. 23,550. In citing the proactive nature and purpose of the rule, the report stated that “[a]lthough the threat of widespread indiscriminate retransmission of high value digital broadcast content is not imminent, it is forthcoming and preemptive action is needed to forestall any potential harm to the viability of over-the-air television.” *Id.* at 23,557.

106. *Id.* at 23,557–58. The proposed rule drew dissenting comments from both Commissioner Michael J. Copps and Commissioner Jonathan S. Adelstein. *Id.* at 23,615–21. Copps emphasized that the broadcast flag will prohibit the dissemination of valuable news and information services. Additionally, Copps voiced concerns about the ability of the broadcast

In contrast to the entertainment industries, those who advocate a more liberal application of copyright laws argue that copyright privileges were never intended to function as an absolute property right.¹⁰⁷ Others argue that instead of expanding the public domain, the proper response to the issues raised within traditional copyright law by the internet is to create a regulated and licensed system that may virtually eliminate the concept of the public domain.¹⁰⁸

flag to track personal information about the viewers' habits. *Id.* at 23,616–17. Adelstein expressed concern that widespread restriction of programming would limit public accountability. *Id.* at 23,620. The constitutionality of the broadcast flag is currently being challenged by a lawsuit filed by nine public interest organizations, including the American Library Association, the Consumers Union, and the Electronic Frontier Foundation. See Press Release, Public Knowledge, FCC Has No “Unbridled Power” to Create Broadcast Flag (Dec. 3, 2004), available at <http://publicknowledge.org/pressroom/releases/pr120304>.

107. See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997). Boyle argues that “since there is no ‘natural’ absolute intellectual property right, the doctrines which favor consumers and other users, such as fair use, are just as much a part of the basic right as the entitlement of the author to prevent certain kinds of copying.” *Id.* at 105. Boyle suggests that “there is something larger going on under the *realpolitik* of land-grabs by Disney and campaign contributions by the Recording Industry of America.” *Id.* at 112. Highlighting the influence of the entertainment and software industries over copyright legislation and public opinion, Boyle calls for a new public discourse concerning the costs and benefits of heightened copyright protection versus a broadened public domain. *Id.* at 113–14.

108. See Tom W. Bell, *Fair-Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998). Bell envisions digitalized and widespread licensing. Every use of a copyrighted material comes through “automated rights management” (ARM) in which the copyright owner governs the use of the copyrighted material automatically. *Id.* at 559–60. With automated rights management, copyright owners maintain heightened control over the material through licensing. Bell argues that with the widespread use of automatic rights management, “ARM threatens to reduce radically the scope of the fair use defense to copyright infringement. ARM will interact with existing legal doctrines to supplant fair use with an analogous but distinctly different doctrine: fared use.” *Id.* at 560–61. Bell also cites a number of benefits from ARM, including the reduction of transaction costs throughout the market for copyrighted expression, the creation of “harbors safe from the threat of copyright litigation,” and the increase in the value of the copyrighted work. *Id.* at 587–89. Other commentators question the viability of traditional copyright law given the nature of the internet. See John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, available at <http://wired.com/wired/archive/2.03/economy.ideas.html>. Barlow states that:

Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum (which, in fact, rather resembles what is being attempted here). We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.

Id.

Still others argue that copyright provides an impetus for fostering creativity, and copyright analysis must focus on the author.¹⁰⁹ The protection of the author and her creative works has become largely absent from the argument for heightened copyright measures.¹¹⁰ Instead, copyright protection has become symbolized by corporate greed from industries that rely heavily on copyright protections.¹¹¹ Despite these calls for heightened or decreased copyright protection, the reality is that the internet and its new intricacies raise new issues that challenge standard copyright protection.¹¹²

Barlow is a fellow of the Berkman Center for Internet & Society at Harvard Law School, a research hub dedicated to understanding the internet and helping to shape its direction in the future. See Mission, Berkman Center for Internet & Society at Harvard Law School, at <http://cyber.law.harvard.edu/home/mission> (last visited Feb. 13, 2005). Although the ideologies of the contributors to the Berkman Center vary, they share a common fear that the copyright system in the United States currently squelches creativity instead of encouraging it in accordance with its constitutional purpose. See Boynton, *supra* note 6, at 40. Led by Professor Lawrence Lessig, members of the Berkman Center founded Creative Commons, an organization that enables copyright owners to levy the level of control they retain over their works. *Id.* at 44. Copyright owners that do not want full copyright protection for their works may “dedicate their work to the public domain or license it on terms that allow copying and creative reuses.” *Id.* For the philosophical basis for the Creative Commons, see Lawrence Lessig, Dunwoody Distinguished Lecture in Law, The Creative Commons, address at the University of Florida Fredric G. Levin College of Law (Apr. 26, 2002), in 55 FLA. L. REV. 763 (2003). For a response to Lessig’s ideas, see Jeffrey L. Harrison, *Dunwoody Commentary: Creativity or Commons: A Comment on Professor Lessig*, 55 FLA. L. REV. 795 (2003).

109. See Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003). Emphasizing an international perspective on copyright, Ginsburg argues that copyright must exist to protect an individual’s autonomy over her creation. *Id.* at 1064. While financial and recognitional protection is important, authors are entitled to a certain level of continued artistic control over their works. *Id.*

The Supreme Court upheld the statutory expansion of the term recognized before a copyrighted work falls into the public domain. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003), *reh’g denied*, 538 U.S. 916 (2003). *Eldred* upheld the constitutionality of the Sonny Bono Copyright Term Extension Act. The Act extended the duration of copyright protection from the life of the author plus fifty years to the life of the author plus seventy years. See 17 U.S.C. § 302(a) (2000). The Act extended the copyright term for works made-for-hire, a scheme typically used by businesses and corporate entities, to ninety-five years after publication. *Id.*; see also Shalisha Francis, *Eldred v. Ashcroft: How Artists and Creators Finally Got Their Due*, 2003 DUKE L. & TECH. REV. 14 (2003). Francis argues that the extension of the copyright term is “long overdue” and “virtually essential to allowing copyright owners to obtain their just due.” *Id.* at 20.

110. Ginsburg, *supra* note 109, at 1067–68. Ginsburg’s argument relies on the conception of moral rights that vest in the author of a work. *Id.*

111. *Id.*

112. See Boynton, *supra* note 6, at 43. Benkler states, “each major innovation in the history of communications—the printing press, radio, telephone—was followed by a period of

IV. ANALYSIS OF THE VIDEO PIPELINE DECISION

The Third Circuit's *Video Pipeline* decision is a reasonable and proper limitation on the fair use doctrine. First, while Video Pipeline portrayed its clip previews as serving an indexing function like that served by research guides, the court's decision is reconcilable with the Seventh and Ninth Circuit's fair use findings regarding research guides.¹¹³ If Video Pipeline's goal was to provide an indexing service for movies, it used too much of the copyrighted material to serve this purpose. Like in *Ty, Inc. v. Publications International Ltd.*, where the defendant only copied the minimum amount of material necessary to produce a functional collectors' guide,¹¹⁴ Video Pipeline could have provided an indexing service based only on factual attributes about the movie. In doing so, Video Pipeline would have created an indexing service without using copyrighted elements.¹¹⁵

Second, the holding is consistent with prior case law governing fair use and the internet.¹¹⁶ Given the fair use doctrine's purposes, the two critical factors of fair use analysis in *Video Pipeline* were the first and fourth ones—the purpose and character of the use and the effect on the potential market or value.¹¹⁷

Video Pipeline's purpose in using the clips was to make a profit. This purpose failed to advance any of the basic reasons for the fair use exception, like the informational function found in *Kelly v. Arriba Soft Corp.*,¹¹⁸ or the parodic commentaries found in *Mattel, Inc. v. Walking Mountain Products*¹¹⁹ and *Campbell v. Acuff-Rose*

openness before the rules of its usage were determined and alternatives eliminated." Benkler believes that the internet is currently in this period. *Id.*

113. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002).

114. 292 F.3d at 515–24.

115. The *Kelly* court did not address Posner's central question of whether Arriba Soft only copied what was necessary to produce a marketable guide. 336 F.3d at 821. However, this inquiry is likely the result of the fact that Arriba Soft's search engine did not harm the market for Kelly's product. See *id.* at 821–22. In contrast to products in *Video Pipeline* and *Ty*, Arriba did not produce a product that stood in direct market competition against the original work. *Id.*

116. See *Kelly*, 336 F.3d 811; *Michaels*, 5 F. Supp. 2d 823.

117. See *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 198–200 (3d Cir. 2003), for the first factor and see *id.* at 202–03 for the fourth value.

118. See *Kelly*, 336 F.3d at 820.

119. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803–06 (9th Cir. 2003).

*Music, Inc.*¹²⁰ Given cases where courts have found fair use when the new work is significantly transformative, one could conceive of a situation where a defendant splices together edited video clips in a creative fashion to make an artistic or parodic commentary. Here, however, there was no intent to add expressive or transformative aspects to the excerpts.¹²¹

Moreover, the video clips put Video Pipeline in direct competition with Disney. Disney made a profit from licensing its previews to third parties.¹²² Even though the primary demand is for the full-length movies, Disney could still market its previews to third parties, as evidenced by Video Pipeline's own success in selling the clip previews.¹²³

Third, the court's holding is consistent with the purposes of the Copyright Act and the fair use doctrine.¹²⁴ Fair use protects the public domain from which artists and creators may draw ideas. It enables people to research, comment on, and criticize copyrighted works without fear of harsh sanctions.¹²⁵ The fair use doctrine does not serve as a mechanism for infringers to sample copyrighted work for commercial gain. Although arguments for permitting a more lenient standard to govern the internet¹²⁶ are valid, such arguments are inapplicable to a case like Video Pipeline, where the infringer's only purpose was to profit off the direct copying of the copyright holder's work.

Video Pipeline serves as a victory for the entertainment industry. In protecting Disney's copyrighted excerpts, the court effectively prevented any person or entity from putting excerpts of videotapes on the internet without a license from the copyright holder (assuming that the clip is unaccompanied by expressive elements or commentary).¹²⁷ If this protection is expanded, it could likely lead to

120. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 590–91 (1994).

121. *See* Video Pipeline, 342 F.3d at 199–200. It is important to consider the lack of intent to transform the copyrighted work. Video Pipeline did not argue that its clip previews served as a form of artistic or parodic commentary. *Id.*

122. *Id.* at 202–03.

123. *Id.*

124. *Campbell*, 510 U.S. at 575.

125. *Id.*

126. *See supra* note 107 and accompanying text.

127. If commentary or expressive elements were added to the excerpts, there would be a

strict copyright protection over any visual image from a copyrighted film, like a photograph or a film still.

While *Video Pipeline's* holding helps combat the piracy problems faced by the movie industry, it also enables movie producers and studios to cut out the distributor for online sales. Eliminating the distributor permits film studios to market and exercise greater control over the sales of their films via the internet.¹²⁸ This is particularly important given new attempts to directly distribute content via the internet.¹²⁹ If the movie industry continues to follow in the footsteps of the recording industry, direct online distribution methods, like iTunes or other forms of automated rights management,¹³⁰ may increase as a mechanism for distributing the movie industry's content.¹³¹

PROPOSAL

The holding in *Video Pipeline* reflects the broader tension between a strict copyright enforcement scheme based on licenses and less stringent regulations that expand the public domain.¹³² To balance the necessity of protecting intellectual property rights and the need for a rich public domain for future creation of new works, courts should continue to adapt present fair use standards to the internet; however, given the new issues that emerge with the internet, Congress should take additional measures to further enhance the public domain.

While it is too early to judge the success of automated rights management, early indications show that strict licensing and regulation over the internet and pay-per-use financing will provide the dominant form of distributing copyrighted works in the future.¹³³

greater likelihood that a court would find such use to be fair.

128. See Diane See Morrison, *Hands Off Our Clips*, GUARDIAN, Aug. 13, 2001, at 32.

129. *Id.*

130. See Bell, *supra* note 108, at 559–61.

131. See *supra* notes 105–06 and accompanying text. Apple introduced iTunes in the fall of 2003. iTunes permits users to download individual songs or record albums for a set fee. See Boynton, *supra* note 6, at 40.

132. See *supra* text accompanying notes 127–31.

133. In its first fiscal quarter of 2004, Apple sold over thirty million songs through its iTunes service. John Markoff, *Apple's Success with iPod May Presage the Ascendance of*

This heavily licensed system of rights management may bring profit and extensive control to the entertainment industry, which has been criticized greatly for its corporate greed and its attempts to control legislation. Despite the potential for greater profits for the entertainment industry, automated rights management systems still advance the constitutional aim of promoting the progress of authors.¹³⁴ This form of licensing protects the interests of individual authors by ensuring that the appropriate royalties are collected for each individual download. While entertainment officials are the most outspoken of those entitled to protection, copyright protects the interests of all individual authors, including those who would not be able to create without the payment of copyright royalties.¹³⁵ Automated rights management systems would help protect all copyright holders, not just those with influential lobbying efforts.

Automated rights management limits the availability of source material in the public domain. Yet, Congress can take measures to encourage the availability of source materials from the public domain without limiting traditional access to copyright protection. It can fund organizations like the Creative Commons that encourage authors to dedicate their works to the public domain.¹³⁶ In addition to providing direct funding for such organizations, Congress could also offer tax credits or other incentives to authors who donate their works to the public domain. Such an inducement will help offset some of the author's economic loss that she forfeits by donating her work to the public domain. The success of the Creative Commons proves that some authors are willing to experiment with communal forms of protection.¹³⁷

Additionally, the Library of Congress can sponsor a comprehensive database detailing those works that are in the public domain. Similar to Google's plan to digitize the holdings of a number of large libraries,¹³⁸ the Library of Congress could offer its vast

Hardware Over Software, N.Y. TIMES, Jan. 19, 2004, at C4.

134. See Ginsburg, *supra* note 109.

135. *Id.*

136. *Id.*

137. *Id.*

138. See John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1.

collection to the public on the internet. Finally, Congress should not limit its efforts to the domestic sphere; instead, it should provide an international database of works in the public domain or create an organization that encourages authors from around the globe to donate their works to the public domain. Because all of these databases and organizations could be accessed through the internet, the major costs associated with the database would derive from the establishment and maintenance of a web page.

CONCLUSION

Video Pipeline serves as an appropriate limitation on the extension of fair use to the internet. The holding is consistent with previous doctrine concerning fair use, and it reflects the fact that traditional copyright laws and the fair use doctrine can successfully protect the rights of authors despite new challenges presented by the internet. Although this continued protection may ultimately lead to a system of strict rights management benefiting the entertainment industry, the government can and should take affirmative measures to expand the public domain.