

# EXHIBIT 1

**Expert Report**

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*in the matter of*

GateHouse Media Massachusetts, I, Inc. v.  
New York Times Company  
Civil Action No. 08-12114-WGY

**January 19, 2009**

**I. Purpose**

1. I have been asked to offer my opinion as to whether copyright law's fair use doctrine, codified at section 107 of Copyright Act of 1976, excuses Defendant's practice of making unauthorized copies of Plaintiff's news headlines and ledes. I have also been asked to apply my analysis to several of Plaintiff's own linking practices, focusing specifically on examples that Defendant suggests are substantially similar to the Defendant's own actions.

2. I have been retained by the Plaintiff to do this work, and I am being paid my customary hourly fee of \$750 per hour. My role here, however, is not to advocate for either side, but instead to present my own honest view as to how modern copyright law would address these issues.

**II. Credentials of Expert**

3. I am currently a tenured professor of law at the Law School at the University of California, Los Angeles. I was appointed to that position in July 2007.

4. Prior to my appointment at UCLA, I was for nine years on the faculty at the Law School at the University of Chicago. I was an untenured professor from June 1998 until November 2002, and a tenured professor from December 2002 until my departure in 2007.

5. From 2002 until 2007, I served as editor of the Journal of Law & Economics. The Journal of Law and

Economics is widely regarded as the top peer-reviewed law-and-economics journal in the United States.

6. My teaching and research both focus on intellectual property, with particular emphasis on the public policy motivations that animate copyright and patent law. At UCLA, I teach the full range of intellectual property courses, including a survey intellectual property course, an advanced copyright course, and an advanced patent course. At Chicago, I similarly taught the full range of intellectual property courses, including an introductory copyright course, an introductory patent course, an advanced copyright course, an advanced patent course, and a survey intellectual property course that was for a time mandatory for all first-year students.

7. I have published extensively on intellectual property topics, including scholarly articles in both peer-reviewed journals and law reviews. My articles have appeared in, among other publications, the Journal of Law & Economics, the Journal of Legal Studies, Yale Law Journal, Stanford Law Journal, the University of Chicago Law Review, the Harvard Journal of Law & Technology, the Journal of Economic Perspectives, Georgetown Law Review and the Duke Law Journal. Most of my articles have been republished internationally, including in legal periodicals in China and India.

8. I regularly am invited to speak on intellectual property topics. I have in recent years spoken at dozens of academic institutions including Yale, Harvard, NYU, the University of Chicago, the University of California at Berkeley, the University of Pennsylvania, and China's Wuhan University. I also have participated in events designed for business and/or political audiences, such as policy workshops put on by the Hamilton Foundation and the Progress & Freedom Foundation, and business events sponsored by Microsoft, the Gerson Lehrman Group, and the publishing entity, Wolters Kluwer.

9. In addition to my purely academic work, I advise a diverse mix of clients on strategy and litigation issues related to intellectual property. From time to time, I am retained to provide expert testimony in litigation. And, since December 2007, I have maintained a relationship with the law firm of Loeb & Loeb through which I have the

opportunity to help keep their current and potential clients well-informed about cutting-edge legal issues.

10. I on occasion write for the popular press, for instance publishing editorials in the Wall Street Journal and the Los Angeles Times, and writing more comprehensive columns on legal issues for magazines like Regulation Magazine and IP Law & Business.

11. Lastly, I frequently work with the media, participating in radio news programs, speaking on televised news broadcasts, and talking both on and off the record with reporters from the major newspapers. I myself host a popular monthly online audio program where my guests and I discuss cutting-edge copyright and patent issues, offering MCLE credit to attorneys who listen to each program.

12. A complete curriculum vitae, which includes among other things a full list of my publications from the last ten years, is attached as Exhibit Lichtman-1. A list of all cases from the preceding four years in which I have testified either at trial or by deposition is attached as Exhibit Lichtman-2.

## **II. Introduction**

13. As will become clear later in my Report, the central legal doctrine at play in this dispute is the defense of fair use. That doctrine is codified in the Copyright Act at section 107,<sup>1</sup> but the doctrine is by all accounts a flexible, equitable rule,<sup>2</sup> and its application turns heavily on the specific facts of the case at hand.<sup>3</sup> Thus, while I will carefully analyze the statutory text and its associated case law later in this Report, I thought it best to begin the Report with a brief introduction to the public policy issues that, on the facts of this case, motivate the law and would likely guide a court's fair use analysis.

14. One of the defining and rightly celebrated characteristics of the Internet is the practice whereby one

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<sup>1</sup> 17 U.S.C. § 107.

<sup>2</sup> See, e.g., *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (describing fair use as an "equitable rule of reason").

<sup>3</sup> See, e.g., *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) ("The fair use test remains a totality inquiry, tailored to the particular facts of each case").

website links to, and sometimes even excerpts content from, a website owned by another. Both parties to this litigation recognize, approve of, and participate in this tradition. The New York Times, for example, provides stable website addresses known as permalinks in order to facilitate linking by unaffiliated third parties.<sup>4</sup> The Times even instructs readers on how to use them.<sup>5</sup> GateHouse, too, typically provides permalinks to the copyrighted content on its websites.<sup>6</sup> And GateHouse not only explicitly authorizes certain forms of linking through its Terms of Use,<sup>7</sup> but also has broadly adopted a version of the Creative Commons license that allows substantial literal copying so long as that copying is not for commercial purposes.<sup>8</sup>

15. The central dispute in this litigation is over the degree to which linking and duplication is permissible fair use even if that linking and/or duplication has not been implicitly or explicitly approved by the relevant content owner. There is no question that some linking and duplication is permissible even if unauthorized. Courts have held, for example, that the Google search engine does not violate copyright law when, without permission, it offers certain links to and excerpts from unaffiliated websites.<sup>9</sup> Similarly, thanks to established legal rules that

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<sup>4</sup> For instance, the URL <http://www.nytimes.com/2009/01/19/world/europe/19gazprom.html?partner=permalink&exprod=permalink> will for the foreseeable future consistently point to a specific New York Times article, first published on January 19, 2009, about a natural gas deal between Russia and Ukraine.

<sup>5</sup> See Exhibit Lichtman-3 (screen shot taken from [www.nytimes.com](http://www.nytimes.com) on January 18, 2009, showing specific instructions about how to link to one of that day's editorial columns) ("To link to this article from your blog, copy and paste the url below into your blog or homepage. Using this link will ensure access to the article, even after it becomes part of the NYT archive.").

<sup>6</sup> For example, on the GateHouse Wicked Local Lincoln site, the URL <http://www.wickedlocal.com/lincoln/homepage/x1369592867/Track-work-on-commuter-rail> will for the foreseeable future consistently point to a specific GateHouse article, first published on January 16, 2009, about some repair work being done on the Fitchburg commuter line.

<sup>7</sup> GateHouse publishes its Terms of Use at [http://www.gatehousemedia.com/terms\\_of\\_use](http://www.gatehousemedia.com/terms_of_use).

<sup>8</sup> See Exhibit Lichtman-4 (showing the Creative Commons logo and licensing information in the lower right-hand corner of the GateHouse screenshot). See also the GateHouse Terms of Use, cited in the previous footnote, which also incorporates the Creative Commons license.

<sup>9</sup> See *Perfect 10, Inc., v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) (excusing as fair use infringement associated with Google's

protect activities like commentary and parody, a blogger almost surely can incorporate an unauthorized link and/or include an unauthorized excerpt when writing a blog entry that substantially comments on, criticizes, or pokes fun at some original copyrighted website content.<sup>10</sup>

16. Many unauthorized links on the Internet, then, would not even raise a colorable copyright issue. Some unauthorized linking and duplication, however, is not permissible under federal copyright law. Two intuitive considerations help to identify those cases.

17. The first of these intuitive considerations is the degree to which the practice at issue seems likely to undermine the incentives copyright law endeavors to create. (As I discuss later, this consideration correlates primarily to the fourth fair use factor.) Copyright law in general recognizes rights in authors in order to motivate them to create, disseminate and in other ways develop their work.<sup>11</sup> Unauthorized linking is less likely to be legal the more it interferes with that goal. Put differently, the issue here is whether the unauthorized borrowing deprives the original author of some substantial income stream or opportunity.<sup>12</sup> If it does, and if that threatens to over the long run reduce authors' motivation to produce and disseminate work like the work being copied, the linking practice at issue is inconsistent with copyright law's fundamental goals and as such is less likely to be excused.

18. The second intuitive consideration is the degree to which the unauthorized copying makes possible some output

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search engine). See also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (similarly excusing search engine infringement under the fair use doctrine).

<sup>10</sup> See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (excusing as fair use a parody of a copyrighted musical work).

<sup>11</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.") (citations omitted).

<sup>12</sup> See, e.g., *Campbell*, 510 U.S. at 590 (focusing on the question of "whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original."); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (author is "entitled to protect his opportunity to sell his letters" even though the author had previously "disavowed any intention to publish them during his lifetime").

that is particularly new, worthwhile, or hard to achieve.<sup>13</sup> (This second consideration correlates primarily to the first fair use factor, which I discuss more formally below.) The idea here is simple: If unauthorized copying results in a new work that is largely redundant to the original, there is little need to excuse it. Why risk undermining the incentives discussed above merely to get something quite similar to that which was already made available by the original author? By contrast, if the copying results in a work that for some reason would not be produced by the original author (for instance, a composer would rarely if ever produce a parody of his own musical work<sup>14</sup>); or if the copying results in a work that is substantially different from the original in terms of its purpose, meaning, or effect (for instance, using copyrighted content to produce a search engine<sup>15</sup>); then there is something of value that must be weighed against the incentive concerns articulated above.<sup>16</sup>

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<sup>13</sup> See, e.g., *Kelly*, 336 F. 3d at 818-19 (“We must determine if Arriba’s use of the images merely superseded the object of the originals or instead added a further purpose or different character”); *Campbell*, 510 U.S. at 579 (favoring works that “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message”) (internal quotation and alteration omitted).

<sup>14</sup> *Campbell*, 510 U.S. at 592 (emphasizing the “unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions”).

<sup>15</sup> See, e.g., *Perfect 10*, 487 F.3d at 720 (finding Google’s search engine to be a transformative use of the copyrighted content copied and in other ways used by the software and system).

<sup>16</sup> Of course, the mere fact that a copyist produces a work of social value does not necessarily excuse the copying. Under section 106 of the Copyright Act, copyright holders are given the exclusive right to make derivative works based on their original work. See 17 U.S.C. § 106(2). Thus, a movie might be based on a copyrighted novel; and the movie might itself introduce enormous social value by telling the story in a new way, to a new audience, and possibly with interesting new plot elements; and yet the movie would almost surely be deemed to infringe the original author’s copyright rather than to qualify as fair use. One helpful way to draw the line between examples that are plausibly fair use and examples that are more likely infringing derivative work is to consider whether for some reason the best or only way to achieve the new output was to have it done without the author’s involvement and/or authorization. See *American Geophysical Union*, 60 F.3d at 930 (emphasizing that the copyright holder should in most instances maintain rights over “traditional, reasonable, or likely to be developed” markets).

19. Measured along these two dimensions—and, again, I will anchor these intuitions to the details of the law throughout the remainder of this Report—Defendant’s unauthorized copying and linking seems unlikely to be excused. With respect to the first intuitive consideration, Defendant’s unauthorized copying threatens to substantially undermine Plaintiff’s incentives to produce its hyper-local news. There are only a handful of advertisers available to fund any hyper-local website. By copying and then competing, Defendant cuts that small number of potential funders in half, clearly jeopardizing Plaintiff’s incentives to produce its original news site.<sup>17</sup>

20. Defendant’s copying fares no better under the second intuitive consideration. Defendant’s copying allows the defendant to produce hyper-local websites that are in essence perfect substitutes for Plaintiff’s original sites. There are token differences to be sure. But in no meaningful way do any of the accused sites differ from the originals in terms of their purpose, meaning or effect. Quite the opposite, Defendant’s sites target the same audiences, and the same advertisers, for the same purpose of furnishing news and information for and about a specific local community, each and every day.<sup>18</sup> Thus, there is little if anything that might counterbalance the concern that Defendant’s practice undermines the incentives copyright law aspires to create.

21. My Report proceeds as follows. I begin in Part IV with an outline of the main facts that I considered as I developed my analysis. Part V constitutes my primary legal discussion. There, I consider in detail copyright law’s fair use doctrine, and I apply that doctrine to the controversy over Defendant’s unauthorized linking and duplication practices. In Part VI, in light of the Defendant’s recently served Counterclaim, I turn my

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<sup>17</sup> Legitimate entry by a bona fide competitor would similarly slash advertising revenue. However, that type of entry would require that the new competitor incur costs that are similar to the costs being incurred by GateHouse. For instance, the new entrant would have to pay reporters and in other ways invest in local relationships. Here, by contrast, the Times imposes this enormous economic harm by copying, which is exactly the sort of unfair and inefficient free-riding that copyright law was designed to stop.

<sup>18</sup> Compare, e.g., Plaintiff’s [www.wickedlocal.com/needham](http://www.wickedlocal.com/needham) to Defendant’s [www.boston.com/yourtown/needham](http://www.boston.com/yourtown/needham); or Plaintiff’s [www.wickedlocal.com/newton](http://www.wickedlocal.com/newton) to Defendant’s [www.boston.com/yourtown/newton](http://www.boston.com/yourtown/newton).

attention to Plaintiff's own linking and duplication practices, applying to Plaintiff's behavior the same legal framework that I earlier apply to Defendant's. Part VII briefly concludes.

#### **IV. Facts**

22. I have read a great deal of information about this dispute, and in the Appendix hereto I provide a list of the materials I have been provided and may refer to at trial. In addition, I include throughout this Report citations to specific cases, and I also include citations to a few Exhibits that I myself prepared and now attach. That said, the background facts summarized immediately below are primarily drawn from the Complaint first filed by GateHouse in December 2008, the Answer and Counterclaim served by the New York Times in January 2009, the Affidavit of Gregory Reibman dated December 19, 2008, observation of the parties' websites, and a conversation I had with Howard Owens, GateHouse's Director of Digital Publishing, on the morning of January 19, 2009.

23. I recite facts here not to testify as to the truth of the assertions. I instead summarize and emphasize certain facts only because they provide the background for and context of my opinions. Later in the Report, where specific facts carry particularly important weight, I cite a source for each such fact.

24. Plaintiff GateHouse Media, Inc., owns a large number of local daily and weekly newspapers in Massachusetts and also owns a large number of Internet news websites. Most of those websites are "Wicked Local" community sites devoted to specific local communities; however, some are sites that serve a cluster of communities, with the cluster typically being geographically relevant to one of GateHouse's daily or weekly newspapers.

25. These various websites are sometimes populated by stories written directly for the sites by GateHouse employees or independent contractors, and they are sometimes populated by stories written originally for GateHouse's corresponding local newspapers. Example local websites relevant to this case include <http://www.wickedlocal.com/newton>, which serves the community of Newton, Massachusetts; <http://www.wickedlocal.com/needham>, which serves the community of Needham,

Massachusetts; and <http://www.wickedlocal.com/waltham>, which serves the community of Waltham, Massachusetts. Each of these sites is either primarily or exclusively funded by advertising revenue.

26. Plaintiff uses the term "hyper-local" to refer to the Wicked Local sites, and that vocabulary is meant to emphasize that these sites cater to a niche, local audience and are of particular value to a similarly niche, local group of advertisers.

27. Defendant—the New York Times—itself or through and with subsidiaries owns and/or operates its own hyper-local news websites, including a site that specifically serves Newton, Massachusetts (<http://boston.com/yourtown/newton>), a site that specifically serves Needham, Massachusetts (<http://boston.com/yourtown/needham>), and a site that specifically serves Waltham, Massachusetts (<http://www.boston.com/yourtown/waltham/>). To populate these "YourTown" sites, Defendant has in the past and continues today to copy Plaintiff's news headlines and also to copy the first sentence (the "lede") of Plaintiff's news stories. Those copied materials constitute an important part of the resulting websites, in that the information they convey is of real value to the typical website reader.

28. Defendant's YourTown websites deeplink to individual articles on Plaintiff's Wicked Local websites, such that a reader who reads a story's headline and lede can, if interested, click on a link and be brought to the specific page on the GateHouse site where the full article is stored and available. If the reader then clicks the "back" button on his browser, however, the reader is returned to Defendant's relevant YourTown website rather than being directed to the front page of the relevant GateHouse website.

## **V. Fair Use Analysis**

29. The first step in any copyright case is to determine whether a valid copyright exists. On the record thus far, there seems to be no dispute that the headlines and ledes at issue in this case are eligible for protection, separately and/or as a group. As such, for the purposes of this Report, I assume that the copied materials identified by Plaintiff and registered with the Copyright Office are in fact subject to copyright. Should any dispute arise with

respect to this issue, I would be happy to address it at a later time.

30. The second step in a copyright case is to determine whether the accused infringer has in some way violated one of the exclusive rights granted to copyright holders under section 106 of the Copyright Act of 1976.<sup>19</sup> Plaintiff alleges several plausible violations, including violation of the exclusive right to reproduce under section 106(1), violation of the exclusive right to distribute under section 106(3), and violation of the exclusive right to display under section 106(5). I myself would likely in addition consider whether the right to create derivative work under section 106(2) is also implicated. However, the fact that there is at least some infringement here seems straightforward; and, because Defendant does not seem to have raised this issue, I will assume that Defendant's actions do run afoul of at least one of the rights listed in section 106.

31. My focus, then, is on the proper interpretation and application of the fair use doctrine, which is codified at section 107 of the Copyright Act.<sup>20</sup> Section 107 empowers a court to excuse, on public policy grounds, acts that would otherwise be deemed to impermissibly infringe a copyright holder's exclusive rights. The idea is for courts to excuse infringement in instances where a "rigid application of the copyright statute . . . would stifle the very creativity which that law is designed to foster."<sup>21</sup>

32. Fair use began as a flexible, judge-made doctrine. When federal copyright law was revised in 1976, however, fair use was codified in the statute at section 107. That codification was explicitly intended to re-state the then-existing law and not to expand or contract fair use in any way.<sup>22</sup> Thus, even today, fair use retains the flexibility and comprehensiveness of an equitable rule, and its

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<sup>19</sup> 17 U.S.C. § 106.

<sup>20</sup> 17 U.S.C. § 107.

<sup>21</sup> Stewart, 495 U.S. at 236 (quoting Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir 1980)).

<sup>22</sup> See H. R. Rep. No. 94-1476, p. 66 (1976); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) ("The statutory formulation of the defense of fair use in the Copyright Act [of 1976] reflects the intent of Congress to codify the common-law doctrine.").

application is highly dependent on the specific facts and circumstances at issue.<sup>23</sup>

33. Courts are required to consider four specific statutory factors when evaluating an assertion of fair use.<sup>24</sup> But, consistent with the above, courts are explicitly empowered to go beyond those factors and engage in a broader public policy analysis as appropriate.<sup>25</sup>

34. The statutory provision that codifies fair use begins with a list of examples, stating specifically that "reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" is excused. 17 U.S.C. §107. The provision then goes on to identify four factors that must be considered when evaluating a claim of fair use. Those factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.<sup>26</sup>

35. When considering the four explicit factors, courts do not merely count them up. Instead, courts use these

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<sup>23</sup> See *Stewart*, 495 U.S. at 236 (describing fair use as an "equitable rule of reason"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (same); *Wright*, 953 F.2d at 740 ("The fair use test remains a totality inquiry, tailored to the particular facts of each case.").

<sup>24</sup> See 17 U.S.C. § 107 ("factors to be considered shall include").

<sup>25</sup> See *Castle Rock Enter. v. Carol Publ'g Group*, 150 F.3d 132, 141 (2d Cir. 1998) ("the four listed statutory factors in §107 guide but do not control our fair use analysis and are to be explored, and the results weighed together, in light of the purposes of copyright") (citations omitted).

<sup>26</sup> 17 U.S.C. § 107.

considerations as inputs into what is ultimately a flexible, fact-specific public policy analysis.<sup>27</sup>

36. Courts typically do, however, organize their fair use analysis by considering each of the four statutory factors separately and in order. I therefore adopt that same framework here.

37. Before turning to that work, one final clarification: While the text of section 107 explicitly identifies “news reporting” as a favored category, the text does not and should not be read to create a categorical exclusion for all copying somehow associated with the news-gathering function. Indeed, one of the most famous fair uses cases involves copying by a news magazine, where the material copied was former-President Gerald Ford’s written comments about his decision to pardon former-President Richard Nixon after the Watergate scandal.<sup>28</sup> That copying was not excused despite the obvious associated news value. And, indeed, that conclusion was reached only after a careful analysis of the four statutory factors to which I now turn.<sup>29</sup> By the same token, although the statute explicitly refers to “teaching,” “research,” “scholarship” and “classroom use,” another famous fair use case refuses to recognize as fair use the copying of copyrighted work for use in classroom teaching.<sup>30</sup> Again, the four statutory factors drove the court’s analysis.<sup>31</sup>

#### **V. A. The Purpose and Character of the Use.**

38. The first fair use factor is the purpose and character of the use. One issue typically raised with respect to this factor is whether the use is commercial. The intuition is that a profit-generating user can, and thus should, absorb the costs of complying with copyright law and compensating the original author.

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<sup>27</sup> See, for example, *Harper & Row Publishers*, 471 U.S. at 560 (holding that there is “no generally applicable definition [of fair use]” and “each case raising the question must be decided on its own facts”) (quotations omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 560-68.

<sup>30</sup> *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1336 (1997).

<sup>31</sup> *Id.* at 1385-90.

39. There was a time when this consideration was significantly influential. In Sony v. Universal Studios, for instance, the Supreme Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."<sup>32</sup> More recently, however, the Court has backed away from this strong stance, holding instead that "the commercial or nonprofit educational nature of a work is not conclusive" and is only one factor "to be weighed along with others in fair use decisions."<sup>33</sup>

40. The reason for this hesitation is simple: many commercial uses are at the same time strong candidates for fair use. Parodies, for example, are widely understood to be paradigmatic examples of fair use, yet parodists like Weird Al Yankovic at the same time profit handsomely from the work they create. Similarly, educational textbooks are sold at a substantial mark-up above cost, yet no one believes that as a result textbook authors should be denied the protections of the fair use defense.

41. The fact that an entity has a profit motive, then, turns out to not be particularly helpful in terms of distinguishing attractive from unattractive fair use cases. At best, the commercial nature of a use serves as a weak signal that the infringer has resources that could be used to reward or empower the original copyright holder, and that a requirement to do so would not substantially reduce the availability of either the copied or the original work.

42. A second and more important issue considered as part of the first factor is the question of whether the accused use is "transformative" in nature. A use is transformative if it is substantially different from the original work in terms of its purpose, meaning, or effect. A transformative work does not merely supersede the original work. It is instead a work that has new features or brings new value.<sup>34</sup>

43. Whether a work is transformative is important for two reasons. First, all else held equal, a transformative work

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<sup>32</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

<sup>33</sup> Campbell, 510 U.S. at 585.

<sup>34</sup> Perfect 10, Inc., 487 F.3d at 720; Campbell, 510 U.S. at 579.

is less likely to hurt the original author. If an infringing work has the same purpose, meaning, or effect as does the original work, the infringing work likely will displace sales of the original. If the infringing work is sharply different along these dimensions, by contrast, sales could remain intact.

44. The second reason why it is important to consider whether a work is transformative is that a transformative work brings something of value to society, rather than being merely duplicative of that which society already has. It is new and has new meaning. The fact that a work is transformative, then, makes a finding of fair use marginally more attractive. Put differently, there is little reason to trump a copyright holder's exclusive rights if the only payoff is that society would get another work that is largely indistinguishable from the original one. By contrast, if society is at least getting something sufficiently new, there might be a case for a fair use finding, because getting something meaningfully new is itself an attractive outcome.<sup>35</sup>

45. One caveat to the above summary: some courts recognize a work as transformative only if the work is different from the original work in an expressive way. These courts do not accept evidence of just any new "purpose, meaning, or effect"; instead, they require a new expressive purpose, a new expressive meaning, or a new expressive effect. The rationale is that copyright law itself is designed to encourage expressive outputs and indeed itself refuses to protect valuable non-expressive works like databases and directories.<sup>36</sup> Some courts therefore think it appropriate to similarly distinguish expressive from non-expressive work under the first fair use factor. Specifically, these courts refuse to recognize as transformative a work for which the new contribution is informational, organizational, or in some other way valuable but not expressive.<sup>37</sup>

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<sup>35</sup> See, for example, *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) ("The first factor . . . asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.").

<sup>36</sup> See *Feist Pub'ns., Inc. v. Rural Tel. Serv. Co.*, 499 US 340 (1991).

<sup>37</sup> See, for example, *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998) (concluding that retransmission of radio broadcast over telephone lines is not transformative despite the fact that the

46. Applying all this to Defendant's copying, the commercial nature of the defendant's use is straightforward: the New York Times is clearly a for-profit entity engaged in a profit-motivated use designed to promote its long-run financial interest. That said, I doubt any court would be much moved by that fact, for the reasons I explained already above.<sup>38</sup>

47. With respect to the transformative nature of the work, however, Defendant's copying falls flat. Websites like [www.boston.com/yourtown/waltham](http://www.boston.com/yourtown/waltham) and [www.boston.com/yourtown/newton](http://www.boston.com/yourtown/newton) are designed to serve exactly the same purpose as are the websites from which they take copyrighted material. Indeed, these websites each target the same niche audience, the same niche advertisers, for the same news distribution purpose, and do so on a daily and on-going basis. There is no plausible argument that Defendant's websites communicate a substantially different message, serve for their audiences or advertisers a substantially different purpose, or in any other way satisfies the judicial definition of a transformative use. Bluntly, these are look-alike businesses and they are producing look-alike output from a copyright perspective. The copying is clearly not transformative.

#### **V. B. The Nature of the Copyrighted Work.**

48. The second explicit fair use factor is the nature of the copyrighted work in question. Under this factor, courts consider the creativity of the original work. If the original work falls into a highly creative category, such as fictional novels, it is more difficult to argue that fair use is appropriate. If the original work falls on the less creative side of the spectrum, such as biography, fair use is considered more plausible. The explanation is that "some works are closer to the core of intended copyright

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retransmission was for an entirely different, albeit it non-expressive, purpose).

<sup>38</sup> As I discuss later in the Report, the commercial nature of the various websites in dispute does turn out to be relevant under the fourth fair use factor. After all, by copying materials, the Times is able to compete with GateHouse but do so without spending nearly as much on local news-gathering efforts. That gives the Times a significant advantage over GateHouse in the market—an advantage that translates into a type of factor four harm that weighs against a finding of fair use.

protection than others.”<sup>39</sup> On this view, copyright law is primarily concerned with the protection of creative, expressive work, and as a result fair use is less objectionable when it reduces the protection given to works that are not significantly creative or expressive.

49. The news stories at issue here likely fall toward the biography side of the spectrum. Undoubtedly, it takes substantial creativity to write an effective headline, let alone to craft a concise, interesting lede that effectively empowers a reader to deduce whether the fuller story is in fact of interest.<sup>40</sup> Similarly, it is a creative exercise to select which out of the many possible stories to cover each day, let alone in what order to present them.<sup>41</sup> My point here is only that, all else held equal, a court would be more willing to recognize fair use as applied to news headlines and ledes than it would be to recognize a comparable fair use defense as applied to pure fantasy or science fiction.

#### **V. C. The Amount and Substantiality of the Portion Used**

50. The third explicit fair use factor is the amount and substantiality of the portion used. As a general rule, the more the infringer takes, the more this factor weighs against a finding of fair use. The intuition is the obvious one: the extent of the copying is a good proxy for the harm imposed on the copyright holder. If an infringer takes only a tiny segment of a copyrighted work, the odds are low that the taking will much undermine the author’s ability to exploit his own contribution. If the infringer takes the bulk of the work, the opposite logic applies. In this sense, this third factor in some ways echoes considerations raised under the first factor’s test for transformative use and the soon-to-be-discussed fourth factor’s test for the economic significance of the copying.

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<sup>39</sup> Campbell, 510 U.S. at 586.

<sup>40</sup> See Exhibit Nelson-14 (copy of an interview published by the New York Times in which a senior editor discusses “how much intelligence, hard work, sheer creativity, and diligence goes into the art of headline writing”); Exhibit Nelson-13 (news article, published by the New York Times, discussing the “art” of writing headlines).

<sup>41</sup> See Expert Report of Dean Rubin (discussing creativity involved in headline writing and selection).

51. There are exceptions to the general rule stated above. For instance, copying a small amount from an original work might still be problematic if what was taken turns out to be "essentially the heart" of the work.<sup>42</sup> In a famous case along these lines, a magazine purloined a tiny portion of an unpublished manuscript, but still the third fair use factor was deemed to favor the copyright holder because the copied words represented the excerpts that would-be readers were likely most interested in seeing.<sup>43</sup>

52. Conversely, copying the entire work might not weigh against fair use in a case where the only way to accomplish the infringing use is to copy at that scale. In Sega v. Accolade, Inc., for instance, the infringer copied the entirety of a software program in order to study how certain aspects worked.<sup>44</sup> The court put "very little weight" on the amount of copying, however, both because the complete copy was not actually used after the learning was complete, and because there was no reasonable alternative means by which to dissect the program anyway.<sup>45</sup>

53. Taking all that into account, the copying done by the Defendant in this case triggers two different concerns related to the third fair use factor. Each tips this factor against the Times. First and most obviously, a story's headline and its lede appear to be the two most important sentences in the story, and the combination surely represents the heart of the work. Dean Rubin makes this point in fuller detail in his Report,<sup>46</sup> but the point is also relatively obvious even to a lay audience. Indeed, as we all know from our own newspaper reading experience, often a reader can gain a fully sufficient understanding of an article simply by reading the headline, the lede, and then skipping the rest of the piece entirely.

54. Second, to the extent that GateHouse's copyright rights go to the choice it made in selecting to run these stories rather than some other possible stories, Defendant's websites seem to copy a substantial portion of

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<sup>42</sup> Harper & Row, Publishers, Inc., 471 U.S. at 566.

<sup>43</sup> Id. at 565 ("The portions actually quoted were selected . . . as among the most powerful passages in those chapters").

<sup>44</sup> Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

<sup>45</sup> Id. at 1526-27.

<sup>46</sup> See Expert Report of Dean Rubin.

that selection decision. That is, one protected creative contribution made by GateHouse is its creative decision each day with respect to which events and interactions ought to be covered, reported on, and ultimately featured on its websites. The accused New York Times sites parrot this selection to a large degree, in that way copying a substantial portion of GateHouse's copyrighted "selection, arrangement and coordination" of news items.<sup>47</sup>

55. In total, then, the third fair use factor weighs against a fair use finding. Headlines and ledes are just too important, and the Times' copying of GateHouse's news selections is simply too pervasive.

#### **V. D. The Effect on the Plaintiff's Potential Market**

56. The fourth explicit factor listed in section 107 is the effect on the potential market for, or value of, the copyrighted work. This is relevant because a use that interferes with the value of the original work likely undermines the incentives that copyright law is designed to create in the first place. That is, the whole idea behind copyright law is to encourage authors to create, disseminate, and in other ways promote their work by promising authors certain exclusive rights. The more a fair use finding would reduce the value of those exclusive rights, the more harmful that fair use is to the copyright system, and hence the less attractive the fair use defense.

57. Most of the analysis relevant to factor four is intuitive. If an infringer's use directly competes with the copyright owner's use, for example, that economic harm clearly tips factor four against a finding of fair use. Similarly, if the infringer's use seems likely to interfere with the copyright owner's future exploitation of the work in some other form, again that makes fair use less likely.<sup>48</sup>

58. There is one subtle issue with respect to factor four, however, and that is the possibility that factor four in

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<sup>47</sup> See 17 U.S.C. § 103 (extending protection to compilations); 17 U.S.C. § 101 (defining a "compilation" to be "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship").

<sup>48</sup> See *Harper & Row*, 471 U.S. at 568 ("This inquiry must take account not only of harm to the original but also of harm to the market for derivative works.").

some circumstances can be circular. The intuition: if fair use is denied in a given case, then the infringer in that case might himself be willing to pay some sum in exchange for the right to continue the infringement.<sup>49</sup> The question is then raised as to whether that potential payment can really count under factor four, because the result would be that in almost every case factor four would, at least to a small degree, weigh against a finding of fair use.

59. The answer, in my view, is that factor four actually should in almost every dispute weigh at least slightly against a finding of fair use. This is not to say that fair use should be denied in every case. Instead, my point is only that, in almost every case,<sup>50</sup> fair use does reduce author incentives. Other considerations might then swamp that concern. But factor four is designed to highlight the degree to which a finding of fair use would hurt authors, and framed that way there is no reason to exclude from the calculus the losses associated with the very use being litigated.<sup>51</sup>

60. Applying all that to the dispute at issue here, the fourth fair use factor weighs strongly against a finding of fair use. There are two categories of harm to consider.

61. First, the hyper-local sites at issue in this case rely heavily on the funding of local advertisers. That is a small pool, which is to say that there are only a handful of potential advertisers relevant to each hyper-local site. When Defendant's YourTown websites copy materials from Plaintiff's Wicked Local sites, Defendant is by virtue of that copying able to target the very advertisers that Plaintiff, too, serves. If allowed to continue, this would have an enormous financial impact on Plaintiff's operations. Put bluntly, in a situation where there are only ten plausible advertisers in the first place, a change

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<sup>49</sup> See, for example, *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 n.17 (2d Cir 1994) ("a copyright holder can always assert some degree of adverse affect on its potential licensing revenues as a consequence of [the defendant's use] . . . simply because the copyright holder has not been paid a fee to permit that particular use.").

<sup>50</sup> I say "in almost every case" rather than "in every case" because, in some cases, transaction costs would make it impossible for the accused infringer to pay even if the infringer wanted to.

<sup>51</sup> Accord *American Geophysical Union*, 60 F. 3d at 931 ("The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.").

from having one plausible advertising outlet to having two plausible advertising outlets could very easily slash revenues by fifty percent or more.<sup>52</sup>

62. Second, even if Defendant's websites were targeting entirely different advertisers, there would still be substantial factor-four harm in the form of lost licensing revenue. After all, if the copying at issue in this case turns out to fail the fair use test, the New York Times might very well choose to license the relevant content from GateHouse. (Google, in fact, did exactly that after a similar dispute with the Associated Press.<sup>53</sup>) It is hard to know what licensing rate the parties would establish, but the number could be substantial because, in each hyper-local community, GateHouse is either the only or one of very few credible news sources. As a result, GateHouse could quite possibly command a meaningful royalty, with the main constraint being that the New York Times would not pay more to license content than it would cost the Times to insert its own reporters into each hyper-local community.

#### **V. E. Fair Use Conclusion**

63. The four statutory factors play a central role in almost every fair use analysis. Here, as the above makes clear, those factors in my view decisively weigh against a finding of fair use. The most important concerns match the two intuitions with which I began this Report. First, under factors one, three, and four, the New York Times' unauthorized copying threatens to substantially undermine the incentives copyright law has otherwise created in favor of hyper-local news. Second, under factor one primarily, there is little to say in favor of the copying because it in the end produces an output that is substantially redundant to the very work that GateHouse already makes public. As such, in my view, a court would be unlikely to deem the specific practices at issue here to be fair use.

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<sup>52</sup> The economic consequences could actually be far more severe. The second site might not only take half the advertisers; the entry of a second site might also trigger a price war that could erode profitability more sharply.

<sup>53</sup> See "Google reveals payment deal with AP," archived online at [http://news.zdnet.com/2100-9588\\_22-149100.html](http://news.zdnet.com/2100-9588_22-149100.html) (last visited January 18, 2009).

## **VI. Counterclaims**

64. As part of its response to GateHouse's original complaint, the New York Times filed a set of counterclaims against GateHouse's parent corporation in which it asserts that "GateHouse itself has engaged and continues to engage in the same and substantially similar conduct, including verbatim copying of headlines and/or ledes from the New York Times and the Boston Globe."<sup>54</sup> In this Part, I examine the accuracy of that comparison and explain why the examples cited by the Times are in fact different in ways that are not only intuitive, but also legally significant.

### **VI. A. The Batavian**

65. The Batavian is an "Online News and Community Views" website owned and operated by GateHouse in and for the Batavia, New York, area. The Times states that The Batavian "regularly and continuously aggregates and copies headlines" and "links to news articles created by news organizations neither owned by nor affiliated with GateHouse."<sup>55</sup> In support of this allegation, the Times specifically includes a screenshot that shows a National Headlines page of The Batavian,<sup>56</sup> and the Times notes that the National Headlines page "includes numerous verbatim headline links to news articles published by a wide variety of news organizations" including the Times.<sup>57</sup>

66. The Times invites the Court to draw the conclusion that, if the Times' pattern of linking and copying is not fair use, then The Batavian's pattern of linking and copying is also not fair use. The analogy, however, is flawed.

67. Start with the first fair use factor. As applied to the Times' own copying, the first fair use factor leaned heavily against a finding of fair use. The reason was that the Times' copying was not in any way transformative. When headlines and ledes are lifted from <http://www.wickedlocal.com/needham> and copied onto

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<sup>54</sup> Defendant's Counterclaim at p. 16. For simplicity, in this Report I treat both GateHouse entities as one.

<sup>55</sup> Id. at ¶ 27.

<sup>56</sup> Id. at Exhibit 1.

<sup>57</sup> Id. at ¶ 28.

<http://www.boston.com/yourtown/needham>, the result is a website that serves the very same niche audience, targets the very same local advertisers, and provides the very same daily, local news service.

68. The first fair use factor cuts the other way, however, when applied to The Batavian. The reason is that The Batavian's National Headlines page is not a substitute for any of the national news websites to which it links. At the moment, for instance, the National Headlines page is not really a current news source at all. Instead, it is a relatively thin archive of old news headlines, not even updated since September. Moreover, even back in September, the National Headlines page was still no substitute for any of the national news websites to which it linked, because the website contained only a thin sampling of each day's headlines, and indeed most of the headlines were explicitly chosen to be quirky, or obscure, or of interest to the page's editor, or (in his view) of interest to local readers, rather than being the day's actual top news.<sup>58</sup>

69. The Times' own screen capture, dated January 6, 2009, itself makes all of these points. The headlines shown that day turn out to be a mixture of headlines drawn from September 8, 2008 (first link); September 10 (second link); September 1 (third link); August 30 (fourth link); and so on. See Lichtman Exhibits 5-8. Even if the page was last updated on September 10, the point here is that, even on that date, The Batavian was capturing a relatively incomplete smattering of headlines, a far cry from any sort of comprehensive summary of the then-current national news. Lastly, note the subjects of these headlines. In addition to obviously big-ticket stories about Fannie Mae and Hurricane Ike, the first eight links displayed turn out to be stories about a "body-parts" scheme, the new American Idol judge, cars powered by natural gas, community efforts to purchase homes, and the problem of war veteran concussions. See Lichtman Exhibit 9.<sup>59</sup>

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<sup>58</sup> This is discussed at various places in the Owens Deposition transcript, and Howard Owens provided me with further clarification during our conversation on the morning of January 19, 2009 ("Interview with Howard Owens").

<sup>59</sup> Another important fact here is that at least some of the links shown on the National Headlines page do not seem to have been copied from anywhere, but instead seem to be someone's own attempt at rephrasing. The second link is a good example, in that this specific link is not only different from the headline of the linked article, it also

70. These distinctions are obviously important under the first fair use factor. An unauthorized copy that serves in essence as a substitute for the original work is not transformative. An unauthorized copy that serves some entirely different purpose, however, is. When compared to the copying done by the Defendant's YourTown websites, then, The Batavian has a much stronger argument that its copying is transformative. The archive is clearly serving a different purpose than that served by the original news sites. And, even when the stories were current, the sporadic and quirky nature of the headlines chosen similarly suggests that this collection of headlines played a different role than that which was at the time being played by the more comprehensive news sources.

71. For similar reasons, factors three and four of the fair use test also are substantially more favorable as applied to The Batavian than they were as applied to Defendant's various YourTown sites. With respect to factor three, The Batavian draws its headlines from a large mix of news sources. The first four links in the Times' own screenshot, for instance, come from Bloomberg, MSNBC, the New York Times, and the Philadelphia Inquirer. See Lichtman Exhibits 5-8. Thus, to the extent that factor three weighed against the Times because the Times concentrated its copying on specific GateHouse publications, factor three would not weigh against the significantly more diverse Batavian.

72. As for factor four, it is hard to imagine that the Batavian's sporadic and amateur news archive competes for advertisers in any meaningful way with the comprehensive and updated news sources to which it links. As support for this point, note that, as I write this Report, the advertisements currently showing on The Batavian's National Headlines page are advertisements for the Pediatric Associates of Batavia, LLP, Spa Getaways in Batavia, Rhytec Medical Laser Treatment Clinic, and Tom's Internet Garage Sale. See Lichtman Exhibit 9. It is implausible to think that these advertisers would have advertised with the Times but for their deals with The Batavian.

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inaccurately mentions Hurricane Hanna when the article seems to focus on Hurricane Ike. Compare Lichtman Exhibit 9 with Lichtman Exhibit 6.

73. The only fair use consideration that seems to weigh against The Batavian is the circular consideration that is typically considered under factor four. Recall that the circular consideration is the idea that, if a given practice turns out not to be fair use, the then-infringer might be willing to pay the original copyright owner for the right to continue its now-illegal practice. In some circumstances, this future royalty can be substantial and thus it can argue against a finding of fair use. Here, however, the evidence suggests that the National Headlines page draws in almost no Internet traffic.<sup>60</sup> Moreover, there are a large number of potential sources for national news headlines on the web, including Bloomberg, MSNBC, the New York Times, the Philadelphia Inquirer, CNN, Fox News, ABC, and so on. Thus, not only does it seem implausible that GateHouse would pay more than a pittance for the right to continue linking to national news in general, it also seems unlikely that the Times would be able to demand a substantial share of any such royalty given how many other sources could supply the necessary content. The circular consideration, then, seems trivial in the case of The Batavian.

#### **VI. B. Election 2008**

74. For a period of roughly three months, GateHouse's national GateHouse News Service maintained a website focused on the November elections.<sup>61</sup> As the Times notes, this site "aggregated and copied third-party news headlines and ledes as links" during its period of operation.<sup>62</sup> The Times invites the Court to again draw the conclusion that, if the Times' pattern of linking is not fair use, GateHouse's election coverage similarly is not fair use. Again, I disagree.

75. Under the first fair use factor, there is certainly a strong argument that the election page is transformative. GateHouse was not on this page merely parroting one or two competing news sources. Instead, GateHouse was pulling together a mix of stories and perspectives from (at least) the New York Times, the Washington Post, USA Today, Politico, the Christian Science Monitor, Political Wire,

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<sup>60</sup> Interview with Howard Owens.

<sup>61</sup> See GMI-Z1-01903, GMI-Z1-01906, and GM1-Z1-01910.

<sup>62</sup> Defendant's Counterclaim at ¶ 31.

Congressional Quarterly, Roll Call, CNN, MSNBC, and Fox News, with only a small fraction of the links pointing to any one source.<sup>63</sup> Moreover, GateHouse was exercising its own creative process to choose which stories to include, specifically selecting only a fraction of the stories run by each of those news organizations.<sup>64</sup>

76. To be sure, all this resulted in a website that to some degree competed with the original sites. But the result at the same time served a different audience, in a different way—specifically a local audience interested in seeing a diverse sampling of views (e.g. the conservative Fox paired with the more liberal CNN). On net, the first factor would therefore likely tip in favor of the election site.

77. The fourth fair use factor, by contrast, would likely cut against this unauthorized use of copyrighted material. After all, in theory, were sites like the election site to become pervasive, the net effect could be to draw substantial numbers of viewers and advertisers away from the original news sources. Moreover, it is easy to imagine a licensing market where sites like this one would subscribe to news feeds from the major news sources, pay a fee, and through that purchase the right to aggregate news.

78. That said, on the facts here, it is hard to take factor four seriously. The advertisements actually sold on the page seem to constitute only a strip of low-value ads delivered by Google. Thus, for example, the screenshot in the record shows advertisements with headlines like “Sarah Palin’s IQ = 122” and “2009 Anti-Aging Awards.”<sup>65</sup> The economic value of those advertisements is trivial at best; and that implies that the financial harm to the original copyright holders is likely similarly inconsequential.

79. This sharp deviation between theory and fact would likely leave a court reluctant to put too much weight on factor four as applied to the election page. Indeed, an analogous situation arose in a case involving the Google search engine, and the Ninth Circuit reversed what had been a finding of infringement in part because the factor-four

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<sup>63</sup> See GM1-Z1-01909; Interview with Howard Owens.

<sup>64</sup> Interview with Howard Owens.

<sup>65</sup> See GM1-Z1-01909.

evidence was “hypothetical” and the copyright holder could not show any significant then-current harm.<sup>66</sup>

80. Lastly, as I pointed out at the start of my Report, the fair use inquiry is not limited to the four statutory factors alone but instead often includes other public policy considerations. Here, one such consideration would surely be the public importance of sharing, analyzing, and comparing election news. That obviously does not excuse all forms of copyright infringement per se, but it would likely leave a court more willing to excuse infringement in a case that might otherwise be a close call under the conventional factors.

#### **VI. D. Wicked Local Search**

81. The GateHouse Wicked Local websites include a search tool through which readers can enter terms of interest and be pointed to news stories that contain those terms.<sup>67</sup> The Times describes this as the aggregation of third party news links, and again invites the Court to draw an analogy between this activity and the activities that gave rise to this litigation.<sup>68</sup>

82. The analogy here is particularly weak. As I mention above, the copying and aggregation inherent in an Internet search engine is not only transformative in purpose, it also has been explicitly approved in several fair use cases.<sup>69</sup> This is not to say that the Times cannot argue that those cases are wrong, or that the copying here is in some way different from those prior examples. However, the Times makes no effort to draw any distinctions or even to allege any relevant factual detail. Instead, the Times hurriedly draws an analogy between this copying and the copying of which the Times itself is accused. A proper fair use analysis would reject the comparison.

83. Under factor one, the search engine is clearly significantly more transformative. Under factor three, the

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<sup>66</sup> Perfect 10, 487 F.3d at 722-24.

<sup>67</sup> This is implicit in the Defendant’s Counterclaim, and I also confirmed these facts during my conversation with Howard Owens.

<sup>68</sup> Defendant’s Counterclaim at ¶ 32.

<sup>69</sup> See, e.g., Perfect 10, Inc., v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

search engine does not capture the original source's selection and arrangement of headlines but instead combines those headlines with other headlines and then reorganizes the results based on the user's own search terms. Lastly, under factor four, there is here again a theoretical story under which a search engine could either draw advertisers away from the original copied sites or end up paying a non-trivial royalty to the sites it includes in its search. However, on the facts here, there is little evidence in the record to support that story, and (as I discuss above) such a lack of evidence has proven decisive in other search engine litigation.<sup>70</sup>

#### **VI. D. Paragraph 34 Allegations**

84. In paragraph 34 of its Counterclaim, the Times lists in passing three final examples of GateHouse's own linking practices. Each is again introduced on the theory that it is comparable to the Times' own behavior. I consider these three briefly below.

##### **VI. D. 1. Sulphur Daily News**

85. The Times rightly notes that this GateHouse website "aggregated and used third-party news headlines and ledes verbatim as links as recently as September 2, 2008."<sup>71</sup> The Times neglects to mention, however, that the Sulphur Daily News is a newspaper that serves Sulphur, a city in Louisiana; and that those headlines and links all concerned Hurricane Gustav,<sup>72</sup> which was at the time threatening Louisiana and in the end did several billion dollars worth of damage in Louisiana alone.<sup>73</sup>

86. The hurricane was obviously interfering with conventional news coverage,<sup>74</sup> and the hurricane also was clearly an isolated event of enormous public consequence. These facts would surely tilt any fair use analysis in GateHouse's favor, if for no other reason than the pure

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<sup>70</sup> Perfect 10, 487 F.3d at 722-24.

<sup>71</sup> Defendant's Counterclaim at ¶ 34.

<sup>72</sup> See, e.g., GMI-Z1-01916.

<sup>73</sup> Tropical Weather Summary, National Hurricane Center (2008-12-01) (archived online at [http://www.nhc.noaa.gov/archive/2008/tws/MIATWSAT\\_nov.shtml](http://www.nhc.noaa.gov/archive/2008/tws/MIATWSAT_nov.shtml)) (last visited January 18, 2009).

<sup>74</sup> Conversation with Howard Owens, January 19, 2009.

public policy interest in keeping citizens informed during an emergency.

#### **VI. D. 2. MyZeeland.com**

87. The Times similarly points to GateHouse's MyZeeland.com website and again notes that it "aggregated and used third-party news headlines and ledes."<sup>75</sup> This is the best of the Times' many attempted analogies and, in my view, a court could very well determine that MyZeeland's linking practices are not fair use.<sup>76</sup>

88. However, even the MyZeeland.com example is notably more sympathetic than are the examples that involve the Times' YourTown sites. Under factor four, the economic harm imposed by the Times' unauthorized copying is clear and substantial. The copying allows the Times to enter each hyper-local market; those markets have a scarce advertising base to begin with; and thus, upon entering, the Times substantially undermines GateHouse's ability to sell advertising and in that way fund its reporting efforts.

89. In the MyZeeland.com example, by contrast, it is hard to imagine that such amateur news aggregation substantially interferes with the ability of any major news source to market its news. That point is again made clear through the advertisements actually shown on the page. As I sit here to write this Report, the page that shows the disputed links contains advertisements for a local Holland computer shop named "Computers + More," a rug store called "Great Lakes Carpet & Flooring," and TeleRad, a store that sells cellular telephones.<sup>77</sup> None of these seem like remotely plausible advertising partners for CNN or ABC or the New York Times.

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<sup>75</sup> Defendant's Counterclaim at ¶ 24.

<sup>76</sup> I cannot confirm whether any of the news stories that appear on the MyZeeland site are owned by the New York Times or one of its subsidiaries. This is important because, if not, then it is possible that fair use is not even relevant to this situation. After all, the news organizations whose work appears on the site might have implicitly or explicitly approved of this use. In the text, I leave this issue aside and analyze the case under the assumption that some relevant copyright holder has or would complain.

<sup>77</sup> These were the advertisements I viewed on January 18, 2009.

90. Moreover, the MyZeeland.com aggregation page gets almost no traffic.<sup>78</sup> That implies that factor four's circular consideration is also minor. MyZeeland.com is more likely to turn this part of its page off than to pay even a pittance for any copyright rights it might turn out to need. Factor four, then, seems to weigh only weakly against this use.

#### **VI. D. 3. Rockford Register Star**

91. Lastly, the Times rightly notes that the Rockford Register Star "aggregated and used third-party news headlines and ledes" on its website.<sup>79</sup> The Times neglects to mention that the headlines at issue all involved a major shooting at a nearby college campus which resulted in six deaths and multiple injuries.<sup>80</sup> This sort of isolated instance of unauthorized copying, centered around an event of enormous public importance, is surely not only itself fair use under the very same logic discussed above with respect to Hurricane Gustav, but also clearly distinguishable from the daily, relatively comprehensive copying about which GateHouse complains in the principal case.

#### **VII. Conclusion**

92. Published fair use decisions repeatedly emphasize that fair use analysis is, by necessity, subjective and fact-specific. My own view is that the fair use defense should be rejected in the context of the Times' YourTown websites, both because the economic harm to GateHouse is particularly sharp, and because the copying itself has little to recommend it in the sense that it does not result in a work that serves a substantially different purpose, has a substantially different use, or offers a substantially different meaning. My goal here, however, has been to explain the legal underpinnings of my position, so that my rationales and understandings can be compared against analysis put forward by others who might to varying degrees disagree with my conclusions.

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<sup>78</sup> Interview with Howard Owens.

<sup>79</sup> Defendant's Counterclaim at ¶ 24.

<sup>80</sup> Interview with Howard Owens.

93. One final point, then, bears mention. This case is not a referendum on the generic practice of linking. An enormous amount of linking and copying on the Internet is implicitly or explicitly approved of by the relevant copyright owner. As such, it is completely unaffected by the issues in dispute here. Further, beyond that, the fair use doctrine clearly protects a wide range of additional linking and copying that might go above and beyond what any given copyright holder would willingly endorse. This case is instead a fight about at what extreme the protections of the fair use defense expire. Importantly, then, to reject the fair use defense here would be to disapprove not of linking in general, but of a specific, narrow, egregious, economically destructive linking practice that, in this case, threatens to undermine the incentive for anyone to engage in hyper-local journalism. (On the other hand, to restrict fair use as far as the New York Times' defensive Counterclaim asks the Court to do would indeed threaten common and widely accepted Internet practices.)

94. This report was written in an enormously tight timeframe, in large part because of this litigation's compressed schedule. In light of that, and obviously only to the extent permitted by the Court, I ask to reserve the right to add to my analysis in the event that new facts are brought to my attention or new legal allegations become relevant to the dispute.

Signed,

***/s/ Douglas Lichtman***

Douglas Lichtman  
Professor of Law  
UCLA