The Fair Use Doctrine and Trackjacking: Beautiful Animal or Destroyer of Worlds?

ABSTRACT

“Trackjacking” is the unauthorized replacement of the original soundtrack of an audiovisual recording, such as a movie or television show, with another that is designed to alter substantially the plot and/or characters of the original work. While trackjacking is a creative and entertaining form of art, it may also constitute copyright infringement if the original work is one that is copyrighted. However, if certain criteria are met, the “fair use” doctrine provides a mechanism for courts to excuse what otherwise would be considered copyright infringement. Because the unique nature of trackjacking allows the new work to be distributed in such a way as to benefit the market for the infringed underlying work, this note concludes that trackjacking is an exceptional candidate for a fair use defense. This note details the reasons that courts should find trackjacking to be a fair use and recommends ways for trackjackers to ensure that courts will protect their works.

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    A. Add Something New and Creative .................................... 502
Brad Neely would like to encourage you to watch the movie *Harry Potter and the Sorcerer’s Stone*, but he does not want you to listen to it. Instead, he would like you to put your television on mute and listen to him describe what the characters do, think, and say. You can download Neely’s unauthorized alternative soundtrack for free, put it on a CD or an MP3 player, and play it while you watch the DVD. The experience is called *Wizard People, Dear Reader*, and it is the first in what could become a whole new way to watch movies.¹

Overdubbing a film with an alternative soundtrack is not a new concept. Traditionally, copyright owners have authorized various alternative soundtracks, such as overdubbing in a new language or commentaries found on many DVDs.² New technologies, however, have enabled independent artists easily to create and distribute their own alternative soundtracks, both with and without the original video. A sizeable number of independent commentators have sprung up, offering hundreds of downloadable commentary tracks, both for free and for sale. It is reasonable to anticipate that the same may happen with works like *Wizard People, Dear Reader*—works created not merely to comment on films, but to rewrite scripts in their entirety. The practice, which this note refers to as “trackjacking,” presents unique legal copyright issues that have not been previously considered by any court.

Part I of this note describes the history of alternative soundtracks, the development of trackjacking, and the future of trackjacking. Part II details the legal foundations of copyright law, with an emphasis on the growth and development of the fair use doctrine. Part III analyzes the potential application of the fair use doctrine to trackjacking. Finally, Part IV provides guideposts to assist trackjackers in protecting their works under the doctrine of fair use.

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¹ See *Wizard People, Dear Reader* by Brad Neely, http://www.illegal-art.org/video/wizard.html (last visited Nov. 3, 2007) (providing the audio files, along with instructions on how to enjoy, *Wizard People, Dear Reader*).

² See infra Part I (discussing the development of DVD alternative soundtracks).
I. BACKGROUND

A. History and Development of Alternative Tracks

One feature of DVD video is the ability to include multiple alternative audio tracks that are synchronized to the video track. In addition to offering viewers the option to view a film in one of several languages, many DVDs give viewers the ability to watch the film while listening to a commentary track. Such commentary tracks may leave the original soundtrack in place, albeit at a lower volume, or they may cut out the original soundtrack altogether, leaving just the video.

A DVD may offer multiple commentary tracks of different types. Commonly, a commentary track will feature one or more speakers who were involved in the making of the film, such as directors, producers, or actors. As the movie progresses, speakers may offer information about the filming of certain scenes, backstage stories, or personal thoughts about the film. Commentaries may feature scholars, film critics, actors commenting “in character,” or even individuals having no relationship with the film and no special knowledge about the subject matter, such as comedian Carrot Top’s commentary on Roger Avary’s Rules of Attraction.

While many commentaries simply augment the original work, others are independent creative works in their own right. For example, a scripted commentary written by Joel and Ethan Coen accompanies their film Blood Simple and features fictional artistic director Kenneth Loring, played by actor Jim Piddock. Loring reveals

3. See Jim Taylor, DVD Demystified 159-60 (2d ed. 2001) (describing the audio capabilities of DVDs).
4. See id.
fake yet amusing “behind the scenes” commentary, such as claiming that “the sweat on the actors is ‘movie sweat’ gathered from the flanks of Palomino horses,” providing another level of entertainment in the film.\(^{10}\) It may be argued that the Loring commentary is a separate work in its own right. However, the question then becomes whether the new work overshadows the original.

One of the most notable examples of commentary overshadowing the original work can be found in *Mystery Science Theater 3000*, a television series (and feature film) that consists primarily of a running commentary superimposed over particularly bad movies.\(^{11}\) While much of the commentary consists simply of humorous, off-the-cuff remarks, the commentators frequently invent new lines of dialogue for the on-screen characters and accompany them with narration that describes thoughts, motivations, and emotions at variance with the original film.\(^{12}\)

DVD commentaries, *Mystery Science Theater 3000*, and other such works authorized by the original copyright holders show the potential commercial and artistic value of alternative audio tracks. However, barriers exist to newcomers who try their hand at this craft. Licensing the rights to copy and distribute films can be expensive. Moreover, copyright owners are often protective of their creative works, and many would likely be unwilling to subject their films and shows to the sort of treatment dished out by *Mystery Science Theater 3000*.

In an article entitled “You, Too, Can Be a DVD Movie Critic,” acclaimed film critic Roger Ebert suggested the idea of “[d]o-it-yourself movie commentary tracks.”\(^{13}\) With the technology now available, anyone with a computer and a microphone has the ability to record digitally an audio file that can then be distributed on the Internet and played on a computer or MP3 player alongside a DVD.\(^{14}\) Ebert suggested that critics and fans could provide entertaining and enlightening commentary that the film’s makers could not duplicate.\(^{15}\)

\(^{10}\) Bourne, *supra* note 9.


\(^{14}\) See *id*.

\(^{15}\) *Id*. 
Active communities of independent commentators now provide hundreds of commentary tracks for films and television shows that can be burned to a CD, put on a digital music player, or simply played using a computer. For those who do not want the hassle of synchronizing the commentary with a particular DVD, a free program called “Sharecrow” allows commentaries to be assigned to DVDs so they will stay in sync with the disc, even when skipping around. The creators of Sharecrow call these alternative commentary tracks “crows,” which is both an acronym for “Commentary Released On the Web” and a tribute to Crow T. Robot, one of the characters in *Mystery Science Theater 3000*. Michael J. Nelson, head writer for *Mystery Science Theater 3000*, provides purchasable, downloadable commentaries, which he calls “RiffTrax.”

By creating and distributing commentary without the accompanying video, independent commentators need not obtain the right to alter, copy, and distribute the film. The end-user simply acquires the original, unaltered video from another source and combines it with the commentary herself.

**B. Development of Trackjacking**

“Trackjacking” is the “unauthorized replacing of the original soundtrack of an audiovisual recording, such as a movie or television show, with [a soundtrack] designed to substantially alter the original plot and/or characters.” The term is “derived from a conjunction of the phrase ‘soundtrack hijacking’ and is intended to convey the idea of unauthorized usurpation.” Unlike the traditional commentator, who adds his or her own input while leaving the underlying work intact, the trackjacker seeks to change the original work in order to take the audience on a new and different journey. The commentator supplements while the trackjacker supplants.


18. *See* Sharecrow User Guides / FAQ, supra note 17.


21. *Id.*
My Way Entertainment’s video, *The Juggernaut Bitch!*, is an example of trackjacking. It consists of video clips taken from the children’s show *X-Men: The Animated Series*, which have been overdubbed with “ghetto’ slang, profanity, and non sequiturs.” The popularity of the video led to the inclusion of one of its signature lines in the 2006 movie, *X-Men: The Last Stand*. When another character attempts to immobilize The Juggernaut, the Juggernaut responds with “Don’t you know who I am? I’m The Juggernaut, bitch!” before easily breaking free of the restraints.

A similar example of trackjacking can be found in Fensler Films’ *G.I. Joe* public service announcement parodies. Clips were taken from the public service announcement/safety messages of the 1980s animated series *G.I. Joe*, which were then re-cut, sometimes with added animation, and overdubbed with new audio. While the original clips generally featured the heroes of the *G.I. Joe* series giving safety tips to children, such as warning them to stay away from downed power lines, the Fensler Films versions feature the heroes shutting children in refrigerators or disintegrating them with energy pulses.

Both Fensler Films and My Way Entertainment distribute their works as complete audiovisual files, meaning that the end-user downloads a copy of the video track along with the audio. Neither Fensler Films nor My Way Entertainment have obtained the right to copy and distribute the video they use. As a result, the *G.I. Joe* public service announcements have attracted legal attention from Hasbro, Inc. Alleging that the works infringed Hasbro’s copyrights, the

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22. Video.google.com, I’m the Juggernaut Bitch!, http://video.google.com/ videoplay?docid=-3934651591022114445&q=juggernaut (last visited Nov. 3, 2007). During the writing of this note, many copies of the video have been removed from sites such as YouTube in response to copyright claims by Marvel Entertainment, Inc.


company sent a “cease and desist” letter to Fensler Films, demanding that the works be removed from the website.30

Because copyright owners are probably even more reluctant to turn their works over to trackjackers than they are to commentators, finding an alternative to obtaining the right to copy and distribute videos is essential for would-be trackjackers. The obvious solution would be to follow the lead of independent commentators—distribute the audio track alone and leave it to the end-user to combine it with a copy of the video obtained from another source.

One of the most well known examples of this technique is The Dark Side of the Rainbow.31 By watching the 1939 film The Wizard of Oz on mute while simultaneously listening to the 1973 Pink Floyd album The Dark Side of the Moon, one is supposedly able to observe many moments where the album and the film correspond with each other,32 creating a music video experience that replaces the optimistic themes of the original film with the dark pessimism of the album.33 The Dark Side of the Rainbow is distinctive in that the perceived effect is solely a user-created phenomenon. Pink Floyd band members have insisted that they had no intention of integrating the album with the movie and that any apparent synchronization is purely coincidental.34

Questions over whether The Dark Side of the Rainbow is due to design or mere serendipity have not stopped people from trying it out, and those that sell the film and the album are not complaining. Pink Floyd’s record company is pleased by the increased demand for the album,35 and Turner Classic Movies gave instructions on how to experience The Dark Side of Oz when the film was aired on television for the first time without commercial interruption.36

32. See id.; see also The Dark Side of the Rainbow: Is the Yellow Brick Road in the Pink? We Watch “The Wizard of Oz” While Listening to Pink Floyd’s “Dark Side of the Moon” to See What Happens, WICHITA EAGLE, June 13, 1997, at 1B (listing many of the coincidences in The Dark Side of the Rainbow).
34. See Gardner, Introduction, supra note 31.
Richard Roeper, of the popular movie-reviewing television program *At the Movies with Ebert & Roeper*, hailed the movie *Harry Potter and the Sorcerer’s Stone* as “The Wizard of Oz of its time.” Just as *The Dark Side of the Rainbow* plays off *The Wizard of Oz*, Brad Neely’s *Wizard People, Dear Reader* is designed to serve as an alternative soundtrack to *Harry Potter and the Sorcerer’s Stone*, in an example of what Carl Jung termed “synchronicity.” Neely’s work is available for free on the Internet, along with instructions on how to synchronize it with your own copy of *Harry Potter and the Sorcerer’s Stone*.

*Wizard People, Dear Reader* begins by describing itself as “*Harry Potter and the Sorcerer’s Stone*, a book on tape” and consists entirely of narration by Brad Neely. The events and dialogue “read” by Neely generally match what the characters are doing on screen, but vary from the original script so as to create characters and a plot significantly different from the original. Brad Neely has performed *Wizard People, Dear Reader* live at theaters and film festivals around the country. However, the shows were shut down after Warner Brothers, the owner of the rights to *Harry Potter and the Sorcerer’s Stone*, warned theaters to stop performing Neely’s version. Warner Brothers has taken no formal legal action, and Brad Neely has stated that he will not fight the issue in court. The downloadable version remains available online.

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39. See *Wizard People, Dear Reader* by Brad Neely, supra note 1.
41. See *Wizard People, Dear Reader* by Brad Neely, supra note 1.
45. See id.
II. THE LEGAL FOUNDATIONS OF COPYRIGHT AND THE FAIR USE DOCTRINE

A. Legal Foundation of Copyright

The Copyright Act of 1976 gives copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”\(^{47}\) The Act specifically includes “motion pictures and other audiovisual works” as a category of protected works.\(^ {48}\) By leaving it to end-users to acquire their own copy of a given video, trackjackers avoid violating certain rights of copyright owners, such as the right to reproduce or publicly distribute the copyrighted work of another.\(^ {49}\) However, the Copyright Act also gives copyright owners the exclusive right “to prepare derivative works based upon the copyrighted work.”\(^ {50}\) The Copyright Act defines a “derivative work” as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”\(^ {51}\)

For the trackjacker who wishes his work to synchronize with what is happening on screen, it is almost inevitable that the trackjack will have to copy some of the elements or ideas of the underlying work: superhuman mutants fighting each other, soldiers giving advice to children, or a young boy going to school to be a wizard. However, similarity of ideas is not alone sufficient to prove copyright infringement, since ideas are not copyrightable.\(^ {52}\) The Copyright Act clearly states that “[i]n no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”\(^ {53}\)


\(^{48}\) Id. § 102(a)(6).


\(^{50}\) Id. § 106(2).


\(^{52}\) See id. § 102(b); see also Mazer v. Stein, 347 U.S. 201, 217 (1954) (“[Copyright] protection is given only to the expression of the idea—not the idea itself.”).

\(^{53}\) 17 U.S.C. § 102(b).
The inability to copyright ideas was explained in the case of Steinberg v. Columbia Pictures Industries, Inc.\textsuperscript{54} In Steinberg, the district court considered a movie poster for the film Moscow on the Hudson that was strikingly similar to a cover illustration from The New Yorker magazine.\textsuperscript{55} After the defendants admitted to purchasing and referring to the plaintiff’s magazine during the creation of the poster, the court found that, although not identical, the two works contained elements that were “so similar that it is impossible, especially in view of the artist’s testimony, not to find that defendants’ impermissibly copied plaintiff’s.”\textsuperscript{56} The Steinberg court acknowledged that “[t]here is no dispute that defendants cannot be held liable for using the idea [embodied in the original illustration].”\textsuperscript{57} However, the court concluded that defendant had gone beyond the idea and had copied the plaintiff’s expression of the idea.\textsuperscript{58} While an idea is not copyrightable, one’s expression of that idea is.

In Sid & Marty Krofft Television Products, Inc. v. McDonald’s Corp., the Ninth Circuit addressed the degree to which copyright law protects expression.\textsuperscript{59} Whether a work infringes the copyright of the underlying work turns on whether there is “substantial similarity” in the expression of the ideas of the works in question.\textsuperscript{60} The Krofft court explained that such infringement is established upon showing of the following: (1) “ownership of the copyright” by the plaintiff; (2) “circumstantial evidence of [the defendant’s] access to the copyrighted work”; and (3) “substantial similarity” between the two works.\textsuperscript{61} The court elaborated that the “substantial similarity” test requires a showing not only of similarity in the ideas—the “extrinsic test”—but also similarity in the expressions of the ideas—the “intrinsic test.”\textsuperscript{62}

In defending his work, a trackjacker may seek to have his case decided under the third element established by the court in Krofft, perhaps even as a matter of law, if the characters and plot of his work are changed in such a way that the ideas of his work are not “substantially similar” to the ideas of the underlying work.\textsuperscript{63} The test for substantial similarity of ideas is an “extrinsic” test, according to

\textsuperscript{55} See id. at 709-10.
\textsuperscript{56} Id. at 710.
\textsuperscript{57} Id. at 712.
\textsuperscript{58} See id. at 712-14.
\textsuperscript{59} 562 F.2d 1157, 1164-69 (9th Cir. 1977).
\textsuperscript{60} See id. at 1164.
\textsuperscript{61} See id. at 1162.
\textsuperscript{62} See id. at 1164.
\textsuperscript{63} See id.
Kroff, and a court may appropriately look to “specific criteria which can be listed and analyzed.”64 For example, were Pink Floyd’s Dark Side of the Moon to be tested against The Wizard of Oz, a court might hold that, since Pink Floyd’s lyrics do not incorporate any of the original dialogue or story elements of the film, the concepts described in the album are not substantially similar to the concepts of the movie. Therefore, no reasonable jury could find there to be substantial similarity of ideas.65 Presumably, the case should then be dismissed.

However, if a trackjack contains line-by-line changes of what is said on screen into other words that convey a similar meaning, a court would probably hold that, as a matter of law, there exists substantial similarity of ideas between the works. For example, in the “l33t Version”66 of the Star Wars Episode III: Revenge of the Sith trailer,67 subtitles are added to the trailer that translate the on-screen dialogue into a type of slang known as “l33t sp33k.”68 The words of the trailer can be listed side-by-side with the words of the translation, and an expert in “l33t sp33k” may be allowed to testify as to whether the ideas conveyed are similar or not.

If similarity of ideas is found, a court must proceed to ask whether there is substantial similarity of the expression of those ideas.69 The test for substantial similarity of expression is an “intrinsic” test that “does not depend on the . . . external criteria and analysis which marks the extrinsic test.”70 Instead, the intrinsic test asks whether the “ordinary reasonable person” would find the works to be substantially similar.71 The concern is not with dissection of

64. Id. The court elaborated that such criteria include “the type of artwork involved, the materials used, the subject matter, and the setting for the subject.” Id.
65. See Gardner, Is There Anything to It?, supra note 33 (“The pessimistic themes of Dark Side of the Moon stand in sharp contrast to the optimism of The Wizard of Oz.”)
68. See id.; see also Jeff Carooso, Are You l33t?, NETWORK WORLD, May 17, 2004, at 1.
69. See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp, 562 F.2d 1157, 1164 (9th Cir. 1977).
70. Id.
71. See id. (citing Int’l Luggage Registry v. Avery Prods. Corp., 541 F.2d 830, 831 (9th Cir. 1976)).
individual elements but with the “total concept and feel” of the works. In Krofft, the court noted that “no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.”

Under the Krofft test, it is likely that a court would find a work such as Wizard People, Dear Reader to be substantially similar to the underlying work. While Wizard People, Dear Reader has a style of its own, there is similarity both “extrinsically” in the characters, plot, and dialogue, and “intrinsically” in the themes and overall “feel.” The inquiry does not stop here, however. Even if Wizard People, Dear Reader were found to be substantially similar to Harry Potter and the Sorcerer’s Stone, it may nevertheless be considered not to be an infringement under the doctrine of “fair use.”

B. The Fair Use Doctrine

Congress’s authority to create copyright law is founded in Article I, Section 8 of the Constitution, which provides that Congress shall have the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” In explaining the constitutional purpose of copyright law, the Supreme Court stated that “[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.” Specifically, “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”

In its report accompanying the comprehensive revision of the Copyright Act of 1909, the Judiciary Committee of the House of Representatives wrote that when enacting a copyright law Congress should consider the following questions: “[f]irst, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the

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72. Id. at 1167.
73. Id. at 1164 (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).
public?” Where Congress leaves ambiguity in the law of copyright, the courts should likewise balance “the interests of authors . . . in the control and exploitation of their writings . . . [with] society’s competing interest in the free flow of ideas, information, and commerce.”

In the 1841 case of Folsom v. Marsh, Justice Joseph Story wrote of the “nice balance” upon which the question of piracy depended. According to Justice Story, Folsom involved “one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases.” In Folsom, the defendant had written a book entitled Life of Washington, over a third of which consisted of letters and other documents first published in the plaintiff’s book, Writings of President Washington. After finding that the plaintiff held the copyright to most of the letters and that the defendant had copied them, Justice Story considered the question of whether the copying was “a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs.” Justice Story “distilled the essence of law and methodology from the earlier cases,” and concluded that, when determining whether there is a “justifiable use,” a court should “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”

Justice Story’s discussion of justifiable use foreshadowed the development of the “fair use doctrine,” as codified in section 107 of the Copyright Act of 1976. The Act permits courts to find an action, which might otherwise constitute a violation of the exclusive rights of a copyright owner, to be a “fair use” of the copyrighted work at issue. The doctrine of fair use, originally created and articulated in case law,

78. Sony, 464 U.S. at 429.
79. 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).
80. Id.
81. See id. at 345.
82. Id. at 348.
84. Folsom, 9 F.Cas. at 348.
86. See id.; see also Campbell, 510 U.S. at 577 (discussing Congress’s intent in codifying the fair use doctrine).
“permits . . . courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”

Pursuant to section 107, the factors to be considered when making a determination of “fair use” include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

According to the Supreme Court, the factors listed in the statute are meant to be illustrative guidelines to be “weighed together, in light of the purposes of copyright.” No single factor is dispositive, and courts are not limited to these considerations alone.

In Harper & Row Publishers, Inc. v. Nation Enterprises, the Supreme Court applied the fair use provision of the Copyright Act to a case involving the “unauthorized use of quotations from a public figure’s unpublished manuscript.” The Nation magazine used a stolen, unpublished manuscript of A Time to Heal: The Autobiography of Gerald R. Ford to produce a short piece that “scooped” an article about to appear in Time Magazine. Harper & Row, the owners of the copyright to the unpublished manuscript, had an agreement to sell the exclusive right to print prepublication excerpts to Time. However, as a result of The Nation article, Time canceled the agreement and Harper & Row sued The Nation alleging copyright infringement.

The Supreme Court recognized that the fair use provision of the Copyright Act was intended to codify the common law doctrine, and “not to change, narrow, or enlarge it in any way.” Noting that the four factors enumerated in the section 107 were nonexclusive, the

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87. Campbell, 510 U.S. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1900)).
89. Campbell, 510 U.S. at 578.
90. See id. at 584-85.
92. See id. at 542.
93. See id.
94. See id.
Court identified the aim of the fair use doctrine as being a “constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.” 96 The Court went on to conclude that the unpublished nature of a work, although not determinative, “tend[s] to negate a defense of fair use.” 97 The Court reasoned that, though the right of first publication is expressly made subject to the fair use doctrine, “fair use analysis must always be tailored to the individual case.” 98

Such tailoring is especially evident in the Court’s application of the third factor of the fair use doctrine, which directs a court to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 99 The Court observed that “[i]n absolute terms, the words actually quoted were an insubstantial portion of ‘A Time to Heal.’” 100 However, the Court noted that the defendants had taken what a *Time Magazine* editor described as “the most interesting and moving parts of the entire manuscript” and what the lower court identified as “the heart of the book.” 101 The Court held that, although the portions taken were small in comparison to the whole, they constituted a substantial portion nonetheless. 102

The Supreme Court once again addressed the fair use doctrine in *Campbell v. Acuff-Rose Music, Inc.*, evaluating the potential fair use of a commercial parody of a copyrighted song. 103 Defendants, a rap music group known as 2 Live Crew, had written and released a song entitled “Pretty Woman,” which parodied the rock ballad by Roy Orbison and William Dees, “Oh, Pretty Woman.” 104 It was uncontested that 2 Live Crew’s song was an infringement of Orbison and Dees’ work; however, the defendants argued that their use was fair. 105 The Court proceeded to analyze the case using the four fair use

96. *Id.* (citing HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)) (alteration in original).
97. *Id.* at 554 (citing S. REP. NO. 94-473, at 64 (1975)).
98. *Id.* at 552 (citing S. REP. NO. 94-473, at 65).
101. *Id.* at 564-65 (emphasis added) (internal quotations omitted).
104. *See id.* at 572-73.
105. *See id.* at 574.
factors provided in section 107 of the Copyright Act, relating the factors back to Justice Story’s opinion in *Folsom v. Marsh.*

The *Campbell* Court first considered “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” The Court noted that “[t]he central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation.” Essentially, the first factor examines “whether and to what extent the new work is ‘transformative.’” The Court held that parody had an obvious claim to transformative value because it creates a new work out of an old one.

The Court observed that the second factor, “the nature of the copyrighted work,” “draws on Justice Story’s expression, the ‘value of the materials used.’” The Court held that “[t]his 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.” The Court held that the plaintiff’s original song, “Oh, Pretty Woman,” fell “within the core of the copyright’s protective purposes.”

The Court connected the third statutory factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” with Justice Story’s consideration of “the quantity and value of the materials used.” Referring to *Harper & Row,* the Court held that this factor informs the first factor, since “a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.”

The Court agreed with the lower court’s finding that 2 Live Crew’s song had taken a substantial portion of the original, but held

106. See id. at 576.
107. Id. at 578 (quoting 17 U.S.C. § 107(1) (2000)).
108. Id. at 579 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)) (alteration in original).
109. Id.
110. Id.
112. Campbell, 510 U.S. at 586 (quoting Folsom, 9 F. Cas. at 348).
113. Id.
114. Id.
116. Campbell, 510 U.S. at 586 (quoting Folsom, 9 F. Cas. at 348).
117. See supra text accompanying notes 91-102.
119. See id.
that parody requires a precise analysis that acknowledges its peculiar needs:

Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original’s most distinctive or memorable features, which the parodist can be sure the audience will know.120

Accordingly, the Court recognized that, while 2 Live Crew’s song copied the “heart” of the original song, “the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim.”121 Consequently, the Court held that “[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart,”122 and remanded the issue to the lower court to evaluate the amount taken “in light of the song’s parodic purpose and character.”123

The Court then considered the fourth statutory factor: “the effect of the use upon the potential market for or value of the copyrighted work.”124 This factor can be related to Justice Story’s inquiry into “the degree in which the original authors may be injured.”125 The Court of Appeals had held that if the intended use was commercial, the likelihood of a negative impact on the market for the original could be presumed.126 However, the Supreme Court found such a presumption to be in error.127 Because the case involved “something beyond mere duplication for commercial purposes,” market harm could not be simply inferred.128 According to the Court, 2 Live Crew’s song was transformative rather than superseding, and it served a different market function than the original.129 Furthermore, the Court held that some market harm may not even be cognizable, because “parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.”130 A court must

120. Id. at 588 (citation omitted).
121. Id.
122. Id.
123. Id. at 589.
124. Id. at 590 (quoting 17 U.S.C. § 107(4) (2000)).
128. Id.
129. See id.
130. Id. at 592 (quoting BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)).
distinguish between market harm caused by a parody that kills demand for the original and market harm caused by a parody replacing the original.\textsuperscript{131}

The next Part examines each of the statutory fair use factors in light of this relevant case law and predicts how a court might evaluate the possible fair use of trackjacking. Given the precedent set forth in \textit{Folsom}, \textit{Harper & Row}, and \textit{Campbell}, it is likely that a court would find trackjacking to constitute fair use of underlying copyrighted works.

\section*{III. ANALYZING THE FAIRNESS OF TRACKJACKING}

\subsection*{A. The Purpose and Character of the Use}

The first factor in the fair use analysis directs a court to look at “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”\textsuperscript{132} In older decisions, such as \textit{Sony Corp. of America v. Universal City Studios, Inc.}, the Supreme Court indicated that this was the most important factor, and that “every commercial use of copyrighted material is presumptively \ldots unfair.”\textsuperscript{133} In \textit{Campbell v. Acuff-Rose Music, Inc.}, however, this presumption was dismissed.\textsuperscript{134} Instead, the Supreme Court held that the proper inquiry should be whether the new work “supersedes” the original, “or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”\textsuperscript{135} If the new work is not “superseding” but is instead “transformative,” that determination will tend to weigh in favor of a finding of fair use.\textsuperscript{136} Transformative works “lie at the heart of the fair use doctrine \ldots , and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”\textsuperscript{137}

According to the \textit{Campbell} Court, “parody has an obvious claim to transformative value,”\textsuperscript{138} being a socially valuable creative activity

\begin{enumerate}
\item[131.] See id. at 592-93.
\item[134.] See 510 U.S. at 584-85.
\item[135.] \textit{Id.} at 579.
\item[136.] \textit{See id.}
\item[137.] \textit{Id.}
\item[138.] \textit{Id.}
\end{enumerate}
that can create a new work out of an older one. The Court noted that, in order to comment on the original work, the parodist requires the right to use some elements of the original work.139 However, the Court also suggested that when the original is merely copied “to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.”140

Like parody, trackjacking is potentially a socially valuable and creative activity that can create a new work from an older one. Also like parody, trackjacking requires the right to use some elements of the original work in order to be effective. While trackjacking may be parody, and thus fall directly within the scope of Campbell’s fair use analysis, that is not always the case. What if a trackjacker takes a dialogue-heavy film and replaces the dialogue with lines of his own that have nothing to do with the plot or characters of the original work? The trackjacker would not choose the film because it has anything to do with the story he wants to tell, but rather to save himself the trouble and expense of filming the scenes. Such a practice would allow aspiring filmmakers to “avoid the drudgery in working up something fresh”141—exactly the activity that copyright law seeks to protect against.

Trackjacking need not always be parody in order to be sufficiently “transformative,” however. Trackjacking does not find its way under the protective umbrella of the fair use doctrine by riding the coattails of parody. Rather, trackjacking deserves the protection of the fair use doctrine on its own merit: it puts older works to new and different uses. A trackjack may “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”142 This conjures the very definition of what it means for a new work to be “transformative.” The trackjacker who produces such a work may be considered less like the parodist who takes elements of a work in order to mock the original,143 and more like the teacher who takes elements of a work in order to

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139. See id. at 580-81.
140. Id. at 580.
141. Id.
142. Id. at 579.
143. See, e.g., Mightygodking.com, I Don’t Need Your Civil War, http://mightygodking.com/index.php/i-dont-need-your-civil-war/ (last visited Nov. 3, 2007) (parodying Mark Millar et al., Civil War (2006)).
teach something unrelated to the original. A court may find that the first factor in the fair use analysis—the purpose and character of the use—favors certain kinds of trackjacking.

B. The Nature of the Copyrighted Work

The second fair use factor directs a court to look at the “nature of the copyrighted work.” In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court indicated that works involving a high degree of creativity, such as fictional works, are entitled to more protection than works that are factual in nature. However, the *Campbell* Court also noted that the fact that a work is close to the core of copyright is not “ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.” For trackjacking that is parody, such as *Wizard People, Dear Reader*, a court would probably find that this factor is inconclusive.

However, trackjacking need not inevitably borrow from well-known, expressive works. A sufficiently creative trackjacker may base their work on fact-based works, such as documentary footage or a newscast, media less worthy of copyright protection than films such as *The Wizard of Oz* or *Harry Potter and the Sorcerer’s Stone*. Using an unknown or uncreative work would allow a court to find that this factor squarely favors a finding of fair use.

The harder case would be trackjacking that uses a creative work, but does not parody it. In that case, a court would probably find that this factor does not favor a finding of fair use. However, this factor is not dispositive, and a court may consider the analysis under other factors sufficiently weighty to overcome a negative result under this factor.

C. The Amount and Substantiality of the Portion Used

The “amount and substantiality of the portion used in relation to the copyrighted work as a whole” is the third factor of the fair use
In *Campbell*, the Court recognized that “the extent of permissible copying varies with the purpose and character of the use.” The essential directive here is that a fair use should take no more than is necessary in order to accomplish its purpose.

The amount and substantiality prong is linked with the fourth factor—the “effect of the use upon the potential market for or value of the copyrighted work.” Essentially, the more a work takes, the more likely it is to serve as a market substitute for the original. Since trackjacking requires synchronization between the new work and the old, some of the old work will naturally be incorporated into the new work. For example, *Wizard People, Dear Reader* takes many of its plot elements and characters from *Harry Potter and the Sorcerer’s Stone* in order to parody them. However, the complete product is arguably a new, independent work in its own right.

Defining the extent of the portion used by trackjacking is difficult because the relationship between the original work and the derivative works is symbiotic. It may appear that *Wizard People, Dear Reader* has “used” the entire on-screen portion of the movie *Harry Potter and the Sorcerer’s Stone*; however, according to *Campbell*, this is not the sort of “use” that a court should consider relevant under the third factor.

The *Campbell* Court held that, because the nature of parody requires that a parody take the “heart” of the original in order to make a recognizable reference to that original, the proper inquiry is not whether the parody takes the heart of the work, but whether the amount taken is excessive in light of the parody’s purpose and character. Likewise, because the nature of trackjacking requires that it relate to the visual content of the original work, the proper inquiry should be whether the trackjacker has taken more than is necessary in order to accomplish this purpose.

While *Wizard People, Dear Reader* might serve as a substitute for the way a consumer enjoys *Harry Potter and the Sorcerer’s Stone*, it cannot serve as a market substitute. While a consumer may enjoy

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151. See id. at 588-89.
153. See *Campbell*, 510 U.S. at 591.
154. See supra text accompanying notes 39-46 (discussing the *Wizard People, Dear Reader* trackjack).
155. See supra text accompanying notes 133-40 (discussing the *Campbell* Court’s focus on transformative uses).
156. See supra text accompanying notes 119-23.
Wizard People, Dear Reader alongside Harry Potter and the Sorcerer’s Stone, the consumer will not purchase one instead of the other. Instead, users who wish to have the full experience will have to obtain both. Because of this unique feature, a court is likely to find that the third factor of fair use favors trackjacking, even when substantial portions of the plot, characters, or dialogue of the original work are used.157

D. The Effect of the Use

The fourth factor in the fair use analysis directs a court to consider “the effect of the use upon the potential market for or value of the copyrighted work.”158 As discussed above, Wizard People, Dear Reader occupies an enviable position under this factor compared to other derivative works because it requires users to obtain (by renting or purchasing) the original movie of Harry Potter and the Sorcerer’s Stone in its entirety.159 Wizard People, Dear Reader can only help, not hurt, the market for the original film by giving consumers an additional reason to purchase the movie. Such an arrangement leaves owners of trackjacked works little room to complain, as far as demand for their original work is concerned. This would be true even if a work such as Wizard People, Dear Reader were sold rather than given away. Because commercial works no longer carry a presumption of unfairness,160 it appears that trackjacking could potentially be done for profit yet still fare well under this final factor.

Because there is little or no likelihood of market harm as a result of trackjacking, trackjacking should prevail under this effect of the use factor. A parodist who replicates the work of another, adds something of his own, and sells both together, may capture some of the value of the original work at the expense of the original author. In contrast, however, the trackjacker is only compensated for what he adds, while still allowing the original author to be fully compensated for the underlying work. Even the argument that a derisive parody might suppress demand for the original, an argument specifically rejected in Campbell,161 cannot be made against trackjacking. Even if a trackjack became so popular that more consumers chose to enjoy it rather than the original work, those consumers would still be paying

157. See Campbell, 510 U.S. at 591.
159. See supra Part III.D.
160. See Campbell, 510 U.S. at 584-85.
161. See id. at 591-92.
the author of the original to gain the full experience. A critical trackjacket may actually benefit the pocketbooks of the owners of the underlying work, bolstering the argument for a finding of fair use for the new craft. Therefore, this final factor strongly supports a finding of fair use.

Under these factors it would seem that a court could easily find that *Wizard People, Dear Reader* is a fair use. Because *Wizard People, Dear Reader* is transformative rather than superseding, an examination of its purpose and character favors a finding of fair use under the first factor. Further, because *Wizard People, Dear Reader* is parody, the fact that *Harry Potter and the Sorcerer’s Stone* is a creative work does not weigh heavily against a finding of fair use under the second factor. Additionally, because the nature of *Wizard People, Dear Reader* requires it to take enough from the original in order to synchronize with the character and story of the underlying work, yet without being able to serve as a market substitute, it does not take enough to be “excessive” under the third factor. Finally, because *Wizard People, Dear Reader* is unlikely to harm the market for *Harry Potter and the Sorcerer’s Stone*, an examination of the effect of the use favors a finding of fair use under the fourth factor.

IV. Solution: Advice to Trackjackers

Although trackjacketing is arguably a fair use, trackjackers should protect themselves and their work nonetheless. The key to ensuring that trackjacketing will survive legal challenges is to demonstrate that trackjacketing is a creative form of art that will advance the public good. Based on an analysis under the current law, five pieces of advice are readily apparent for those trackjackers who wish to operate within the boundaries of the law.

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163. See supra text accompanying notes 132-44 (discussing the first factor of fair use).
164. See supra text accompanying notes 145-48 (discussing the second factor of fair use).
165. See supra text accompanying notes 149-57 (discussing the third factor of fair use).
166. See supra text accompanying notes 158-66 (discussing the fourth factor of fair use).
167. See supra text accompanying notes 79-87 (discussing the original rationale for the fair use doctrine).
A. Add Something New and Creative

First, trackjackers should add something new and creative that alters the purpose, message, or character of the underlying work. Courts are less likely to protect works that are parasitic in nature. If trackjacking appears to be merely a way to ride the coattails of a previous popular work without adding anything new and substantial, it is less likely to be found to be “transformative” under the first factor of fair use. Instead, trackjackers should endeavor to make unique and original works of art that contribute more than they take.

B. Trackjack Unknown or Unpopular Works

Second, trackjackers could use unknown or unpopular works. In *Campbell*, the Court noted that parodies will usually copy well-known creative works. The same is not necessarily true of trackjacking. Parody relies upon the audience’s familiarity with the nature of the original work. Trackjacking need not necessarily parody, however, and may be based on unknown and unpopular works. *Mystery Science Theater 3000* has demonstrated that even the worst movies can be transformed into something entertaining through inventive means. By using unknown or unpopular works, trackjackers may demonstrate that trackjacking is not dependent upon the creative genius of other authors and that it is a valuable art form that should be allowed and encouraged.

C. Use Uncreative Works as Underlying Material

Third, trackjackers could use uncreative works as underlying material. By using factual footage, such as newscasts, documentaries, and training videos, trackjackers may receive a more favorable analysis under the second fair use factor. Because the aforementioned sources are not creative, they are not so close to “the core of copyright” and are not entitled to the heightened copyright protection of their fictional, creative counterparts. By using

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168. See supra text accompanying notes 135-36.
169. See *Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors . . . weigh[ing] against a finding of fair use.”).
170. See supra Part III.B.
171. See *Campbell*, 510 U.S. at 598.
172. See supra text accompanying notes 11-12.
173. See supra Part III.B.
uncreative, fact-based works, it is more likely that trackjacking would fall within the bounds of fair use.  

D. Encourage Consumers to Obtain Underlying Works Legally

Fourth, trackjackers should encourage consumers to obtain legally the underlying work that their trackjack is to accompany. Even if the illegal actions of some consumers cannot be directly attributed to trackjackers, such activity will undermine the argument under the fourth prong of fair use analysis that trackjacking does not serve as a market substitute for the original work. If trackjacking goes hand-in-hand with illegally obtaining the underlying work, the economic benefit that could have accrued to the author of the original work would be diminished, and a substantial part of what sets trackjacking apart from permissible fair use derivative works, such as parodies, would be lost.

E. License the Underlying Works or Use Public Domain Works

Finally, trackjackers should take precautions to protect against possible infringement of underlying works. Despite the availability of a viable fair use argument, one path of least resistance is to avoid infringement altogether by licensing the rights to films. Trackjackers may also avoid liability by using public domain works as their underlying inspiration. Classic public domain films such as Alfred Hitchcock’s *The 39 Steps* or F. W. Murnau’s *Nosferatu* for

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174. See Campbell, 510 U.S. at 586.
175. See e.g., Creating a “Wizard People, Dear Reader” DVD on Linux, http://apocalyptech.com/linux/wpdr/ (last visited Nov. 5, 2007) (explaining how to recreate *Wizard People, Dear Reader* by using the Harry Potter and the Sorcerer’s Stone DVD).
176. See supra Part III.D.
179. *Nosferatu, Eine Symphonie des Grauens* (Prana-Film GmbH Film 1922) (American Release: *Nosferatu, A SYMPHONY OF HORROR* (Film Arts Guild 1929)). Notably, the film was found to infringe upon Bram Stoker’s copyright-protected *Dracula*; rather than paying damages, the production company declared bankruptcy and agreed to the destruction of the negative and all prints of the film. Phil Hall, The Bootleg Files: “Nosferatu,” FILMTHREAT.COM, Oct. 26, 2007. http://www.filmthreat.com/index.php?section=features&Id=2056. Today, the film is in the public domain and available for
example, would seem to lend themselves well to some new creative input, and could be distributed along with the new audio without having to worry about infringement.

V. CONCLUSION

Trackjacking has the potential to become a significant new form of art. Because it can create new, valuable works, it is the type of socially beneficial activity that the fair use doctrine is intended to protect. New technologies, such as digital recording and online distribution, have made trackjacking economically viable, and future technologies may open even more unanticipated forms of expression. The defense provided by the fair use doctrine encourages such creative advances and should be utilized to help foster the development and sustainability of the new art of trackjacking and the artistic possibilities it provides.

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