

Can Intentional or Knowingly Reckless Misuse of Copyrighted Material Be Considered “Fair Use?”

GUYLYN CUMMINS AND VALERIE E. ALTER

During the heat of the Obama/McCain presidential campaign, creative juices flowed into candidate ads designed to persuade the nation’s voters to make the “correct” presidential decision. Notwithstanding a web of strict campaign and truth-in-advertising laws, the campaigns sometimes crossed the thin line between creativity and intentionally false or misleading implications by using copyrighted works to attribute viewpoints or endorsements to those who did not hold them.

During her speech at the 2008 Republican convention, Sarah Palin quipped that the difference between a hockey mom and a pit bull was “lipstick.” Within days, Barack Obama used the term “lipstick on a pig” at a campaign rally. In response, the McCain campaign posted an online ad designed to criticize Obama for his remark. The ad used a clip of *CBS Evening News* anchor Katie Couric referring to sexism in America, and placed the clip to make it appear that she was referring to Obama’s remark. In fact, Couric’s commentary had been broadcast months earlier and was referring to the impact of sexism on Hillary Clinton’s campaign. Suffice it to say that neither CBS nor Couric was pleased with the campaign’s use of the footage.

Although the ad quickly disappeared while CBS and the McCain campaign debated whether that use of the copyrighted news clip was a fair use under copyright law, the legal question remains. The question is important because, as the Supreme Court has recognized, false speech is of little value, if any, and society is best served by discouraging it. However, traditional tort claims based on false speech or false endorsements may not provide a remedy for those wronged by intentionally or recklessly false uses of copyrighted

materials. Courts have thus begun to adapt the traditional copyright fair use analysis embodied in the Copyright Act (17 U.S.C. § 107) to provide a copyright remedy to those wronged by false or misleading uses of copyrighted works.

As the case law develops, courts will undoubtedly refine the test first proposed by the Second Circuit in *Maxtone-Graham v. Burchell*, which essentially considers whether distortions or misrepresentations are so egregious that no reasonable person could find them to be the product of mere carelessness. This article explores whether courts should refine the *Maxtone-Graham* test and look to the constitutional malice doctrine applied in defamation, false light, and similar claims involving falsehoods to supplement, or at least to inform, the traditional copyright fair use analysis for cases involving intentionally or knowingly reckless false or misleading uses of copyrighted materials.

Traditional Tort Claims

The McCain ad presents an implied false endorsement in a political advertisement. Traditional tort claims—like defamation, false light, false endorsement, or false advertising—may not provide a remedy.

First, tort liability for defamation attaches only where all elements of a defamation claim are established. Thus, a defamation claim will not afford a remedy in a case like the McCain campaign ad where the use of copyrighted material may be injurious, but may not necessarily be “defamatory.”¹

Similarly, a claim for false endorsement under the Lanham Act requires the use of a person’s identity to indicate sponsorship or approval of a product resulting in consumer confusion.² A political advertisement like the McCain ad is not a commercial product to which such tort liability would generally attach.³ A Lanham Act false advertising claim may be equally inapplicable because it applies to misstatements about a competitor’s or one’s own products.⁴

A false light claim also may be unavailing in this context as it would

require that the use of the copyrighted work be “highly offensive to a reasonable person.”⁵ The McCain ad may not satisfy this criterion, and, therefore, false light torts would provide no remedy.⁶

Traditional torts may thus not provide a remedy for a knowing or intentional false use of a copyrighted work, like that which occurred in the McCain ad. The parameters for the fair use analysis therefore become more important to the issue of whether the Copyright Act can fill that void, and provide a remedy for the false and/or misleading use of a copyrighted work.

As shown below, courts have recently begun to fill the void left by traditional tort claims by permitting copyright owners to prevail over a fair use defense where the claim involves the intentionally or recklessly false use of copyrighted material. Although the current case law is a good start, it may be aided by considering whether a use of a work is intentionally false or misleading under the constitutional malice standard typically applied in defamation cases. Applying the constitutional malice test could properly balance copyright and First Amendment interests and yield the correct result.

The history of the fair use doctrine provides an instructive starting point for an expanded fair use analysis.

History of the Fair Use Doctrine

Fair use has existed for almost 300 years.⁷ Today, the fair use doctrine is codified in the Copyright Act of 1976, which provides that a fair use is not an infringement of copyright.⁸

Despite its longevity, as Judge Pierre Leval of the Second Circuit Court of Appeals once marveled, “What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives.”⁹ Instead, the 1976 Copyright Act largely adopted the guideposts Justice Story set forth in his 1841 decision in *Folsom v. Marsh*:

Guylyn Cummins (gcummins@sheppardmullin.com) is a partner in the downtown San Diego office of Sheppard Mullin Richter & Hampton LLP. *Valerie E. Alter (valter@sheppardmullin.com)* is an associate in the firm’s Los Angeles/Century City office.

In short, we must often . . . 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.¹⁰

As Judge Leaval aptly noted, rather than merely “guess and pray” about how courts will resolve copyright disputes, fair use should be perceived as a “rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law[,]” and not as a “disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law[.]”¹¹

So let’s turn to the objectives of copyright law.

Copyright Objectives

The Supreme Court has observed that copyright serves two primary objectives: (1) “to assure contributors to the store of knowledge a fair return for their labors” and (2) to “motivate the creative activity of authors and inventors” “in order to benefit the public.”¹² In light of these goals, the Copyright Act itself now protects the fair use of copyrighted materials for general educational or illuminating purposes “such as criticism, comment, news reporting, teaching . . . scholarship, or research.” The Act identifies four primary factors to be considered by courts in determining whether a use is “fair”:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;¹³
2. the nature of the copyrighted work;¹⁴
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;¹⁵ and
4. the effect of the use upon the potential market for or value of the copyrighted work.¹⁶

“The factors enumerated . . . are not meant to be exclusive: ‘[Since] the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.’”¹⁷ While courts must consider the Copyright Clause’s enumerated “nonexclusive” factors, judges must still examine fair use from all

angles to determine if the defendant’s use would serve or disserve the objectives of the Copyright Act in a particular case.¹⁸ In making this determination, courts have considered whether (1) a defendant acted in good faith and (2) the use is in the public’s interest. Both of these factors in their current form may already prevent a finding of fair use where the use in question is false and misleading, but both also may benefit from an incorporation of the constitutional malice standard.

Good or Bad Faith

Since the language of the Copyright Act explicitly suggests additional unenumerated factors bear on a fair use finding, and although bad faith is not one of the enumerated factors,¹⁹ the Supreme Court has considered it in evaluating the “purpose and character” of the questioned use.²⁰

In *Harper & Row*, *The Nation* magazine obtained an unauthorized copy of President Gerald Ford’s then-unpublished memoirs. The editor of *The Nation* “knew that his possession of the manuscript was not authorized and that the manuscript must be returned quickly to his ‘source’ to avoid discovery,” but published juicy excerpts of the memoirs anyway.²¹ Harper & Row sued for copyright infringement, and *The Nation* asserted a fair use defense. In analyzing the “purpose and character of the use,” the Court considered *The Nation*’s bad faith stating, “The trial court found that *The Nation* knowingly exploited a purloined manuscript. Unlike the typical claim of fair use, *The Nation* cannot offer up even the fiction of consent as justification.”²² The Court ultimately rejected a fair use defense for various reasons, including the fact that prior to *The Nation*’s publication, the memoirs were unpublished and subject to lucrative contracts for right of first publication of excerpts, which went unpaid in the face of *The Nation*’s “scoop.”²³

The Second Circuit followed suit, analyzing bad faith in the context of a fair use defense in *NXIVM Corp. v. First Principles, Inc.*²⁴ There, the plaintiff ran nonprofit websites “in connection with his work as a for-profit ‘cult-deprogrammer.’ The websites provide[d] information to the public about controversial groups, about which complaints of mind control ha[d] been lodged.”²⁵ The defendant publisher learned about NXIVM’s “activities in the course of his de-programming services.”²⁶ He obtained from a one-time participant in a NXIVM

seminar a copy of NXIVM’s manuscript, which was unavailable to the general public, and which NXIVM attempted to protect from disclosure with nondisclosure agreements. The publisher prepared two reports analyzing and critiquing NXIVM’s manuscript, and, in doing so, quoted from and publicized sections of it.²⁷ NXIVM sued for copyright infringement (among other claims). In the face of a fair use defense, the district court denied the request for preliminary injunction, noting NXIVM would not likely succeed on the merits. NXIVM appealed. The Second Circuit criticized the district court for not considering “‘the propriety of . . . defendant’s conduct,’ as directed by *Harper & Row*.²⁸ The court noted, “to the extent that [the publisher] knew that his access to the manuscript was unauthorized or was derived from a violation of law or breach of duty, this consideration weighs in favor of plaintiffs.”²⁹ Yet, the court gave little weight to its bad faith finding because it is not itself “conclusive of the fair use question, or even the first factor.”³⁰ The court ultimately affirmed the district court’s denial of NXIVM’s motion for preliminary injunction.

A district court in the Northern District of California considered a similar scenario in *Savage v. Council on American-Islamic Relations, Inc.*³¹ There, the host of a nationally syndicated radio program, *The Savage Nation*, made comments about the September 11 attacks, Muslims, and defendants, the Council on American-Islamic Relations Action Network, Inc. and the Council on American-Islamic Relations of Santa Clara, Inc. (collectively CAIR). CAIR responded in a detailed commentary entitled *National Radio Host Goes on Anti-Muslim Tirade*, which it posted on its website.³² CAIR also posted an audio file containing excerpts from the radio show, which in its entirety ran for four minutes and thirteen seconds.³³ *Savage*’s host sued for copyright infringement, among other claims, “alleg[ing] that defendants’ unauthorized use of his remarks was taken out of context and that defendants’ ‘misportayals’ destroyed the value of his material and led to a loss of advertising revenue.”³⁴ In response, CAIR raised a fair use defense. *Savage*’s host countered that the infringement was not done for genuine criticism or comment, but instead to misrepresent his views in order to raise funds for their own political purposes as a foreign agent for intentional terror under the guise of

a nonprofit, civil rights group. *Savage*'s host alleged these motives were "fatal" to a fair use defense because fair use presupposes good faith and fair dealing.³⁵ In rejecting the argument, the court reasoned that conflating "motive" with the purpose and character of the use factor is not permitted. Rather, even assuming the allegations about the motive were true, "it is the manner of the use, not the motivation behind it, which must be analyzed."³⁶ The court characterized the Supreme Court's consideration of good faith in *Harper & Row* as limited to "how the original work was obtained, not the motive behind the use."³⁷ Thus, the court gave no weight to the claim that CAIR misrepresented the *Savage* host's views.

Other courts have not interpreted the *Harper & Row* holding as narrowly. In *Maxtone-Graham v. Burtchaell*, the Second Circuit considered a case where a plaintiff argued that a defendant's fair use defense should fail because he misrepresented the plaintiff's work.³⁸ The plaintiff had published a book of interviews of women and their experiences with abortion and unwanted pregnancies in general terms. The defendant sought permission to quote the plaintiff's work in his work, which attempted to "critique the published accounts of 'abortion veterans'" and to contribute to the broader debate on abortion.³⁹ The plaintiff denied the request because the women interviewed in her book "told their stories in order to further the understanding of the Pro-Choice view," and . . . she promised to honor their wishes.⁴⁰ The defendant quoted from the work anyway, and the plaintiff sued for copyright infringement. In the face of a fair use defense, the plaintiff argued that the defendant should not have been entitled to avail himself of a fair use defense because defendant "misled his readers by quoting women describing their experiences with adoption as if they were discussing abortion."⁴¹ The Second Circuit concluded "that many of [the plaintiff's] charges are well-founded—especially those relating to the muddling of adoption and abortion experiences. [The defendant's] scholarship clearly leaves something to be desired, and it is equally unfortunate that the numerous inadequacies in [the defendant's work] escaped the editors' attention."⁴² However, the misrepresentations in the work were not sufficient to negate the fair use defense:

Only where the distortions were so deliberate, and so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness would we incline towards rejecting a fair use claim. The errors in [the defendant's work] do not cross that threshold.⁴³

Lower courts in the Second Circuit have followed this demanding intent test. In *Wojnarowicz v. American Family Association*, American Family Association (AFA) made its mission to campaign "against what it characterizes as the subsidization of 'offensive' and 'blasphemous' art by the National Endowment for the Arts."⁴⁴ The plaintiff was an artist whose work was

assertedly directed at bringing attention to the devastation wrought upon the homosexual community by the AIDS epidemic . . . [and] at times incorporate[d] sexually explicit images for the avowed purpose of shaping community attitudes towards sexuality. As a result, his works have been the subject of controversy and public debate concerning government funding of non-traditional art.⁴⁵

To protest what it viewed as the NEA's funding of offensive art, the AFA "photographically copied fourteen fragments of plaintiff's works which [it] believed most offensive to the public and reproduced these fragments in the AFA pamphlet."⁴⁶ More specifically, the chosen images portrayed "sexual acts" and an image of "Christ with a hypodermic needle inserted in his arm" (among others).⁴⁷ The plaintiff sued the AFA, asserting copyright infringement. The AFA raised a fair use defense, and the plaintiff argued that fair use did not apply because the "defendants' misleading distortion of his work in order to make it appear more 'offensive' than a true and accurate reproduction renders their criticism outside the scope of the" fair use doctrine.⁴⁸ The district court rejected the argument, noting that the standard that the Second Circuit set in *Maxtone-Graham* is high:

[P]laintiff has not established defendants' intent to distort plaintiff's work and to represent the fragments as complete composite works of art with sufficient clarity to surmount that threshold. While the pamphlet

published by defendants misrepresents the original work, it is clear that reasonable persons could find the distortion to be the product of mere carelessness.⁴⁹

The court upheld the secondary use as a fair use.⁵⁰

A similar issue arose again in *Lish v. Harper's Magazine Foundation*.⁵¹ The plaintiff, an esoteric writer and writing instructor who taught workshops in New York, claimed that his "course [was] conducted in an atmosphere of great privacy, and [he] impose[d] strict confidentiality on his students."⁵² The defendant obtained a letter that the plaintiff had distributed to his writing workshop without the plaintiff's permission, and printed an edited and excerpted version of the letter in its magazine with a short introduction.

The deletions—totaling approximately 48 percent of the excerpt—were not marked by ellipses. The only indication in the magazine that the letter had been edited at all was the statement in the introduction "From an introductory letter sent last summer by Gordon Lish to students enrolled in his fall fiction writing workshop."⁵³

The plaintiff sued for copyright infringement, and the defendant raised a fair use defense. The plaintiff argued that fair use was not viable because the defendant "malevolently distorted the Letter and falsely presented it to the public as [the plaintiff's] own work."⁵⁴ The court recognized that "[f]airness in the treatment or editing of the material is an element of good faith," but held the plaintiff had not proven that the defendant acted in bad faith.⁵⁵ The defendant's principal "testified credibly, upon searching and lengthy examination by [the plaintiff's] counsel, to his and [the defendant's] decision to publish the [letter] and for the particular deletions made; and his testimony . . . emphatically established [the defendant's] good faith in the circumstances."⁵⁶ Thus, the court, focusing its analysis "solely on the nature of [the defendant's] use of the Letter," held in the plaintiff's favor after a bench trial.⁵⁷

Finally, a district court in Massachusetts applied the Second Circuit's analysis in *Maxtone-Graham* in evaluating a claim of copyright infringement in *National Association of Government Employees v. Buci Television, Inc.*⁵⁸ There, a police officer in Newton, Massachusetts,

and a resident had a fight that resulted in the resident's arrest. The charges were dropped, and the town offered to settle the civil claims for \$150,000.⁵⁹ The plaintiff, a radio broadcaster, presented the officer's side of the story, criticized the town's settlement offer, and insinuated that the settlement offer was made only because both the resident and the town's mayor were Jewish. As a result of the plaintiff's comments, the town withdrew the settlement offer. The defendant newspaper reported "the settlement withdrawal followed 'televised appeals' by the [officer's] supporters, and characterized the controversy as 'an increasingly ugly dispute tinged with charges of Anti-Semitism.'"⁶⁰ The newspaper further reported the plaintiff in his broadcast "decried the \$150,000 payment, and suggested that it grew out of a Jewish mayor's efforts to funnel taxpayer money to a Jewish constituent."⁶¹ The plaintiff sued, claiming the defendant "intentionally conflated two different quotes of [his] into the defamatory innuendo of Anti-Semitism."⁶² The plaintiff attempted to defeat the fair use argument, arguing the defendant used his copyrighted material "for a smear campaign, not for news reporting."⁶³ The court ultimately granted the defendant's motion for summary judgment because, among other things, the "alleged misinterpretation of [the plaintiff's] comments do not reveal 'distortions . . . so deliberate, and so misrepresentative of the original work' to show bad faith use."⁶⁴

These cases show that while *Maxtone-Graham* and its progeny appear to provide a remedy for those injured by a misleading use of a copyrighted work, the bar is set very high—so high that it is difficult for any plaintiff to meet it. Moreover, the bar is the same regardless of whether or not the plaintiff is a public figure. Finally, by employing a reasonable person standard, these cases will almost always go to a jury, regardless of the available evidence about a defendant's good or bad faith. Although it is clearly important to ensure that First Amendment rights are protected, the *Maxtone-Graham* test may set such a high bar that it provides a safe haven for the very conduct it was attempting to address. Thus, as explained in more detail below, society may thus be better served by looking to the well-developed constitutional malice standard to supplement and temper the *Maxtone-Graham* test.

Public Interest

Courts also have considered the public's interest in a particular work when evaluating a fair use defense. Public interest has loomed large where a plaintiff attempts to use copyright to block the public's access to information,⁶⁵ which the public has a constitutional right to receive.

For example, in *Rosemont Enterprises Inc. v. Random House, Inc.*, the Second Circuit considered the public interest in evaluating the defendant's fair use defense.⁶⁶ The defendant intended to publish a biography of Howard Hughes based in part on articles written for *Look* magazine. Hughes somehow obtained a galley proof of the unpublished, unauthorized biography and thereafter acquired the copyrights to the *Look* magazine articles in an effort to stop the biography's publication. Because the acquisition of the *Look* magazine articles occurred after Hughes warned Random House that there would be "trouble" if the unauthorized biography was published, the court found that the copyrights were acquired for the express purpose of preventing the biography from being published, and ultimately held that the biography was a fair use. The court stated:

Biographies, or course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so "that the world may not be deprived of improvements, or the progress of the arts be retarded."⁶⁷

Similarly, in *Meeropol v. Nizer*,⁶⁸ the district court held that author Louis Nizer's publishing of copyrighted letters of accused spies Julius and Ethel Rosenberg was a fair use because "the continuing interest in and importance of the celebrated Rosenberg case probably entitles the defendants' new book to invocation of the fair use defense."⁶⁹ Citing *Rosemont*, the district court weighed the "greater public interest," i.e., whether distribution of the letters "would serve the public interest in the free dissemination of information and whether their

preparation requires some use of prior material dealing with the same subject matter," and determined it did.⁷⁰

Finally, in a case involving a unique home movie of the Kennedy assassination, *Time, Inc. v. Bernard Geis Associates*,⁷¹ the court held the defendant's copying of frames from plaintiff's motion picture constituted fair use in view of the "public interest in having the fullest information available on the murder of President Kennedy."⁷² The court also noted the author did serious work on the subject matter and "has a theory entitled to public consideration."⁷³

Each of the above cases found that the public interest favored a finding of fair use when such use provided the public with access to important information.

Maxtone-Graham may set such a high bar that it provides a safe haven for the conduct it attempts to address.

However, the same logic does not apply to intentional misrepresentations of copyrighted works. On the contrary, intentional misrepresentations of copyrighted works do not serve the public interest at all. As the Supreme Court has recognized, there is simply no public interest in false facts. As discussed in the next section, the constitutional malice test may be one way to account for the fact that there is no public interest in false facts, and to properly balance First Amendment rights to freedom of speech and access to information against copyright.

Constitutional Malice Standard

Courts may wish to look to the more predictable constitutional malice standard to inform their fair use analysis of deliberately false and misleading uses of copyrighted materials.⁷⁴ Many parallels exist between fair use and free speech protected by the First Amendment that support application of the constitutional malice test to fair use claims involving false and misleading uses of copyrighted works. Both protect robust public discussion and debate on matters of importance to society, including dissemination of ideas and opinions.⁷⁵ First Amendment

and fair use protections give way to false statements of fact made with the requisite level of fault and uses of copyrighted material that deliberately misrepresent the original work, respectively. Given these similarities, the relatively new *Maxtone-Graham* test may benefit from the experience of the constitutional malice standard, which has long been used to balance free speech and robust public debate on important public issues against deliberate falsehoods.

The constitutional malice test was articulated in *New York Times v. Sullivan*, where the Supreme Court held that “erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have

The constitutional malice standard requires the plaintiff to prove the speaker believed a statement to be false.

the ‘breathing space’ that they ‘need to survive.’”⁷⁶ A public figure must therefore prove constitutional malice to recover for false, defamatory speech, while private figures need only establish fault in accordance with the required state law standard, e.g., negligence or recklessness.⁷⁷

The standard for imposing liability for false speech, particularly with respect to public figures, is very high because truth is the ultimate goal of a system of free expression. Courts are hesitant to inhibit the truth-seeking process. The First Amendment’s central purpose is to facilitate “the common quest for truth,”⁷⁸ and categories of unprotected speech are defined by their lack of contribution to that process:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These included the lewd and obscene, the profane, the libelous and the insulting or “fighting” words —those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁷⁹

The Supreme Court’s fundamental First Amendment analysis thus focuses on the distinction between false facts and false ideas. Recognizing that there is no such thing as a false idea, the Court’s opinions in *New York Times Co. v. Sullivan*⁸⁰ and *Gertz v. Robert Welch, Inc.*⁸¹ leave to the marketplace of ideas the process of correcting ideas with the competing impact of other ideas. The contrasting premise is that the First Amendment affords lesser protection for false statements of fact. In the closely related field of libel, there is recognition that “there is no constitutional value in false statements of fact.”⁸²

In its constantly recurring marketplace-of-ideas metaphor, the Court envisions public debate as a truth-seeking process. While “false statements of fact are particularly valueless” because “they interfere with the truth-seeking function of the marketplace of ideas,”⁸³ strict liability for valueless remarks is prohibited because of its chilling effect on speech and the process itself. Accordingly, false statements are protected by a proof requirement far different from strict liability, i.e., a burden of proof placed upon the plaintiff requiring both a showing of falsity and a showing of the “requisite level of culpability.”⁸⁴

In addition to defamation, the constitutional malice standard noted above has been applied to other torts. In *Time Inc. v. Hill*,⁸⁵ the Supreme Court applied it to false light claims, which occur when a person is placed in a false light a reasonable person would find highly offensive. The Court applied this standard both because it felt that the public issue being discussed deserved First Amendment protection and because a false light claim is similar to defamation in dealing with falsities.⁸⁶

Similarly, the constitutional malice standard has been applied to the tort of intentional infliction of emotional distress.⁸⁷ In finding that a plaintiff alleging an intentional infliction claim for a false statement could not plead around the First Amendment, the Supreme Court held that political and public debate cannot be restrained merely because of a victim’s emotional distress.⁸⁸

In essence, the constitutional malice standard requires the plaintiff to prove that the speaker believed a statement to

be false, but nonetheless spoke it anyway. The proof may show that a speaker made the statement with actual knowledge of its falsity or with serious doubts of its probable falsity.⁸⁹ In other words, the speaker must make the false statement with at least serious doubts as to its truth.⁹⁰ The inquiry is objective, and does not require an examination of the speaker’s motives.

Should the fair use analysis factor in the constitutional malice test where use of a copyrighted work is to intentionally or recklessly convey a false implication? At least one author who has recently grappled with a similar issue has concluded in the affirmative.

Mark A. Petrolis wrestled with the fair use/constitutional malice issue in his article *An Immoral Fight: Shielding Moral Rights with First Amendment Jurisprudence When Fair Use Battles with Constitutional Malice*.⁹¹ “Moral rights” give an artist personal rights to his or her work, including personality, spirit, and soul, and recognize the author’s “honor and reputation” may be harmed if the work is mistreated.⁹² In essence, moral rights allow an artist to safeguard his or her work from becoming an inaccurate reflection of the artist’s personality or soul. A moral rights violation occurs if a work is falsely attributed to the artist that he or she did not create, or when a work is altered such that it falsely represents how the work was intended to be shown.⁹³ In 1990, the Visual Artists Rights Act (VARA) incorporated moral rights into U.S. copyright law, and fair use is thus an equitable defense to a moral rights claim.⁹⁴

Petrolis argues for using the constitutional malice standard to serve as a wedge between the fair use/moral rights conflict for several compelling reasons.⁹⁵

First, bad faith or motive is a “slippery concept in the copyright context” while the constitutional malice standard provides more certainty.⁹⁶ The constitutional malice standard focuses solely on the speaker’s knowledge of falsity or serious doubts as to truth, not motive.⁹⁷ This argument applies equally to traditional fair use claims: examination of objective factors—such as knowledge of falsity—will provide more predictability than a subjective examination of motive or intent.

Second, a public artist, like a public figure, knowingly accepts public discussion and criticism of any work he or she places into the public arena, often

to encourage open debate or criticism. Similarly, traditional copyright holders who submit works for public discourse are essentially “limited purpose” or maybe even “all purpose” public figures who knowingly entered the sphere of public influence.⁹⁸

Third, while the constitutional malice standard is difficult to prove, it would not prohibit a fair use finding except for works created with deliberate factual falsehoods—an outcome that is in the public’s interest.⁹⁹ Because a moral rights violation occurs when either the artist is falsely attributed a work he or she did not create, or when a work is altered such that it falsely represents how the work was intended to be shown, the constitutional malice standard would both promote fair use (absent knowing falsity) and protect moral rights. Similarly, in the context of traditional copyright claims, limiting recovery to deliberate falsehoods promotes robust debate and discourse without constant fear of legal liability, but permits action to be taken against those spreading deliberate falsehoods, in which the public has no interest.

Finally, the constitutional malice standard would further the policies of fair use and moral rights in protecting useful public discourse. But just as the First Amendment does not protect intentionally false factual statements, the same should be true when copyrighted material is used in an intentionally false and misleading manner. This argument applies equally to a traditional copyright fair use analysis outside of the moral rights context.

Application of the constitutional malice standard may thus strike a proper balance between the rights of copyright owners and the general public’s right to freedom of speech. An application of both the traditional fair use analysis and the constitutional malice test to the McCain ad shows how they complement each other and promote the public good.

The McCain Ad

If only the traditional fair use factors are applied to the McCain ad, the ad’s use of the Couric news clip might be found to be a fair use. Under the “purpose and character” factor, the McCain ad is an entertaining, powerful political message by his campaign designed to criticize his opponent’s campaign on the issue of sexism. Comment and criticism lie at the heart of the fair use defense for copyrighted works, and courts “consider

it highly undesirable to hinge a legal determination solely on the relative truth or accuracy of statements made in the context of debate on a highly volatile social issue.”¹⁰⁰

On the other side of the issue, there is little justification in allowing the McCain campaign to attribute intentionally to CBS and Couric a false endorsement of McCain or criticism of Obama. The false endorsement of a major presidential candidate could severely harm his or her ability to gather and report the news without a perceived bias, and be materially misleading to the public. But, under the traditional fair use test, is the distortion in the McCain ad “so deliberate, and so misrepresentative of the original work that no person could find” it to be the product of mere carelessness? Or is the use of Couric decrying sexism in America equally fair in the ad regardless of whether she is referring to Sarah Palin or Hillary Clinton? This factor could go either way and provides little predictability.

Applying the second factor, the “nature of the copyrighted work,” a newscast like Couric’s is informational. Thus, the newscast is entitled to less stringent copyright protection and is more susceptible to a fair use claim.¹⁰¹

With respect to the third factor, the amount and substantiality of the use, only a few seconds of a single CBS newscast are used in the McCain ad, and the portion taken could not be said to be the “heart” of the newscast.¹⁰² Thus, this factor probably favors a fair use finding as well.

Finally, with respect to the fourth market factor, the McCain ad is not in the same potential market as the CBS newscast, nor is it a substitute for the newscast.¹⁰³ Thus, this factor also likely favors a finding of fair use.

McCain’s use of the CBS/Couric clip may therefore pass the traditional fair use analysis. However, the ad’s misleading use of the clip seems fundamentally not “fair” and should not be protected by an equitable doctrine like fair use. Application of the constitutional malice test could remedy this perceived wrong.

Applying the constitutional malice test, use of the news clip to intentionally and falsely indicate that Couric is addressing Sarah Palin and endorsing the sexism theme of the McCain campaign, when the original segment clearly shows she was addressing the lessons of the Hillary Clinton campaign, should

constitute “knowledge of falsity” or “reckless disregard of the truth.” A comparison of the original newscast from which the clip was taken and the McCain ad readily reveals the flaw. There is no public interest in false endorsements or attributions through the misuse of copyrighted works, especially in the heat of a presidential campaign. Rather, copyrighted materials are placed in the public domain to encourage fair public discussion, debate, and criticism and for “scientific, scholarly, news reporting or like purposes” that have some value to society, not to mislead the public. While “deliberate distortions” of copyrighted works may be “good entertainment,” such factual misuses undermine the First Amendment’s “quest for truth.” Attributing intentionally false viewpoints or endorsements to authors also undermines the incentives of authorship. As in defamation law, the constitutional malice standard would protect CBS and Couric from such an intentional false imputation, and promote with more certainty than a bad faith analysis truthful speech and less self-censorship, thereby achieving the goal of disseminating ideas and knowledge to the public that are fair to copyright owners as well. Thus, applying the constitutional malice test fills in the gap left by a more traditional fair use analysis.

Conclusion

Both fair use and the constitutional malice standard encourage dissemination of useful information to the public and protect against knowingly or reckless use of false factual information that has little, if any, value to society. Both should be able to coexist without doing grave harm or injustice to one another.

Judging knowing or reckless false uses of factual copyrighted material under the established constitutional malice standard for dealing with falsehoods does not present the slippery slope that a pure bad faith/good faith analysis would present for a fair use determination, thereby instilling more predictability to the fair use analysis. Both the burden shifting to the plaintiff of proving falsity and fault under the “constitutional malice” standard, coupled with the heightened clear and convincing proof standard, should adequately protect ample fair use of copyrighted materials and prevent public deception, while providing a viable remedy for the false and misleading use of a copyrighted work. C

Endnotes

1. See, e.g., *Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993); CAL. CIV. CODE §§ 44, 45, 45a, 46.
2. 15 U.S.C. § 1125(a).
3. See *Kournikova v. Gen. Media Commc'n, Inc.*, 278 F. Supp. 2d 1111, 1120 (C.D. Cal. 2003); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992) (“A false endorsement claim based on the unauthorized use of a celebrity’s identity is a type of false association claim, for it alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff’s sponsorship or approval of the product.”); *Sodexho USA, Inc. v. Hotel et al. Union, Local 217*, 989 F. Supp. 169 (D. Conn. 1997) (finding the “commercial advertising or promotion” language of § 1125(a) was “added by Congress to ensure that the section would not be applied to political speech”); but cf. *Browne v. McCain*, No. 08-5334, 2009 U.S. Dist. LEXIS 18876 (C.D. Cal. Mar. 20, 2009) (applying the Lanham Act to use of the Jackson Brown song “Running on Empty” in a McCain political advertisement “where the consequences of widespread consumer confusion as to the source of such speech could be dire”) and *United We Stand Am., Inc. v. United We Stand, Am., New York*, 128 F.3d 86 (2d Cir. 1997) (discussing application of the Lanham Act to noncommercial uses, but not applying it to cases where the plaintiff’s trademark is used as an “integral part of the idea being expressed”).
4. 15 U.S.C. § 43(a); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (the elements are “(1) a false statement of fact by the defendant in a commercial advertisement about its own or another’s product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products”). Cf. *Groden v. Random House, Inc.*, 61 F.3d 1045, 1053 (2d Cir. 1995) (citing 135 CONG. REC. H1217 (daily ed. Apr. 13, 1989) (finding that application of the Lanham Act to an advertisement with a political message would raise substantial free speech issues, and that the legislative history surrounding the 1989 amendment to § 43(a)(2) makes clear the proposed change should “not be read in any way to limit political speech, consumer or

editorial comment, parodies, satires, or other constitutionally protected material”)).

5. See RESTATEMENT (SECOND) OF TORTS § 652E.

6. Moreover, the constitutional malice doctrine applied to defamation claims applies equally to false light claims. See, e.g., *Kapellas v. Kofman*, 1 Cal. 3d 20, 35, n.16 (1969). As discussed *infra*, constitutional malice requires a showing of “either ‘deliberate falsification’ or reckless publication ‘despite the publisher’s awareness of probable falsity’” [T]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 730–31 (1968).

7. See *Act for the Encouragement of Learning*, 1709, 8 Anne, ch. 19; *Gyles v. Wilcox*, 26 Eng. Rep. 489, 2 Atk. 121 (1740) (No. 130).

8. 17 U.S.C. § 107.

9. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1994).

10. 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

11. Leval, *supra* note 9, at 1106 (arguing for the traditional fair use analysis using the four factors enumerated in the Copyright Act, and not considering factors like bad or good faith).

12. *Harper & Row, Publ’rs, Inc. v. Nation Enter.*, 471 U.S. 539, 545–46 (1985) (citation omitted). See also U.S. CONST. art. I, § 8, cl. 8 (Congress’s power is to promote the science and arts “by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries”); cf. *Act for the Encouragement of Learning*, 709, 8 Anne, ch. 19 (the purpose of copyright protection is “for the Encouragement of Learned Men to compose and write useful Books”).

13. This factor focuses on the justification for the use of the copyrighted work and examines whether the use fulfills the objectives of copyright law to stimulate creativity for public illumination and education. 17 U.S.C. § 107(1) (noting a distinction based on “whether such use is of a commercial nature or is for non-profit education purposes”). Courts must consider each challenged passage, as each passage quoted must have a “useful, educational and instructive purpose vital to demonstrating an objective” and not be merely “good reading.” Leval, *supra* note 9, at 1106.

14. This factor focuses on incentives of authorship. The more creative the work, the more protection it is afforded from copying, while the more informational or functional the work, the broader the scope of the fair use defense afforded. See generally 4-13 NIMMER ON COPYRIGHT § 13.05 at [2] *The*

Nature of the Copyrighted Work

15. This factor assesses the portion of the original work used. It focuses both on the quantitative analysis of the amount taken and the qualitative substantiality of whether that taking is “essentially the heart” of the original. 17 U.S.C. § 107(3). In general, the larger the volume or the greater the importance of what is taken, the less likely the taking will be found to be fair use. *Harper & Row*, 471 U.S. at 563.

16. The “effect on the market” factor focuses on the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107(4). Not every type of market injury (such as harsh criticism) impairs a finding of fair use, even though it may negatively affect the market or profits of the author. Rather, this factor measures whether the market for the original is impaired because the “taking” serves the consumer as a substitute for the original. *Harper & Row*, 471 U.S. at 565.

17. *Harper & Row*, 471 U.S. at 560 (quoting H.R. REP. NO. 94-1476, at 65 (1976) (alteration in original)).

18. See Leval, *supra* note 9, at 1110–11.

19. See 17 U.S.C. § 107.

20. This is true even after the Supreme Court’s decision in *Campbell v. Acuff-Rose Music*, in which the Court emphasized that good faith is but one of many factors that courts can consider in applying a fair use analysis, and is by no means dispositive. 510 U.S. 569 n.18 (1994) (“Finally, regardless of the weight one might place on the alleged infringer’s state of mind, we reject Acuff Rose’s argument that 2 Live Crew’s request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew’s actions do not necessarily suggest that they believed their version was not fair use.” (internal citations omitted)). See also *NXIVM Corp. v. First Principles, Inc.*, 364 F.3d 471, 479 (2d Cir. 2004) (“we believe that the bad faith of a defendant is not dispositive of a fair use defense. . . . Moreover, after *Campbell* it is clear that a finding of bad faith, or a finding on any one of the four factors, cannot be considered dispositive.” (internal quotations and citations omitted)).

21. *Harper & Row, Publ’rs, Inc. v. Nation Enter.*, 471 U.S. 539, 543 (1985).

22. *Id.* at 563.

23. *Id.*

24. 364 F.3d 471 (2d Cir. 2004).

25. *Id.* at 475.

26. *Id.*

27. *Id.* at 475–76.

28. *Id.* at 478.

29. *Id.*

30. *Id.* at 479.
31. No. 07-6076, 2008 U.S. LEXIS 60545, at *1–3 (N.D. Cal. July 25, 2008).
32. *Id.* at *3.
33. *Id.* at *3–4.
34. *Id.* at *4.
35. *Id.* at *12 (internal quotations omitted).
36. *Id.* at *12–13.
37. *Id.* at *13.
38. 803 F.2d 1253 (2d Cir. 1986).
39. *Id.* at 1256.
40. *Id.* at 1257.
41. *Id.*
42. *Id.* at 1261.
43. *Id.*
44. 745 F. Supp. 130 (S.D.N.Y. 1990).
45. *Id.* at 133.
46. *Id.* at 134.
47. *Id.*
48. *Id.* at 143.
49. *Id.* at 144.
50. *Id.* at 147.
51. 807 F. Supp. 1090 (S.D.N.Y. 1992).
52. *Id.* at 1094.
53. *Id.* at 1093.
54. *Id.* at 1097.
55. *Id.*
56. *Id.*
57. *Id.* at 1097, 1105.
58. 118 F. Supp. 2d 126 (D. Mass. 2000).
59. *Id.* at 128.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 130.
64. *Id.* (quoting *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir. 1986)).
65. See, e.g., 4-13 NIMMER ON COPYRIGHT § 13.05 (citing *Castle Rock Enter. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998)) (treatise quoted).
66. 366 F.2d 303 (2d Cir. 1966).
67. *Id.* at 307 (internal citations omitted).
68. 361 F. Supp. 1063 (S.D.N.Y. 1973).
69. *Id.* at 1067–68. It is worth noting, however, that the Second Circuit suggested that the fair use defense may have been inapplicable for other reasons, namely that the effect of the publication of the letters on the market for the copyrighted work was disputed. *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).
70. *Nizer*, 361 F. Supp. at 1067–68.
71. 293 F. Supp. 130 (S.D.N.Y. 1968).
72. *Id.* at 146.
73. *Id.*
74. *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).
75. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772–74 (1986); 17 U.S.C. § 107.
76. 376 U.S. 254, 271–80 (1964) (establishing constitutional malice as the fault standard in public figure cases). See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (the First Amendment requires some leeway for inadvertent false statements of fact as they are “inevitable in free debate”).
77. Public figures are either all-purpose public figures, like celebrities, or limited-purpose public figures, like those who have voluntarily and actively sought in connection with any given matter of public interest to influence the resolution of the issues involved. See *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 744–45 (Cal. 1984).
78. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984).
79. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).
80. 376 U.S. 254 (1964).
81. 418 U.S. 323 (1974).
82. *Id.* at 340.
83. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 880 (1988).
84. *Id.*
85. 385 U.S. 374 (1967).
86. *Id.* at 377.
87. *Falwell*, 485 U.S. 46.
88. *Id.* at 51.
89. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).
90. See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (the standard is not met by showing mere reckless conduct or measuring whether a reasonable prudent person would have published, or would have investigated before publishing).
91. Mark A. Petrolis, *An Immoral Fight: Shielding Moral Rights with First Amendment Jurisprudence When Fair Use Battles with Constitutional Malice*, 8 J. MARSHALL REV. INTELL. PROP. L. 190 (2009).
92. See *id.*; 17 U.S.C. § 106A(a) (Visual Artists Rights Act (VARA)). Moral rights include (1) the right of integrity, (2) the right of attribution, and (3) the right to withhold (withdrawal). Petrolis, *supra* note 91, at 191. The right of integrity protects the artist’s work as a whole and prevents any mutilation, distortion, or altering of the work. *Id.*
- The right of attribution allows an artist to be identified with his or her work, or to not associate his or her name with it and communicate anonymously. *Id.* at 193. The right also prevents a low-quality work from being associated with the artist and thus prevents dilution of the artist’s reputation. *Id.* The right of withdrawal allows an artist to withdraw or prevent a work from reaching the public, and thus allows the artist to control criticism or comment that affects reputation. *Id.* These rights preserve and ensure the artist’s message will be conveyed to the public as the artist intended, thereby embracing First Amendment principles. VARA thus protects “the right to disassociate from distorted, mutilated, or modified works that result in prejudicial harm to the artist’s honor or reputation.” *Id.* Moral rights are independent of the rights granted by copyright, but VARA imposes on moral rights fair use limitations. 17 U.S.C. § 106A(a) (rights of attribution and integrity are subject to 17 U.S.C. § 107).
93. See 17 U.S.C. § 106A(a)(1)–(3).
94. See *id.*
95. Petrolis, *supra* note 91, at 206.
96. *Id.* at 212.
97. See, e.g., *Hustler v. Falwell*, 485 U.S. 46 (1988).
98. Petrolis, *supra* note 91, at 214. However, if a plaintiff can show the work is not within the scope of the plaintiff’s public persona, then the plaintiff is not a public figure. The constitutional malice factor protects public debate on public officials or figures.
99. *Id.* at 213.
100. See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir. 1986) (finding that “[o]nly where the distortions [are] so deliberate, and so misrepresentative of the original work that no person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim”).
101. Harper & Row, Publ’rs, Inc. v. Nation Enter., 471 U.S. 539, 563 (1985).
102. *Id.* at 565.
103. *New Era Publ’ns Int’l v. Carol Publ’g Group*, 904 F.2d 152, 160 (2d Cir. 1990) (because excerpting a work for criticism and comment does not produce a work in competition with the copyrighted work, the infringing material does not supplant the original work and does not implicate the concerns of the Copyright Act).