RESOLVED, That the American Bar Association supports the principle that the doctrine of “fair use” should be applied in a manner consistent with the constitutional goal of copyright, which is “to Promote the Progress of Science and useful Arts” by giving authors exclusive rights in their works for limited times (see U.S. Const., Art. I, §8, cl.8); and

FURTHER RESOLVED, That the American Bar Association supports the principle that when a user of copyrighted works merely repackages the copyrighted material and delivers it to the copyright owner’s actual or potential market, that use should not in and of itself be deemed a transformative use that would weigh in favor of fair use, regardless of whether the user can deliver that copyrighted material more efficiently than the copyright owner or its current licensees; and

FURTHER RESOLVED, That the American Bar Association supports the principle that the copyright owner’s actual or potential market includes those markets that are traditional, reasonable or likely to be developed, regardless of whether the copyright owner has already entered a particular market or has plans to do so.
REPORT

I. Introduction

This Resolution addresses the appropriate interpretation and application of the fair use doctrine in copyright law. Specifically, it addresses (i) whether a user who develops a more efficient means of delivering copyrighted content is making a transformative use of that content that would weigh in favor of fair use, and (ii) whether, in evaluating the “effect on plaintiff’s actual or potential market,” one should consider all traditional, reasonable or likely to be developed markets, even if the copyright owner has not yet entered a particular market or made plans to do so.

Fair use is a defense to copyright infringement that provides an opportunity, in appropriate circumstances, to use copyrighted works for free without obtaining a license or permission from the copyright owner. Fair use is an essential part of copyright law, and provides a means of balancing the rights of owners and users “to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’” *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 575 (1994), citing U.S. Const., Art. I, §8, cl. 8. To achieve this purpose, the Copyright Clause of the Constitution empowers Congress to grant to authors “for limited times. . . the exclusive right to their . . . Writings.” U.S. Const., Art. I, §8, cl. 8.

It has been more than 24 years since the Supreme Court provided guidance on fair use in *Campbell v. Acuff-Rose,* 510 U.S. 569. During that time, advances in digital technology and communications have made possible previously unknown means of creating, delivering and enjoying copyrighted works. The lower courts, however, have applied the principles of fair use inconsistently. These inconsistencies have caused practical difficulties for lawyers and uncertainty for clients across the spectrum – from individual users and large corporate service providers to individual authors and corporate copyright owners in every field of endeavor, whether nonprofit, educational or private sector.1

The ABA has an important role to play in this area. It is familiar with a wide range of interests and concerned with the difficulties of counseling clients who want to know whether particular activities will qualify as fair use, particularly when new means of creating and exploiting copyrighted works are involved. The diversity of interests in the ABA means that the ABA usually has a broader perspective than the parties to any particular dispute. This Resolution calls for the ABA to provide guidance on fair use and the application of the four factor test in the context of the digital environment, in order to provide greater clarity to attorneys practicing in the copyright field by making recommendations that balance the interests of the various stakeholders and further the constitutional goals of copyright.

Uncertainty as to the proper application of fair use is reflected in recent fair use cases, as well as those currently working their way through the federal courts, e.g., Fox News Network, LLC v TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018), cert. denied (discussed below); Brammer v. Violent Hues Prods., LLC, 2018 U.S. Dist. LEXIS 98003 (E.D. Va. June 11, 2018) (discussed below); and Graham v. Prince. This resolution is intended to put the ABA in position to file an amicus brief in an appropriate case.

(a) The Fair Use Provision in Copyright Law

Originally a judge-made doctrine, fair use was first codified in the Copyright Act of 1976 as section 107. 17 U.S.C. §107 provides as follows:

107. Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The uses listed in the introductory paragraph to section 107 are merely examples of the types of works that may qualify as fair use. They do not automatically qualify as fair use, nor are other uses excluded from fair use. In every case, all four factors must be considered and weighed to determine whether, when taken together, the alleged infringer has made a case for a fair use defense to copyright infringement.

Factor one examines the purpose and character of the use, including whether the use is of a commercial nature or for nonprofit educational purposes. In Campbell v. Acuff-Rose, which involved a parody of the song “Oh Pretty Woman” by the band 2 Live Crew, the Supreme Court explained how courts should analyze fair use, particularly the first factor. According to the Court, the purpose of the investigation under factor one is to see

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2 Graham v. Prince, 265 F. Supp.3d 366 (S.D.N.Y. 2017) (denying defendant’s motion to dismiss based on his fair use defense; discovery deemed necessary to assess defendant’s claim that creation of artwork from plaintiff’s photo posted to Instagram was a fair use).
if the new work merely supersedes the objects of the original creation, or “instead adds something new with a further purpose or different character, altering the first with new expression, meaning or message.” Id. at 579. This factor “asks, in other words, whether and to what extent the new work is transformative.” Id., citing Pierre Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990). Transformative use is not required for a finding of fair use, but the goal of copyright is generally furthered by the creation of transformative works. 510 U.S. at 579.

The second fair use factor – the nature of the copyrighted work -- generally embraces two considerations: first, whether the work at issue is unpublished (in which case it is usually less susceptible to fair use) and second, whether the work is factual or fanciful. Copyright is sometimes said to protect fanciful works more strongly than it does factual works, although the Second Circuit, in Authors Guild v. Google, found no rationale for granting authors of factual works less protection than authors of fanciful works. In any event, courts often accord little weight to factor two. Authors Guild v. Google, Inc., 804 F.3d at 220.

The third fair use factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole is reasonable, considering the purpose of the copying. Even a relatively small taking can weigh against fair use if the material taken is very important. See Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539, 564-65 (1985). On the other hand, in a number of transformative use cases, the courts have allowed use of entire works, having concluded that such use is necessary for the transformative purpose. E.g., Authors Guild v. Google, 804 F.3d at 221 and n.24.

Factor four requires an evaluation of the effect of the use on the potential market for or value of the copyrighted work. The court must consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original [work].” Campbell v. Acuff-Rose, 510 U.S. at 590, citing 3 M. Nimmer and D. Nimmer, Nimmer on Copyright, §13.05[A][4], p. 13–102.61 (1993). The court must take into account not only the harm to the original, but also the harm to the market for derivative works. Campbell, 510 U.S.at 590, citing Harper & Row, 471 U.S. at 568. The markets to be considered are those that are “traditional, reasonable or likely to be developed.” American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930 (2d Cir. 1994). When a parody is involved, courts usually do not recognize any adverse effect on the copyright owner’s market, since the parody is unlikely to substitute for the original. But in Campbell, the Court recognized that 2 Live Crew’s rap parody could have an adverse effect on plaintiff’s market for derivatives of its song, specifically, non-parody rap versions. The Court remanded to the lower court for findings on this issue, demonstrating that it did not regard transformativeness as dispositive of factor four. In other words, a transformative work could still affect the right holder’s market.

Campbell v. Acuff-Rose is the Supreme Court’s most recent substantive review of a case involving the fair use doctrine in copyright. Since Campbell was decided, many
lower courts have grappled with numerous questions concerning transformative use and fair use, including whether a particular use is transformative, and the effect of the use on plaintiff’s actual or potential market. The inconsistent perspectives of the courts have made it difficult for attorneys practicing in the field of copyright to provide sound advice to their clients.

This Report addresses two issues that have become problematic in advising clients on fair use: First, if the user is exploiting the copyright owner’s content through a new means of distribution or in a new format that can provide access to content more efficiently, is that in itself transformative? And, second, does the copyright owner’s absence from a particular market justify concluding that the user’s exploitation of the copyright owner’s content in that market cannot cause an adverse market effect?

(b) The Effect of New Means of Distribution on the Fair Use Calculus

Whether the use of a copyrighted work is transformative is not the only consideration in determining if a use qualifies as fair use, but transformativeness is influential and sometimes determinative in a fair use analysis. Most courts have agreed that making a copyright owner’s content publicly available through a new mode of distribution is not itself transformative, even if the new means of distribution is more efficient or convenient. For example, in UMG Recordings, Inc. v. MP3.com, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), MP3.com operated a service whereby anyone who demonstrated possession of a particular recording could access that recording on the Internet. To implement its service, it copied tens of thousands of popular music CDs containing sound recordings that plaintiffs owned into its database. MP3.com argued that its copying qualified as fair use, since its service merely allowed its users to access over the Internet recordings that they already owned. Analyzing factor one, the court rejected defendant’s claim that its use was transformative. According to the court,

[Although defendant recites that [it] provides a transformative "space shift" by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium -- an insufficient basis for any legitimate claim of transformation. Id. at 351. (citations omitted).

The court observed that defendant “adds no new aesthetics, new insights or understandings” to the original music recordings it copies; while MP3.com’s services “may be innovative, they are not transformative.” Id. (citing Castle Rock Entm’t, Inc. v. Carol Publ’g Group, 150 F.3d 132, 142 (2d Cir. 1998). The court rejected MP3.com’s fair use defense, and found its unauthorized copying infringed the copyrights in plaintiffs’ sound recordings.

A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), aff’d in part, rev’d in part, 239 F.3d 1004 (9th Cir. 2001), also involved a claim of fair use of copyrighted content in the context of new technology. Napster developed and managed
software that allowed users to access the Internet to find and copy music they wanted. By means of a centralized database, Napster’s software would match a person who wanted a copy of a recording with one or more people who already had a copy, providing a quick and virtually seamless way to acquire recordings by making free unauthorized copies. Napster was sued for secondary infringement, but argued its users were making a fair use, and with no primary liability, there could be no secondary liability. The court concluded that the users were not making a transformative use because providing or downloading sound recordings in the form of MP3 files does not transform the copyrighted music. 114 F. Supp. 3d at 912.

Napster argued its users were merely “space shifting” – that is, using the technology to listen to CDs at a place of their choosing, without having to cart around the CDs – and that such space shifting was authorized by the Supreme Court’s decision in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). The Napster court rejected the analogy to the Sony case, which involved time shifting of free television programs for later in-home viewing, and not “space shifting” of CDs available for purchase in an environment that facilitated widespread copying of the CDs. It ultimately found that users were not making a fair use of the copyrighted sound recordings. 114 F. Supp. 2d at 915-16.

Authors Guild v. Google, Inc., 804 F.3d 202, was a case that the Second Circuit Court of Appeals described as “test[ing] the boundaries of fair use.” ld. at 206. Google digitally scanned over 20 million books from libraries (with their cooperation) and created a database containing the digitized books. ld. at 208. Users, through the Google Books Service (GBS), could search the database free of charge. In response to a user’s search inquiry, the GBS identifies books that contain the search term and includes a few snippets (each approximately one-eighth of a page of text) so that the user could see the context in which the term is used to determine whether to get the book. The court deemed Google’s full text copying of the books to create the GBS database to be highly transformative, and necessary to create a full-text searchable database.

The Authors Guild v. Google court also concluded that the snippet function added to the transformative nature of the GBS, since it assisted users in determining whether the book identified will be of interest to the user. The result of the search inquiry was said to be different in purpose, character, expression, meaning, and message from the work from which it was drawn. Id. at 217. The search inquiries provided information about the books sought, not the text of the books themselves. The court found that copying each book in its entirety was necessary to the search function, and the controls Google placed on the number and content of snippets displayed prevented the GBS from becoming a substitute for all or a substantial portion of the books. ld. at 221-22.

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3 The GBS supplies more than a snippet when it has a license to do so from the publisher, or where the work is in the public domain. In cases involving reference works such as dictionaries, where a small snippet will obviate the necessity for the user to seek out the book, the GBS does not provide a snippet. 804 F.3d at 222.
So the Authors Guild v. Google court concluded that the transformative nature of Google’s search function justified copying the full text of the books for Google’s internal use, as well as the distribution of a small portion of text to further assist the searcher. But the court took pains to explain that the snippets constituted no more that 16% of a book, in the aggregate, and were unlikely to substitute for purchase of the book. Id. at 224-25. It is clear from the court’s decision that the “highly transformative” nature of Google’s search service justified distribution of snippets to users, but it would not extend to distribution of full text.

Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, provides another perspective on transformative use. In that case, the Second Circuit reversed a district court decision that would have significantly expanded the fair use doctrine. The Second Circuit declined to hold that TVEyes was making a fair use of Fox News’ copyrighted programming.

TVEyes is a commercial service that records news from more than 1400 channels, 24 hours a day. It enters these news programs in a database, together with text-searchable transcripts of the news programs created primarily by using the closed-captioned text that accompanies each news program. Search queries by TVEyes’ clients (who pay $500/month for the service) yield a list of videoclips that contain the search term. By clicking on an item in the list, a customer can play a videoclip of up to ten minutes long. 883 F.3d at 175. Initially a customer could play an unlimited number of clips, but after Fox brought suit, TVEyes employed a mechanism to prevent customers from viewing subsequent segments – although the efficacy of this mechanism was disputed by the parties. The TVEyes service also allowed customers to archive search results on TVEyes’ server (otherwise they are deleted after 32 days); download the results to users’ own computers; and email the clips (or link to them) so that others, including non-TVEyes clients, may view them. Id.

The district court concluded that some of TVEyes’ activities were fair use (creation of the database, the search function, archiving), while others (e.g., downloading the videoclips, emailing the clips to others), were not. Id. at 174. On appeal, the Second Circuit distinguished the “Search function,” which allowed customers to identify videos that contained their search terms, from the “Watch function” which allowed TVEyes customers to view ten minute videoclips.4 Fox did not challenge the district court’s decision concerning the Search function, so the Second Circuit focused its decision on the Watch function.

Concerning factor one, the court concluded that TVEyes’ Watch function was “at least somewhat transformative,” since it enhanced efficiency by enabling users to identify programs of interest and provided “nearly instant access” to the identified material “that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means.” Id. at 177. But because it delivered the content to

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4 Id. at 176. As the court found that the Watch function was not fair use, it deemed it unnecessary to analyze other functions that TVEyes permitted, such as downloading or emailing videoclips. Id.
clients without alteration, the court ultimately concluded that the Watch function had “only a modest transformative character.” *Id.* at 178. The court analogized to *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which permitted in-home time-shifting of free television programs, because TVEyes’ service allowed customers to view Fox’s programming when it was convenient to them. 883 F.2d 3d at 177-78. Judge Kaplan, in his concurrence, argued that even if TVEyes’ service enhances the efficiency of delivering content, that does not make it transformative, because the service merely repackages and delivers the original, but does not provide “new insights or understandings.” *Id.* at 185-86. He pointed out that in *Authors Guild v. Google* there were safeguards against Google’s service supplanting the books in the database that were not present in *Fox v. TVEyes*. *Id.* at 187. He also found nothing within *Sony* to support the idea that “efficiency-enhancing technology is transformative.” *Id.* at 188.

As the cases discussed above illustrate, courts differ in their determinations as to whether distribution of a copyrighted work in a new medium or with a new technology is itself transformative. While many have decided that changing the technological means of delivery is not itself transformative of the copyrighted work, this is not a consistently-held view. Practitioners, copyright owners and users would all benefit if the courts were more consistent in the way they analyze this issue in evaluating fair use.

(c) The Significance of the Copyright Owner’s Absence from a Particular Market that the Putative Fair User Seeks to Exploit

Not every potential harm to the copyright owner is cognizable under the fourth fair use factor. Instead, courts look to “traditional, reasonable or likely to be developed” markets. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 & n. 17 (2d Cir.), *cert. dismissed*, 516 U.S. 1005 (1995). Can the user claim that there is no market harm if it is operating in a market that the copyright owner is not exploiting? In many cases, the courts have resisted such claims, on the theory that if the market is within the copyright owner’s right to exploit, the owner’s decision not to exploit remains within his rights. The concept of “use it or lose it” generally does not govern copyright rights.

There may be many reasons why a copyright owner chooses not to enter a market. For example, she may feel that exploiting one market could “cannibalize” sales in another market; she may be waiting to see which of two or more delivery technologies will take

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5 Judge Kaplan (a federal district judge sitting by designation) contended in a concurring opinion that it was unnecessary to address whether TVEyes’ use was transformative, since the majority stated that even if it were transformative, overall it was still not fair use. 883 F.3d at 183.

6 *E.g.*, *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 145-46 (2d Cir. 1998) (finding the fourth factor weighed in favor of plaintiffs, who still maintained a right to create derivative works even if it had chosen not to enter the market); *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010) (upholding the District Court’s determination that despite the fact that defendant’s work was unlikely to impact the sales of plaintiff’s work, an unauthorized sequel might undermine the potential market for an authorized version even where author publicly disclaimed intent to authorize a sequel). *But see Katz v. Chevaldina*, No. 12 Civ. 22211, 2014 U.S. Dist. Lexis 88085, at *26-27 (S.D. Fla. June 17, 2014) (finding no harm to the potential market for the plaintiff’s work where the plaintiff expressed no interest in selling or profiting from his photograph); *Katz v. Chevaldina*, No. 12 Civ. 22211, 2014 U.S. Dist. Lexis 126446 (S.D. Fla. Sept. 4, 2014) (adopting Magistrate’s recommendation and granting summary judgment to defendant).
hold in the marketplace; she may choose to refrain from selling for a period of time to
build up demand; or she may just not want to enter the market. If the user can claim that
because plaintiff is not delivering content by means of a particular new and efficient
technology and thereby establish the user’s exploitation of that market creates no harm
to the copyright owner, then as each new technology is introduced there will be a race to
exploit it. If the copyright owner does not move quickly enough, it will lose its right to
exploit the new market using its own content to a party who claims fair use.

In UMG Recordings, discussed above, defendants claimed that there was no
actual or potential effect on plaintiffs’ market because plaintiffs were not currently
licensing their recordings to be copied in order to provide access over the Internet, and
that market is not one that is “traditional, reasonable or likely to be developed.” Id. at 352,
citing American Geophysical Union v. Texaco, 60 F.3d at 930 & n. 17. The court held
that defendants were not free to usurp a market that “directly derives from reproduction
of plaintiffs’ copyrighted works” even if plaintiffs had not yet entered that market. Id.

Infinity Broadcasting Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998), also
addressed the copyright owner’s absence from a market in the context of the fourth fair
use factor. Infinity owns a large network of radio broadcasters as well as the copyrights
in programs broadcast on its stations. Kirkwood owned Dial-Up, a service that allows its
customers to listen to radio broadcasts in cities around the country, for purposes such as
making sure their commercials are aired. (There was, however, no limit to the amount of
a broadcast customers could listen to.) Infinity sued Kirkwood when his service
retransmitted some of its broadcasts. The district court upheld Kirkwood’s fair use
defense. Id. at 107. Concerning the fourth factor, it concluded that Kirkwood’s
transmission to its specialized audience was not likely to have a material effect on
Infinity’s revenue.7 The district court was also persuaded that there was no adverse
market effect because Infinity did not offer commercial listen lines, or authorize
retransmission of its programs. The Second Circuit, however, found that although Infinity
did not operate commercial listen lines, it did provide them in a package offered to some
of its advertisers. Even though Infinity did not directly charge for listen lines, it still derived
benefit from them, and Dial-up’s activities would disrupt this market.

As discussed above, Fox News sued TVEyes for copying and distributing its news
programming, and TVEyes asserted a fair use defense. The court observed that TVEyes
makes available “virtually the entirety of Fox content that TVEyes users want to see and
hear,” particularly considering the brevity of most news segments. 883 F.3d at 179.
TVEyes’ service diminishes Fox’s ability to license searchable access to its copyrighted
content. According to the court, TVEyes’ success indicates that there is a “plausibly
exploitable” market that allows searching and viewing of copyrightable television content,
and TVEyes was depriving Fox of potential licensing revenue. Id. at 180. 8

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7 The district court considered only the effect on the market of Kirkwood’s use, and not the effect if the use
should become widespread.

8 As to whether TVEyes was exploiting a market that Fox did not, Fox established in the district court that it
was already making available digital downloads of its news content. However, it made available downloads
Finally, *Brammer v. Violent Hues Prods.*, 2018 U.S. Dist. LEXIS 98003, is a recent case in which a photographer sued when his photograph was copied from the Internet and used in promotional material for a film festival in the Washington D.C. area. Brammer testified that although he had sold reproductions of the photo in the past, he “currently makes no effort to market the photo.” *Id.* at *7. This statement helped persuade the court that there was no market effect from Violent Hues’ use, because the existing market was very small. Citing the fact that Brammer had a couple sales after the alleged infringement began, the court concluded that Violent Hues had not “provid[ed] a market substitute for the photo” and there was no adverse market effect under factor four.9 *Id.*

A copyright owner’s decision not to enter or remain in a particular market should not be read to cede that market to another. Nevertheless, some courts have held that where the copyright owner is not participating in a market, or is doing so only in a minimal way, one who uses the copyright owner’s content in that market creates no market harm. It is apparent that practitioners are unable to provide advice on this issue with any certainty, to their detriment and that of their clients. The uncertainty and potential cost are barriers to entry for users and innovators looking to utilize certain advances in digital technology and communications, with the downside cost acting as a more significant barrier for individuals and smaller businesses.

II. Conclusion

As this Report illustrates, the combination of advances in digital technology and inconsistent application by courts of the fair use doctrine has led to uncertainty affecting a diverse range of users and innovative businesses. It is difficult to responsibly advise such clients on important considerations in an analysis of whether particular activities constitute fair use or risk infringement. This Resolution calls for a consistent approach to fair use in which (i) distribution of a copyright owner’s work in whole or in substantial part, using an efficient new technology or new means of distribution, is not deemed a “transformative” act in support of a fair use determination, and (ii) a copyright owner’s absence from a particular market is not determinative of whether the copyright owner can be harmed if his content is exploited in that market.

Respectfully submitted,

Mark K. Dickson
Chair, Section of Intellectual Property Law
January 2019

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9 The court considered only whether Violent Hughes’ use had an adverse effect on plaintiffs’ market; it did not consider the effect if the use were to become widespread.
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GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Intellectual Property Law

Submitted By: Mark K. Dickson, Section Chair

1. Summary of Resolution

This Resolution addresses interpretation and application of the fair use doctrine in copyright law by calling for a consistent approach to fair use that furthers the constitutional purpose of copyrights and balances the interests of various stakeholders, with particular attention to application of fair use in the context of the digital environment and with respect to repackaging copyrighted material. If a user of copyrighted works merely repackages the copyrighted material and delivers it to the copyright owner’s actual or potential market, that use does not qualify as a transformative use that would weigh in favor of fair use, and a copyright owner’s actual or potential market includes markets that are traditional, reasonable or likely to be developed. This approach to fair use will reduce uncertainty for a spectrum of users and innovative businesses and provide greater clarity for the attorneys advising them.

2. Approval by Submitting Entity:

This Resolution was approved on November 13, 2018 by the Council of the Section of Intellectual Property Law.

3. Has this or a similar Resolution been submitted to the House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

None

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The policy would provide the basis for an Association amicus curiae brief to a court considering the proper approach to interpretation and application of the fair use doctrine in copyrights law.

8. **Cost to the Association. (Both direct and indirect costs)**

   Member and GAO staff time

9. **Disclosure of Interest. (If applicable)**

   None

10. **Referrals.**

    An earlier version of the Resolution and Report was referred to the Section of Science and Technology. In December, the final version was distributed to that section and each of the other Sections, Divisions, Forums, and Standing Committees of the Association.

11. **Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address):**

    Mark K. Dickson  
    Section Chair, Section of Intellectual Property Law  
    Phase M Legal  
    205 De Anza Blvd., Ste. 212  
    San Mateo, CA  94402-3989  
    Tel: (650) 346-6675  
    mdickson@phasem.com  

    Susan Barbieri Montgomery  
    416 Huntington Avenue  
    Boston, MA 02115  
    Tel.: (617) 373-7071  
    S.Montgomery@northeastern.edu

12. **Contact Name and Address Information. (Who will present the Report to the House?)**

    Susan Barbieri Montgomery  
    416 Huntington Avenue  
    Boston, MA 02115  
    Tel.: (617) 373-7071  
    S.Montgomery@northeastern.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution addresses interpretation and application of the fair use doctrine in copyright law by calling for a consistent approach to fair use that furthers the constitutional purpose of copyrights and balances the interests of various stakeholders, with particular attention to application of fair use in the context of the digital environment and with respect to repackaging copyrighted material. If a user of copyrighted works merely repackages the copyrighted material and delivers it to the copyright owner’s actual or potential market, that use does not qualify as a transformative use that would weigh in favor of fair use, and a copyright owner’s actual or potential market includes markets that are traditional, reasonable or likely to be developed. This approach to fair use will reduce uncertainty for a spectrum of users and innovative businesses and provide greater clarity for the attorneys advising them.

2. Summary of the Issue that the Resolution Addresses

During the 24 years since the Supreme Court last provided guidance on interpretation and application of fair use doctrine, advances in digital technology and communications have made possible previously unknown means of creating, delivering and enjoying copyrighted works, while inconsistent interpretation and application of fair use by the courts has led to practical difficulties for lawyers and burdensome uncertainty for a diverse range of users and innovative businesses looking to utilize those advances.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution calls for a consistent approach to fair use in accordance with the constitutional purpose of copyrights, including an interpretation and application of statutory fair use factors in which (1) distribution of a copyright owner’s work in whole or in substantial part, using an efficient new technology or new means of distribution, should not in itself be deemed a “transformative” act in support of a fair use determination, and (ii) a copyright owner’s absence from a particular market is not determinative of whether the copyright owner can be harmed if his content is exploited in that market.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No known opposition.