



JIPEL

NYU Journal of Intellectual Property
& Entertainment Law

ARTICLES

An Empirical Study of U.S. Copyright Fair Use Opinions Updated,
1978-2019

Barton Beebe

Editorial, The Need for Collective Standards:
Validating Raw Data in Legal Empirical Analysis

NYU JIPEL Volume 10 Editorial Board

Charging Bull, Fearless Girl, Artistic Composition, and Copyright

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NOTE

Crediting Procompetitive Justifications for Digital Platform Defendants:
Continued salience of a broad, efficiencies-focused approach

Ashley Ulrich

NEW YORK UNIVERSITY
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PREFACE

This Fall 2020 issue – Volume 10, Issue 1 – contains works exploring a multitude of continuing and timely legal issues in intellectual property and our digital world. Notably, they are diverse in both subject matter and research methods.

First, Professor Barton Beebe provides a statistical study evaluating every reported federal court opinion utilizing section 107's fair use test – a total of 579. His article also serves to update his previous study of the same, published in 2008. Beebe concludes that much has remained the same since his first edition. Specifically, the courts continue to apply section 107's four factors mechanistically despite collective acknowledgement that the first and fourth serve as the heart of Fair Use analysis. At the same time, Beebe's data demonstrate a few novel trends in the doctrine's jurisprudence. For example: The Second Circuit has declined in their interpretative influence and we have seen a rise in summary judgment issuance. You may also see Beebe talk about his work with me on our second episode of The Author Series.

Second, our staff explains its statistical validation methods used for Beebe's article and pushes for collective standards for validating raw data in legal empirical analysis.

Third, Professor Richard Chused reviews the recent confrontation between Wall Street, *Charging Bull*, *Fearless Girl*, and copyright law. Specifically, Chused analyzes the validity of Arthur di Modica's claim: that he enjoys the legal right to control the physical setting in which *Charging Bull* is displayed and thus, *Fearless Girl*'s proximity infringes on his copyright. As an expert in art law, Chused beautifully addresses the issue by referencing historically significant compositional artworks and disputes. I find his comparison of the *Charging Bull-Fearless Girl* controversy to Pablo Picasso's conflict with the Francisco Franco-led Spanish government over the location of his seminal work – *Guernica* (1937) – to be particularly insightful.

Finally, Managing Editor Ashley Ulrich provides a timely and critical analysis addressing whether the current assessment of procompetitive justifications within rule of reason analysis is sufficiently broad and flexible to deal with digital platforms accused of violating antitrust laws. Ulrich concludes that this existing approach – which allows courts to consider the range of ways that digital platform businesses enable market efficiencies – is superior to alternatives proposed by some courts and other legal scholarship.

This issue also marks a decade of publishing for *JIPeL*. Over this span, we have evolved from a blog of 10 editors to a journal staff of nearly 60. Our works have been discussed on *The View*, *Live with Kelly & Ryan*, *The Guardian*, *Billboard*, *The Miami Herald*, and more. This growth is owed to the hard work done by the nine volumes that have come before us. And on behalf of this tenth volume, I promise to continue this tradition of excellence in innovative scholarship.

Thank you for reading.

Sincerely,

Zachary J. Bass

Editor-in-Chief

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AND ENTERTAINMENT LAW

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NUMBER 1

AN EMPIRICAL STUDY OF U.S. COPYRIGHT FAIR USE
OPINIONS UPDATED, 1978-2019

BARTON BEEBE*

This article presents a brief update through 2019 of the author's previous quantitative study of all reported federal court opinions that applied the Copyright Act's four-factor test for copyright fair use. This updated study systematically analyzes 579 copyright fair use opinions from 435 cases over the 42-year period from 1978 through 2019. The updated data show that, for better and worse, much has remained the same in our fair use case law since 2005. Most notably, the fourth factor, going to the effect of the defendant's use on the market for the plaintiff's work, continues ultimately to dominate the test. However, the data record a significant shift toward summary adjudication of the fair use defense, a decline in the influence of the courts of the Second Circuit, and a substantial recovery in recent years in courts' attention to the transformativeness test for fair use.

* John M. Desmarais Professor of Intellectual Property Law, NYU School of Law. This long-running project has benefitted from presentations to the Los Angeles Copyright Society in 2008, the Fordham Intellectual Property Law & Policy Conference in 2012, the University of Washington School of Law Campbell at 21 Conference in 2015, New York City Bar Association Copyright Law Committee in 2015, and the Intellectual Property Scholars Conference in 2018. Thanks to Emiliano Catan, Jeanne Fromer, and Matthew Sag for comments. Thanks to Lauren Bobersky and Matthew Sumner for excellent research assistance.

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INTRODUCTION

Section 107 of the Copyright Act of 1976 sets forth four factors that courts “shall” consider in determining whether an unauthorized use of a copyrighted work qualifies as a non-infringing “fair use.”¹ The four-factor test is central to the operation of American copyright law and the system of commercial and artistic speech that it regulates. Since the January 1, 1978 effective date of the Copyright Act, the test has been the subject of four Supreme Court cases² and perhaps a fifth one this term in *Google LLC v. Oracle America, Inc.*³ Over the decades, the four-

¹ Copyright Act of 1976, Pub. L. No. 94-553, sec. 101, § 107, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107 (2018)).

² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Stewart v. Abend*, 495 U.S. 207 (1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

³ *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018), *cert. granted*, 140 S. Ct. 520 (2019).

factor test has also featured in hundreds of lower court cases, incited an enormous amount of scholarly commentary,⁴ and received widespread international attention from nations considering, and then usually declining to adopt, the American four-factor approach to copyright fair use.⁵

In light of the continuing importance of and attention to the four-factor test, this article presents an update through 2019 of my previous quantitative study of all reported federal court opinions that made substantial use of the section 107 four-factor test from 1978 through 2005.⁶ That previous study analyzed 306 opinions from 215 cases over that 28-year period.⁷ This updated study analyzes 579 opinions from 435 cases over what is now a 42-year period from 1978 through 2019. It applies the same method of “systematic content analysis” of the fair use opinions that I pursued in the previous study.⁸ In doing so, it seeks to assess the daily life of our fair use case law outside of the headline-making, blockbuster cases that tend to populate our casebooks and serve as the usual suspects in our fair use scholarship. As the original study showed and this update will affirm, the “leading cases” do not

⁴ See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][6] (Matthew Bender rev. ed. 2019) (“A wealth of scholarly theories have been advanced to bring order to the tangled brier that is fair use.”). Indeed, there are far more law review articles on copyright fair use than there are fair use court opinions. For the period 1978 through 2019, the overall ratio of law review articles on the issue to actual court opinions on the issue was 1.61—or, stated differently, over that period there were only 0.62 fair use court opinions for every law review article published on copyright fair use. Furthermore, these data very likely underestimate the number of law review articles on fair use during the period. They are based on the number of entries appearing each year in the Hein Online Law Journal Library that used the term “fair use” in their titles and addressed copyright fair use (rather than, for example, trademark fair use).

⁵ See generally JONATHAN BAND & JONATHAN GERAFFI, THE FAIR USE/FAIR DEALING HANDBOOK (2013), infojustice.org/wp-content/uploads/2013/03/band-and-geraffi-2013.pdf [<https://perma.cc/5XCL-BWJF>] (providing a typology of fair use laws around the world); Niva Elkin-Koren & Neil Weinstock Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 HASTINGS L.J. (forthcoming 2020) (reporting the results of an empirical study of Israeli fair use case law).

⁶ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008).

⁷ *Id.* at 564–65.

⁸ See *id.* at 623–24 (describing the method of collecting and coding the opinions studied).

necessarily reflect or influence everyday fair use adjudication, particularly in the district courts.⁹

The updated data show that much has remained the same in our fair use case law since 2005. The same two factors that drove the test through 2005 have continued to do so: the first factor, going to the “purpose and character” of the defendant’s use,¹⁰ including whether it qualifies as “transformative,”¹¹ and the fourth factor, going to “the effect of the [defendant’s] use upon the potential market for or value of the copyrighted work.”¹² As between these two factors, the updated data indicate that at least in the general population of our fair use case law, factor four has remained the single dominant factor in courts’ adjudication of the fair use defense—economic analysis continues ultimately to define fair use in the American copyright system.¹³ Meanwhile, appeal, reversal, and dissent rates remain unexceptional as compared to other areas of private law.¹⁴ Courts continue to apply the four-factor test mechanically and rarely consider additional factors beyond the four that are prescribed by the statute.¹⁵ The lower courts continue mistakenly to cite old, obsolete dicta from the Supreme Court case law, dicta that the Court itself has repeatedly tried to overwrite.¹⁶ Admirably, however, judges continue to resist stampeding all the factor outcomes to conform with the overall test outcome; instead,

⁹ It cannot be stressed strongly enough, however, that the statistics set forth in this update—and indeed in the original article—cannot present a complete picture of our fair use case law, let alone of the larger operation of copyright fair use outside of the case law. The data are a necessary supplement to, but they cannot substitute for, traditional systematic doctrinal analysis. At best, each statistic is an additional form of circumstantial evidence, a description of a different part of the elephant, that may be adduced to develop a better understanding of our overall fair use case law. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 732–34 (2011) (discussing the problem of selection bias and defending the utility of systematic content analysis of reported federal opinions); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 83 (2012) (“The potential for selection bias notwithstanding, the fact remains that litigated cases are important and they are constantly subject to ad hoc empirical assessments. . . . The unrepresentative nature of written opinions does not imply that scholars should abandon the field of empirical legal studies, but it does call for some caution in interpreting results.”); see also Beebe, *supra* note 6, at 565–66 (discussing selection bias).

¹⁰ 17 U.S.C. § 107(1) (2018).

¹¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–85 (1994) (discussing the fair use concept of transformativeness).

¹² 17 U.S.C. § 107(4).

¹³ See *infra* Part III.E.

¹⁴ See *infra* Part I.B.2.

¹⁵ See *infra* Part I.A.

¹⁶ See *infra* Parts III.B.2, III.E.

they generally continue to admit in their written opinions when a factor does not support their overall fair use finding.¹⁷

But the updated data also show some notable developments in the case law since 2005. A substantially higher proportion of our fair use case law now takes the form of motion to dismiss and summary judgment opinions.¹⁸ There has also been a significant rise in the proportion of opinions addressing unauthorized uses of photographs.¹⁹ Among the lower courts, the courts of the Second Circuit still exert the most influence on the fair use case law, but that influence is declining.²⁰ More substantively, while the transformativeness test appeared to be waning in influence by 2005, it has since recovered its previous level of influence, even in the lower-profile, workaday fair use opinions that make up the majority of the data.²¹ However, the data indicate that in these same opinions, while courts now routinely consider transformativeness, a finding that the defendant's use is transformative is still far from necessary to trigger a finding of fair use.

This update assumes some familiarity with and roughly follows the structure of the original study. Part I provides background on section 107 and the general characteristics of the opinions, including the proportion that found fair use, and of the judges who wrote them. Part II reports how the factor outcomes correlated with each other and the overall test outcome, to which factors judges devoted the bulk of their analysis, and the degree to which judges stamped the factor outcomes. Part III focuses more specifically on the factual findings judges made under each of the four factors.

I BACKGROUND

A. Section 107 of the Copyright Act of 1976

My original study briefly addressed the history of the fair use doctrine and section 107.²² Here, for reference purposes, I quote section 107 in full:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in

¹⁷ See *infra* Part II.C.

¹⁸ See *infra* Part I.B.1.

¹⁹ See *infra* Part I.B.1.

²⁰ See *infra* Part I.B.3.

²¹ See *infra* Part III.B.1.

²² See Beebe, *supra* note 6, at 557–61.

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.²³

Though section 107 consists of three parts (the preamble, the four factors, and the final statement added in 1992 regarding unpublished works), nearly all courts and commentators continue to focus only on the four factors. Over the 42-year period from 1978 through 2019, only 21.6% of the opinions cited the preamble to justify their fair use determination, and that proportion has remained essentially unchanged throughout the period.²⁴ Meanwhile, since 1992, only eight opinions have explicitly alluded to the added statement regarding unpublished works as informing their fair use analysis.²⁵ More significantly, despite courts' frequent recitation of the principle that the factors "are not meant to be exclusive,"²⁶ courts appear to have grown even less likely to consider factors beyond the four statutory factors. The original study

²³ 17 U.S.C. § 107.

²⁴ Interestingly, however, 3.3% of the opinions (or 19 of the 579 opinions) made an adverse inference that to the extent the defendant's use did not take the form of "criticism, comment, news reporting, teaching . . . , scholarship, or research," this supported a determination that the use did not qualify as a fair use. *See, e.g.,* *Peteski Prods. v. Rothman*, 264 F. Supp. 3d 731, 739–40 (E.D. Tex. 2017) ("Here, [defendant] made no alteration to the work nor did she use it as part of a commentary or criticism.").

²⁵ *See, e.g.,* *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 742 F.3d 17, 31 (2d Cir. 2014), *amended and superseded by* 756 F.3d 73 (2d Cir.). Three of these eight opinions nevertheless found no fair use. *See, e.g.,* *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1168 (9th Cir. 2012).

²⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

reported that 17.0% of the 306 opinions through 2005 considered other factors;²⁷ since 2006, that proportion has dropped to 4.7%.²⁸ The original drafters of section 107 were concerned that the section would freeze what had up to then been an evolving judge-made doctrine.²⁹ The data show this concern to have been valid.

As for the manner in which courts have used the factors, courts continue to apply them “mechanistically,”³⁰ perhaps even more so than they did in the past. The original study reported that 59.5% of the 306 opinions through 2005 adopted the practice of explicitly stating which party, if either, each factor favored;³¹ since 2006, 77.0% of fair use opinions have done so. Overall, of the 579 opinions in the updated dataset, 87.5% considered all four factors, and 85.9% did so in order. (As in the past, this all greatly facilitated reliable coding of the opinions.)

B. Distributions of the Opinions

1. Distribution of Opinions by Year and Posture

Figure 1 shows the distribution by year of the 433 district court opinions, 139 circuit court opinions, and seven Supreme Court opinions in the updated dataset.³² The annual number of circuit court fair use opinions has remained relatively steady since the 1980s. By contrast, since 2010, there has been an uptick in the annual number of district court opinions employing the four-factor test.³³ This uptick may partly reflect a significant increase in fair use opinions involving defendants’ unauthorized appropriation of photographs, especially in the internet context. Of the

²⁷ Beebe, *supra* note 6, at 564.

²⁸ See also Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2620 (2009) (“It is curious . . . how reluctant courts have been to consider factors beyond those set forth in § 107 in the fair use caselaw.”).

²⁹ See Beebe, *supra* note 6, at 559.

³⁰ *Harper & Row*, 471 U.S. at 588 (Brennan, J., dissenting).

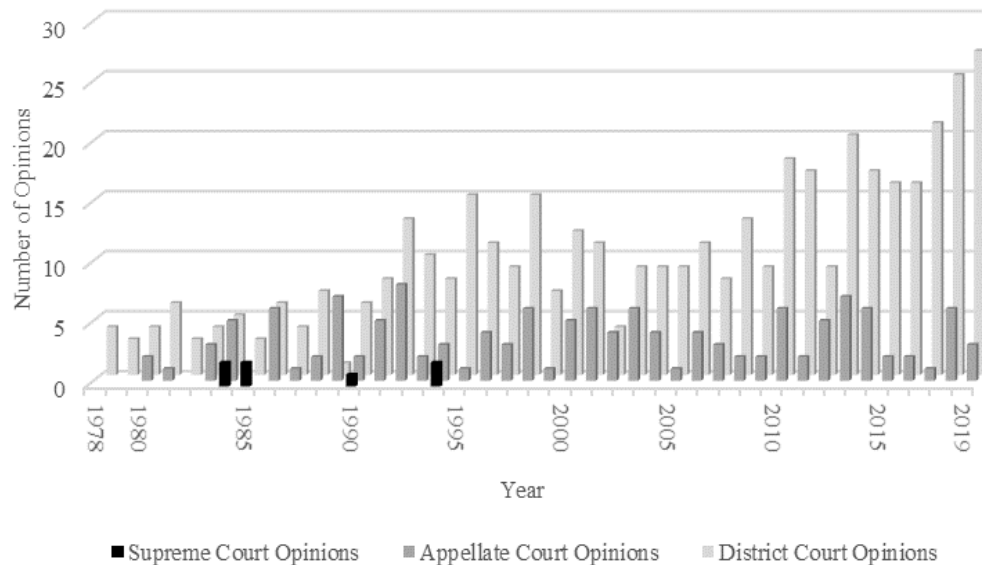
³¹ Beebe, *supra* note 6, at 562.

³² Of the 435 cases that produced these opinions, 336 produced only one opinion. By contrast, five cases produced five opinions each. For the final majority opinion in each of these cases, see *Harper & Row*, 471 U.S. 539; *New Era Publications International, APS v. Henry Holt, Co.*, 884 F.2d 659 (2d Cir. 1989); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Bouchat v. Baltimore Ravens Ltd. Partnership*, 737 F.3d 932 (4th Cir. 2013). This study coded the United States Court of Federal Claims as a district court.

³³ The rapid increase in district court opinions has meant that for the first time since 1992, there were more federal court opinions on copyright fair use in both 2018 and 2019 than there were law review articles focused on the issue in each of those years. The ratio of court opinions to law review articles in 2018 was 1.11 and in 2019, 1.03.

25 district court opinions in 2018, 18 (or 72.0%) involved the copying of photographs; of the 27 district court opinions in 2019, 14 (or 51.9%) did so.³⁴

FIGURE 1
NUMBER OF REPORTED SUPREME COURT, APPELLATE COURT, AND
DISTRICT COURT FAIR USE OPINIONS BY YEAR, 1978–2019



A second explanation for the increase in district court opinions since 2010 may emerge out of the data represented in Table 1 and Figure 2. Table 1 reports the distribution of opinions by posture for the full 42-year period from 1978 through

³⁴ Viewed differently, of the 83 district court opinions in the overall dataset involving the unauthorized reproduction of photographs, 61 (or 73.5%) date from 2010. The Liebowitz Law Firm represented the plaintiff in three district court opinions involving photographs in 2018 and four involving photographs in 2019; the firm also represented a videographer in an additional 2019 opinion. The plaintiff prevailed on the fair use issue in five of these eight opinions. On the Liebowitz Law Firm, see Mike Masnick, *Copyright Troll Richard Liebowitz Benchslapped and Sanctioned AGAIN in a Massive Filing Detailing Pages upon Pages of Him Lying Under Oath*, TECHDIRT (June 30, 2020, 3:33 PM), <https://www.techdirt.com/articles/20200626/18131744799/copyright-troll-richard-liebowitz-benchslapped-sanctioned-again-massive-filing-detailing-pages-upon-pages-him-lying-under-oath.shtml>.

2019.³⁵ Figure 2 shows the 5-year moving average of the annual number of fair use opinions by posture (for the leading postures) over the same period. No doubt due at least in part to the influence of *Bell Atlantic Corp. v. Twombly*³⁶ and *Ashcroft v. Iqbal*,³⁷ the past decade has seen a significant rise in the number of opinions addressing motions to dismiss based on the fair use defense.³⁸ Of the 53 motion to dismiss opinions appearing in the dataset, only three predate *Twombly*.³⁹

There has also been a significant rise in opinions addressing motions for summary judgment on the fair use defense, suggesting that litigants and courts have become more comfortable in the past decade with addressing the defense in the summary judgment posture.⁴⁰ In some instances, this has led to individual cases producing multiple district court opinions on the fair use issue in relatively quick succession.⁴¹ For the period 1978 through 2019, 58.7% of our fair use case law

³⁵ For purposes of simplifying the data, this study coded as preliminary injunction opinions two temporary restraining order opinions that included complete four-factor fair use analyses. *See United Tel. Co. v. Johnson Publ'g Co.*, 855 F.2d 604 (8th Cir. 1988); *James Castle Collection & Archive, LP v. Scholastic, Inc.*, No. 1:17-CV-437-BLW, 2017 U.S. Dist. LEXIS 181801 (D. Idaho Oct. 30, 2017).

³⁶ 550 U.S. 544 (2007).

³⁷ 556 U.S. 662 (2009).

³⁸ WILLIAM F. PATRY, PATRY ON FAIR USE § 7:5, Westlaw (database updated May 2020) (“Increasingly, courts have considered fair use on a rule 12(b)(6) motion to dismiss for failure to state a claim . . .”).

³⁹ *See Gregerson v. Vilana Fin., Inc.*, 446 F. Supp. 2d 1053 (D. Minn. 2006) (denying motion to dismiss); *Chi. Sch. Reform Bd. of Trs. v. Substance, Inc.*, 79 F. Supp. 2d 919 (N.D. Ill. 2000) (granting motion to dismiss); *Int-Elect Eng'g, Inc. v. Clinton Harley Corp.*, No. C-92-20718 JW, 1993 U.S. Dist. LEXIS 11510 (S.D. Cal. June 24, 1993) (same). With respect to post-*Twombly* motion to dismiss opinions in the data, less than half were in cases involving photographs.

⁴⁰ *See Sony BMG Music Ent. v. Tenenbaum*, 672 F. Supp. 2d 217, 221 (D. Mass. 2009) (“The doctrine of fair use is not infinitely malleable, requiring a jury determination every time it is intoned, no matter what the facts.”). *See also* Pierre N. Leval, *Campbell as Fair Use Blueprint*, 90 WASH. L. REV. 597, 613 (2015) (“Fair use disputes should generally be amenable to disposition on the pleadings or on summary judgment.”).

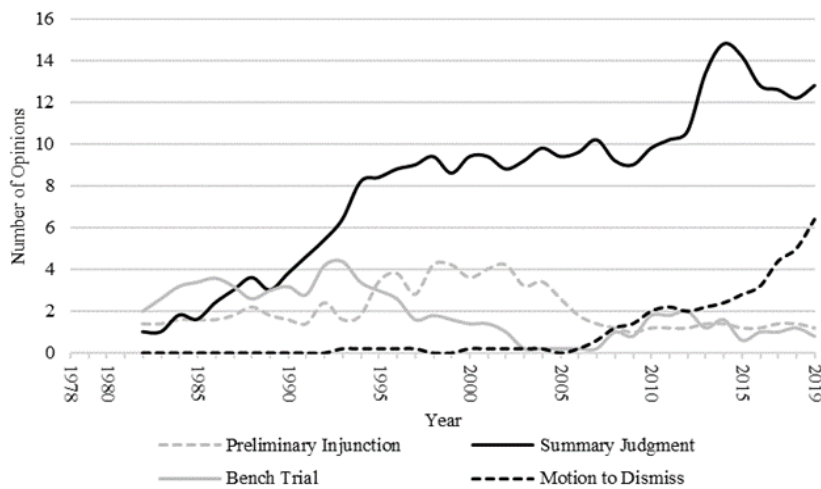
⁴¹ *E.g.*, *BWP Media USA, Inc. v. Gossip Cop Media, LLC*, 87 F. Supp. 3d 499 (S.D.N.Y. 2015) (motion to dismiss granted based on the fair use defense with regard to one of plaintiff's photographs and denied with regard to other plaintiff's photographs); *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395 (S.D.N.Y. 2016) (finding after bench trial that defendant's use of certain plaintiff's photographs did not qualify as fair use); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 256 F. Supp. 3d 1099 (S.D. Cal. 2017) (denying motion to dismiss on fair use defense); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 372 F. Supp. 3d 1101 (S.D. Cal. 2019) (granting summary judgment to defendant on fair use defense).

consisted of opinions addressing motions for summary judgment on the fair use issue; more specifically, 52.5% of fair use circuit court opinions did so.

TABLE 1
DISTRIBUTION AND FAIR USE WIN RATE BY POSTURE OF ALL FAIR USE
OPINIONS, 1978–2019

Posture	<i>N</i>	%	Found Fair Use	Found No Fair Use
Preliminary Injunction	85	14.7	.337	.663
SJ - Plaintiff	72	12.4	---	.806
SJ - Defendant	103	17.8	.718	---
Cross Motions for SJ	165	28.5	.467	.412
Bench Trial	77	13.3	.351	.598
Motion to Dismiss	53	9.2	---	.359
Other	24	4.1	.292	.458
Total	579	100.0	.402	.449

FIGURE 2
5-YEAR MOVING AVERAGE OF ANNUAL NUMBER OF MOTION TO DISMISS, PRELIMINARY
INJUNCTION, SUMMARY JUDGMENT, AND BENCH TRIAL FAIR USE OPINIONS, 1978–2019



2. *Reversal, Dissent, and Appeal Rates*

The original study observed that the conventional wisdom at the time viewed fair use as an extraordinarily unpredictable and unstable area of copyright law.⁴² Yet the data up to 2005 showed that appeal, reversal, and dissent rates in the fair use case law were entirely unexceptional in comparison to other areas of private law.⁴³ Since that time, a body of important scholarship has emerged arguing that copyright fair use is in fact a reasonably predictable and stable area of American law.⁴⁴

The updated data further support this revised and reassuring view of the fair use case law. If anything, the statistics have trended toward more stability. From 1978 through 2005, the percentage of circuit court majority fair use opinions that reversed the district court was 33.8%;⁴⁵ from 2006 through 2019, the percentage that did so declined to 27.3%.⁴⁶ The overall reversal rate for the full 42-year period was 31.3%. As for dissent rates, the original study reported that from 1978 through 2005 the percentage of circuit court fair use majority opinions producing a dissent was 14.1%;⁴⁷ for the period 2006 through 2019, it declined to 6.8%.⁴⁸ The overall dissent rate from 1978 through 2019 was 11.3%. None of these statistics are out of the ordinary for federal civil cases.⁴⁹

3. *Distribution of Opinions by Venue*

Table 2 details the distribution of the 572 non-Supreme Court opinions in the dataset by venue. The courts of the Second Circuit continue to dominate our fair use case law, but not as much as they once did. Figure 3 shows, for all district and circuit court fair use opinions from 1978 through 2019, the 5-year moving average of the annual proportion of such opinions that originated in the district courts or the circuit court of either the Second Circuit or the Ninth Circuit. Cases involving high-technology and the Internet do not alone explain the rise in the proportion of opinions originating in the Ninth Circuit; the proportion of such opinions coming out of the

⁴² See Beebe, *supra* note 6, at 574.

⁴³ See *id.* at 574–75.

⁴⁴ See, e.g., Netanel, *supra* note 9; Sag, *supra* note 9; Samuelson, *supra* note 28.

⁴⁵ See Beebe, *supra* note 6, at 574.

⁴⁶ This decline did not constitute a statistically significant difference. ($X^2(1, N=115)=0.539$, $p=0.463$).

⁴⁷ See Beebe, *supra* note 6, at 574.

⁴⁸ Though apparently a substantial difference, the updated data indicate that the difference in dissent rate for the period from 1978 to 2005 and the dissent rate for the period from 2006 to 2019 did not constitute a statistically significant difference ($X^2(1, N=115)=1.912$, $p=0.167$).

⁴⁹ See Beebe, *supra* note 6, at 574.

Ninth Circuit courts is not substantially different from that of the Second Circuit courts. Meanwhile, the Southern District of New York (S.D.N.Y.) still dominates the district court case law, but again, not as much as it once did. On its own, the S.D.N.Y. contributed more opinions to the overall dataset than all the district courts of the Ninth Circuit combined. But the original study reported that up to 2005, the S.D.N.Y. accounted for 31.3% of fair use district court opinions;⁵⁰ since 2006, that proportion has declined to 26.6%.

Perhaps more interesting—and telling—are the new data on the influence that Second and Ninth Circuit appellate court opinions exert on opinions outside of their respective circuits. As in the original study, both appellate courts enjoy significant trade surpluses in the export and import of opinion citations among the district and appellate courts of the various circuits in the fair use case law. Overall, for the period 1978 through 2019, individual district and circuit court opinions outside of the Second Circuit cited to an average of 1.51 circuit court opinions from the Second Circuit, while opinions outside of the Ninth Circuit cited to an average of 0.92 circuit court opinions from the Ninth Circuit. No other appellate courts come close to these levels of extracircuit influence. As in the original study, by this measure, the S.D.N.Y. on its own exerts more extracircuit influence than every other circuit other than the Second and Ninth, with an average of 0.56 S.D.N.Y. opinions cited by district and appellate courts outside the Second Circuit for the period from 1978 through 2019. But trends over time for these statistics show that the Ninth Circuit has been gaining influence.⁵¹

Thus, as with the original data, our fair use case law continues to consist essentially of what are now the 207 opinions of the Supreme Court, the Second Circuit, the Ninth Circuit, and the S.D.N.Y., along with the remaining 372 opinions that are largely their progeny in the other federal courts.

⁵⁰ *See id.* at 567.

⁵¹ The original study reported that for the period from 1978 through 2005, district and appellate courts outside of the Second Circuit cited to an average of 1.55 appellate court opinions from the Second Circuit, while the equivalent statistic for citations outside of the Ninth Circuit to Ninth Circuit appellate court opinions was 0.68. *See* Beebe, *supra* note 6, at 568. For the period from 2006 through 2019, the statistic for the Second Circuit declined from 1.55 to 1.45 and the statistic for the Ninth Circuit increased from 0.68 to 1.19.

4. Fair Use Win Rates

As reported above in Table 1, for the full period 1978 through 2019, 40.2% of the opinions sampled (regardless of posture and disposition on appeal) found fair use. Because 99 of the 435 cases included in the dataset were responsible for more than one opinion, a better statistic may be the fair use win rate for the last-in-time, non-concurrence, non-dissent opinion in each particular case, which I will refer to as a case's *final opinion*. Of these 435 final opinions, 38.2% found fair use. Table 3 below details the distribution and fair use win rates of these opinions by posture.

TABLE 3
FAIR USE WIN RATE BY POSTURE OF FINAL, NON-
CONCURRENCE, NON-DISSENT FAIR USE OPINIONS IN 435 FAIR USE
CASES, 1978–2019

Posture	<i>N</i>	%	Found Fair Use	Found No Fair Use
Preliminary Injunction	57	13.1	.382	.618
SJ - Plaintiff	61	14.0	---	.803
SJ - Defendant	85	19.5	.694	---
Cross Motions for SJ	120	27.6	.425	.442
Bench Trial	47	10.8	.255	.745
Motion to Dismiss	45	10.3	---	.356
Other	20	4.6	.250	.458
Total	435	100.0	.382	.462

As they did in the original study, the fair use win rates for preliminary injunction and bench trial opinions in Table 3 fall significantly below 50%, with, for example, only one in four final bench trial opinions in the dataset finding fair use. I had suggested in the original study that the low fair use win rates in these postures may be the result of cases in which the defendant pled a relatively weak or even frivolous fair use defense because it is inexpensive to do so.⁵² Good judges will dutifully work through the four-factor analysis even for the most ridiculous claims of fair use, and so such opinions are for better and worse included in the dataset.

The original study introduced one viable (though hardly flawless) method of filtering out opinions addressing a frivolous fair use defense, which is to filter out those opinions that devoted a small proportion of their overall word count to the fair use analysis.⁵³ For the 435 final opinions in the updated dataset, there is a moderate

⁵² See Beebe, *supra* note 6, at 575–80.

⁵³ See *id.* at 567–81.

positive correlation between the proportion of the opinion devoted to the fair use analysis and the likelihood that the opinion will find fair use ($r=0.274$, $N=435$, $p<.001$). This should not be surprising; all else equal, accepting a fair use defense tends to require more analysis than rejecting it.⁵⁴ But filtering for final opinions in the updated dataset that devoted at least 10% of their word count to the fair use analysis, which is comparable to what the original study did as part of its examination of fair use win rates, still yields fair use win rates significantly below 50% for preliminary injunction and bench trial opinions.⁵⁵ To reach a roughly 50% fair use win rate requires filtering only for opinions that devoted at least 40% of their word count to the fair use analysis.⁵⁶ This is all to say that even more so than in the original dataset, the updated dataset shows that a significant majority of our fair use case law—and precedent—consists of analyses that found no fair use.

Overall, the updated data show no statistically significant variations among the circuits in fair use win rates. To be sure, taking all 572 non-Supreme Court opinions in the data set regardless of posture or fate on appeal, the 178 opinions of the courts of the Second Circuit yielded a statistically-significantly higher fair use win rate (47.8%) than did the 394 opinions of courts of the other circuits (36.6%). ($X^2(1, N=572)=6.412$, $p=0.011$). The courts of no other circuit were significantly different when analyzed in this way. But when we focus only on final opinions, any significant differences among the circuits disappear. For example, of the 431 non-Supreme Court final opinions in the dataset, the 124 opinions coming from the courts of the Second Circuit yielded a fair use win rate of 41.9%, while the 307 opinions from outside of the Second Circuit yielded a fair use win rate of 36.5%. ($X^2(1, N=431)=1.114$, $p=0.291$). Further focusing only on final opinions since 2006 (i.e., the new data) does not produce significant differences. There was some evidence in the data from 1978 through 2005 that the case law of the courts of the Second Circuit was relatively fair use friendly.⁵⁷ Whatever intercircuit differences there may have been, however, appear to have faded.

Finally, as for fair use win rates over time, a variety of different approaches to parsing the data produce no clear trends over time. Results greatly depend on how

⁵⁴ See *id.* at 580–81.

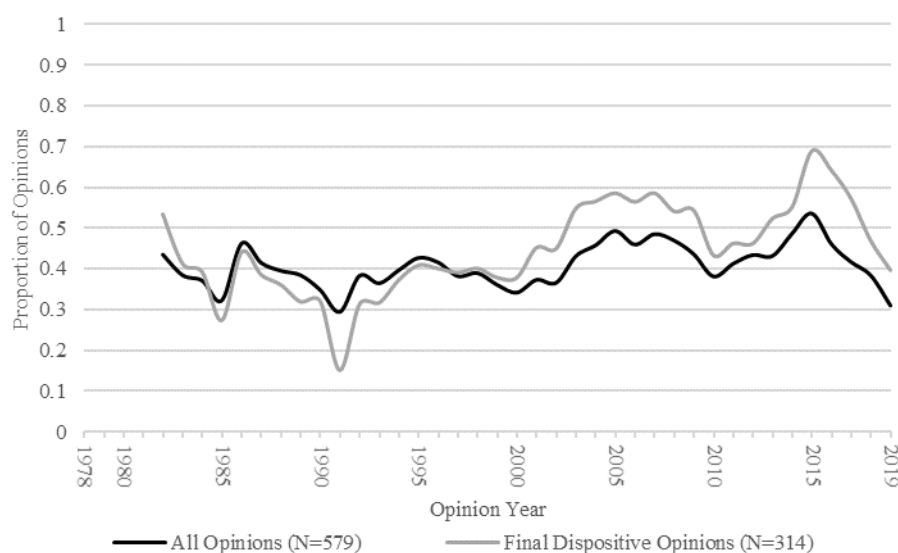
⁵⁵ Specifically, the fair use win rate was .368 for the 144 preliminary injunction and bench trial opinions whose fair use analysis consisted in word count of at least 10% of the opinion's overall word count.

⁵⁶ Specifically, the fair use win rate was .450 for the 60 opinions whose fair use analysis consisted in word count of at least 40% of the opinion's overall word count.

⁵⁷ See Beebe, *supra* note 6, at 594 n.142; Sag, *supra* note 9, at 81–82 (discussing intercircuit differences in fair use win rates).

the opinions are filtered. For example, Figure 4 reports five-year moving averages of the proportion of opinions by year that found fair use for all 579 opinions in the dataset and for the subset of the 314 final opinions in the dataset that dispositively found fair use or no fair use (rather than outstanding fact issues). The former trend is basically flat. The latter suggests some uptick in fair use outcomes since 2000 (starting notably before the Supreme Court case *Campbell v. Acuff-Rose* in 1994). But overall, the data are inconclusive.

FIGURE 4
5-YEAR MOVING AVERAGE OF ANNUAL PROPORTION OF OPINIONS FINDING FAIR USE



C. Judge-Specific Characteristics and Fair Use Outcomes

In a brief 2008 follow up to the original study, and largely inspired by the work of Matthew Sag, Tonja Jacobi, and Maxim Stych,⁵⁸ I tested whether there was any relation between individual judges' ideological or partisan leanings and their propensity to find fair use or no fair use.⁵⁹ To do so, I used a variety of widely-used proxies for and measures of judicial ideology, including most notably the judge's Judicial Common Space (JCS) score.⁶⁰ Regardless of which measure I used, I found

⁵⁸ See Matthew Sag, Tonja Jacobi & Maxim Stych, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801 (2009).

⁵⁹ See Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence From the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517 (2008). See also Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

⁶⁰ See *id.* at 520.

no relation between judges' partisan ideology and their adjudication of the fair use defense in the original dataset of fair use opinions from 1978 through 2005.⁶¹

For the updated data set through 2019, I tested a number of judge-specific variables, including the judge's JCS score, the political party of the judge's appointing president, the judge's age at the time of the opinion, the judge's race, and the judge's gender.⁶² I again found no significant relation between a judge's partisan ideology as measured by the JCS or the judge's appointing president and a judge's adjudication of the fair use defense. Age and race also yielded no significant difference. But interestingly, a simple two-by-three, gender-by-outcome comparison of the updated data suggests that male judges were significantly more likely to find fair use than female judges. Of the 572 non-per curiam opinions in the updated dataset, male judges accounted for 448 opinions, of which 43.1% found fair use and 43.3% found no fair use (the remaining 13.6% found fact issues or produced mixed rulings). By contrast, female judges accounted for 124 opinions, of which only 28.2% found fair use and 51.6% found no fair use. ($X^2(2, N=572)=9.435$, $p=0.008$). It is not at all clear why the data would produce this difference. I consider gender further below.

II

INTERFACTOR ANALYSIS

A. Correlation Analysis

Among the goals of the original study was to establish quantitatively the degree to which the outcomes of each of the factors in the four-factor fair use test correlated with each other and with the overall outcome of the test.⁶³ One means of

⁶¹ See *id.* at 521.

⁶² For the JCS scores of district court judges, I used Christina L. Boyd, *113th Congress Data Downloads* (1937-2014 appointments), FEDERAL DISTRICT COURT JUDGE IDEOLOGY DATA (2015), <http://clboyd.net/ideology.html>. For the JCS scores of appellate court judges and Supreme Court justices, I used Lee Epstein et al., *The Judicial Common Space*, WASH. UNIV. ST. LOUIS (last updated Dec. 15, 2019), <http://epstein.wustl.edu/research/JCS115.02.zip> (data updated through 2017). For other judge and justice characteristics, I used Gary Zuk et al., *Attributes of U.S. Federal Judges Database*, SONGER PROJECT, <http://www.songerproject.org/attributes.html> (last visited Oct. 23, 2020) (data updated through 2000). For recently appointed judges not covered in these datasets, I coded their characteristics (other than their JCS scores) by hand. The data were combined and analyzed in Stata, a common statistical analysis software program.

⁶³ See Beebe, *supra* note 6, at 582–85.

doing so involves pairwise correlation analysis among the factor outcomes and the overall test outcome. Table 4 sets forth these pairwise correlation results.

TABLE 4
PAIRWISE CORRELATIONS AMONG OVERALL FAIR USE OUTCOMES AND FACTOR
OUTCOMES IN 579 FAIR USE OPINIONS, 1978–2019***
(using ternary variables: 1=favors FU, -1=disfavors FU, 0=other)

	Overall Outcome	Factor One	Factor Two	Factor Three	Factor Four
Factor One	0.804	1			
Factor Two	0.350	0.254	1		
Factor Three	0.706	0.619	0.294	1	
Factor Four	0.853	0.715	0.328	0.658	1

***For all coefficients, $p < .001$.

The results in Table 4 are very much in line with those reported in the original study. As expected, the outcome of factor four (“the effect of the use upon the potential market for or value of the copyrighted work”) correlates most strongly with the overall test outcome and the other factor outcomes, followed by the outcomes of factors one and three (respectively, “the purpose and character of the use” and “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”). Though the correlation between the outcome of factor two (“the nature of the copyrighted work”) and the overall test outcome is statistically significant, it remains, as it always has been, relatively weak. These basic correlation coefficients have not substantially changed over time.

The outcomes of factors one and four are also strongly correlated with each other. Indeed, in 72.5% of the 579 opinions, the court arrived at exactly the same outcome under both factors (out of six possible coded outcomes per factor).⁶⁴ As the original study explained, this result should not be surprising.⁶⁵ A finding under factor one that the defendant’s use is transformative or non-commercial will often support a finding under factor four that the use has no appreciable effect on the potential market for the plaintiff’s work. Of greater interest may be those relatively rare instances in which factors one and four pointed in opposite directions. They did so

⁶⁴ The outcome of each factor was coded as one of the following: favored fair use, disfavored fair use, presented fact issues, was neutral, was not addressed, or was unclear.

⁶⁵ See Beebe, *supra* note 6, at 583.

in 44 opinions. The court's overall fair use determination aligned with factor four in 50.0% of these opinions, aligned with factor one in 36.0% of the opinions, and otherwise found that the fair use determination was a fact issue. As in the original study, correlation analysis and simple percentages suggest, though admittedly weakly, that factor four continues to drive the overall test outcome. However, as I will discuss further below, other analyses of the data present a more complicated picture.

B. Word Count Analysis

The analysis of trends over time in the proportion in word count of courts' fair use analysis that they devoted to each of the four factors may yield further insight into the degree to which courts have relied on certain of the factors in making (or at least defending in their opinions) their fair use determination.⁶⁶ In assessing the word count data from 1978 through 2005, the original study suggested that courts exhibited two waves of attention to factor one.⁶⁷ The first came after the 1984 Supreme Court case of *Sony Corp. of America v. Universal City Studios, Inc.*, in which, as I discuss further below, the Court established the presumption under factors one and four that commercial uses are presumptively unfair.⁶⁸ The second came after the 1994 Supreme Court case of *Campbell v. Acuff-Rose Music, Inc.*, in which the Court fully embraced the concept of transformativeness under factor one.⁶⁹ The original study further suggested that both of these waves were followed by troughs in which courts' attention to the factor lessened, so that by 2005, attention to factor one appeared to have been steadily declining. However, in a subsequent article, Neil Netanel quantitatively studied courts' use of the transformativeness doctrine from the 1994 *Campbell* case through 2010 and documented a recovery of interest by courts in the first factor—and specifically in the transformativeness inquiry—for the period 2006 through 2010.⁷⁰

Figure 5 presents a five-year moving average of the proportion in word count of each opinion's fair use analysis devoted to discussion of each of the four factors. It largely confirms Netanel's argument that despite any apparent decline in attention

⁶⁶ Because judges have continued to apply the four-factor test in a highly mechanical manner (and often use subheadings to label their analysis under each factor), determining the proportion of each opinion's word count that the judge devoted to each of the four factors has remained a straightforward undertaking.

⁶⁷ See Beebe, *supra* note 6, at 587–88.

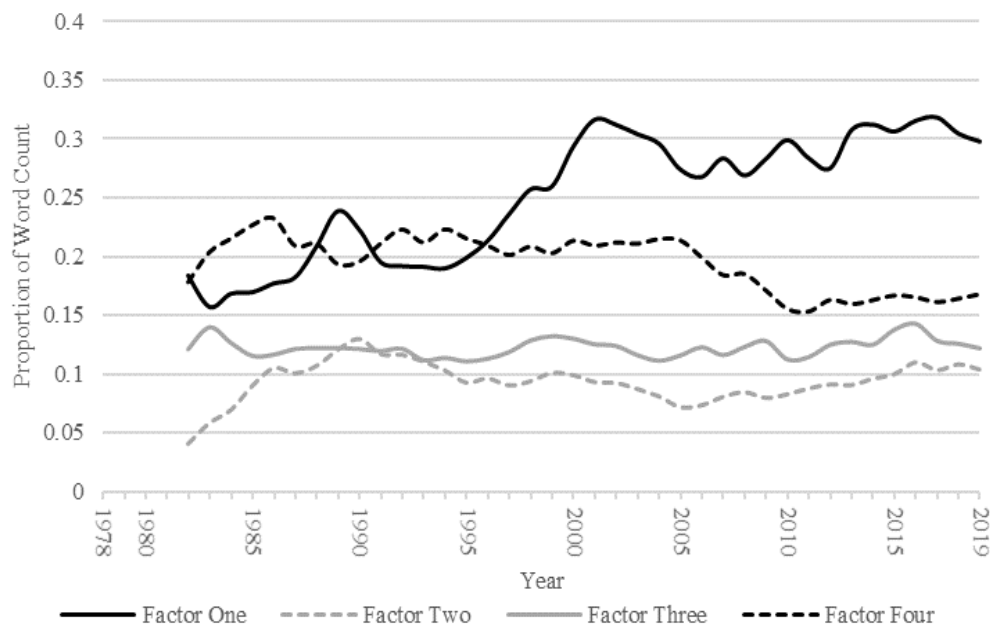
⁶⁸ See *infra* notes 94 and 127 and accompanying text.

⁶⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–85 (1994).

⁷⁰ See Netanel, *supra* note 9, at 736–38.

to factor one from 2000 through 2005, courts renewed their interest in the factor in subsequent years. What is striking is that in the meantime, at least as measured by word count, courts' attention to factor four has noticeably diminished. Whether this is evidence of a decline in the influence of factor four is a question I will return to below.

FIGURE 5
5-YEAR MOVING AVERAGE OF THE PROPORTION IN WORD COUNT OF FAIR USE ANALYSIS
DEVOTED TO EACH OF THE FOUR FACTORS IN 579 FAIR USE OPINIONS, 1978–2019



C. Stampeding

The original study sought to dispel the conventional wisdom at the time that judges first decide whether the defendant's conduct constituted fair use and then align the factor outcomes to support that result.⁷¹ To this end, the study established a stampede score for each opinion, which was simply the sum of the factors that the opinion found to favor fair use minus the sum of the factors that the opinion found to disfavor fair use.⁷² The study showed that courts do not in fact stampede the factors to conform with the overall test outcome.⁷³ Whether finding fair use or no fair use,

⁷¹ See Beebe, *supra* note 6, at 589–90.

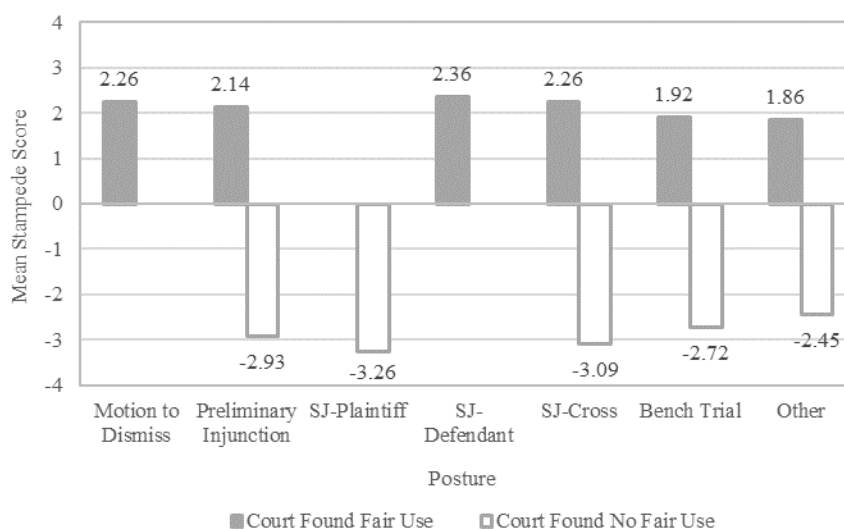
⁷² See *id.* at 590.

⁷³ See *id.* at 590–91.

judges tended to call the factors as they saw them and openly admitted when a factor did not support their overall determination.⁷⁴

The data continue to support this view of the case law. Figure 6 shows the mean stampede score by posture and fair use outcome in the 579 opinions in the updated dataset. None of the means for the period 2006 through 2019 are significantly different from the corresponding means for the period 1978 through 2005.

FIGURE 6
MEAN STAMPEDE SCORE BY POSTURE IN 579 FAIR USE OPINIONS, 1978–2019
(STAMPEDE SCORE = (NUMBER OF FACTORS DETERMINED TO FAVOR FAIR USE) – (NUMBER OF FACTORS DETERMINED TO DISFAVOR FAIR USE))



⁷⁴ See *id.*

III INTRAFACOR ANALYSIS

I now turn to the various subfactor considerations that courts have traditionally relied on to determine the outcomes of each of the four factors.

A. An Overview of the Significance of the Subfactor Findings

To help in understanding what role each of the various subfactor considerations play in the overall fair use analysis, Table 5 presents the results of various logistic regression models estimated for all opinions that were dispositive (i.e., either found fair use or no fair use), were unreversed, and in the case of appellate opinions were neither dissents nor concurrences. I will refer to such opinions, for lack of a better term, as *core opinions*.⁷⁵ The models regress a binary dependent variable representing whether the opinion found fair use on various binary independent variables representing underlying factual findings, whether the opinion came out of the courts of the Second or the Ninth Circuits, and, following *Sag*,⁷⁶ whether the plaintiff or defendant was a natural person. Table 5 reports odds ratios, which are not particularly easy to understand. For each independent variable, the odds ratio reports the ratio of the odds of a finding of fair use to the odds of a finding of no fair use when the condition the independent variable represents is satisfied and all other variables are held constant.⁷⁷ Though the regression models are admittedly rough, the odds ratios can at the very least provide a sense of the relative impact of various factual findings and other variables on the overall fair use determination.

I will discuss the results reported in Table 5 in more detail below. I briefly note here with respect to the various objective variables that the regression results suggest that litigating a case in the courts of the Second Circuit or the Ninth Circuit as opposed to other venues does not significantly affect the likelihood of a fair use

⁷⁵ The subset of final opinions ($N=435$) and the subset of core opinions ($N=354$) intersect (they share 288 opinions in common) but are not identical. Both exclude concurrences, dissents, and reversed opinions. Core opinions further exclude opinions that found that the fair use determination raised issues of fact. By contrast, final opinions include opinions finding a fact issue, but are limited only to the final-in-time (non-concurrence, non-dissent, unreversed) opinion in the case.

⁷⁶ See *Sag*, *supra* note 9, at 74–78.

⁷⁷ For example, according to model 1 in Table 5 (which omits judge gender, circuit, and natural person status of each party), when a court finds that the defendant's use is transformative, the odds of a finding of fair use are 91.3 times as large as the odds of a finding of no fair use. Expressed as predicted probabilities under model 1, the predicted probability that a court will find fair use when the use does not qualify as transformative is .42 (with all other variables set to 0) as against a predicted probability of .99 when the use qualifies as transformative.

finding. Additionally, once we control for the factual characteristics of the cases, the impact of gender is only marginally statistically significant. Finally, consistent with Sag's work, the fact that the owner of the copyrighted work is a natural person (rather than, for example, a corporation) appears to be associated with a significant increase in the likelihood that a court will find fair use.⁷⁸

B. Factor One: Purpose and Character of the Use

We saw above that the outcome of factor one continues to correlate very strongly with the overall outcome of the fair use test. Expressed in percentage terms, of the 354 core opinions in the updated dataset, 153 found that factor one favored fair use and 141 of these (or 92.2%) found fair use; of the 174 core opinions that found that factor one disfavored fair use, 168 (or 96.6%) found no fair use. Indeed, the correlation between the outcome of factor one and the overall test outcome is so strong as to suggest that factor one is nearly dispositive of the overall test outcome. Alternatively, and perhaps more cynically, courts may feel the need to align the outcome of factor one with their overall fair use determination. Regardless, the importance of factor one prompts the question of which subfactor considerations drive the outcome of factor one itself. As in the original study, I focus here on the most important of these subfactors: whether the defendant's use was transformative, whether the defendant's use was commercial or noncommercial, and whether the defendant acted in good or bad faith.

⁷⁸ See Sag, *supra* note 9, at 74–78.

TABLE 5
LOGISTIC REGRESSION OF FAIR USE OUTCOME ON SUBFACTOR FACTUAL FINDINGS
AND OBJECTIVE VARIABLES IN CORE FAIR USE OPINIONS, 1978–2019

	Subfactor Factual Findings and Other Variables	(1)	(2)	(3)	(4)
Factor One	D's use is commercial	.349** (.133)	.321** (.124)	.348** (.135)	.347** (.137)
	D's use is noncommercial	3.208* (1.607)	2.857* (1.451)	3.309* (1.666)	4.189** (2.198)
	D's use is transformative	91.264*** (59.393)	85.665*** (55.695)	90.616*** (59.240)	89.504*** (59.883)
	D's use is parodic	11.528** (8.997)	9.859** (8.187)	12.029** (9.514)	16.776** (13.737)
	D's use is in bad faith	.401 (.328)	.413 (.339)	.383 (.317)	.361 (.292)
Factor Two	P's work is published	2.502* (.976)	2.716* (1.073)	2.368* (.939)	2.426* (.996)
	P's work is unpublished	1.061 (.537)	1.051 (.529)	1.003 (.512)	.991 (.505)
	P's work is creative in nature	.448* (.159)	.483* (.173)	.433* (.155)	.375* (.139)
	P's work is factual in nature	2.506* (1.013)	2.565* (1.051)	2.493* (1.012)	3.092* (1.332)
Factor Three	D used entirety of P's work	.617 (.198)	.623 (.203)	.618 (.198)	.662 (.222)
Objective Variables	Gender (1=Male)		2.200 [†] (.927)		
	Opinion from 2d Circuit			1.373 (.490)	
	Opinion from 9th Circuit			1.430 (.552)	
	Plaintiff was natural person				4.637*** (1.723)
	Defendant was natural person				.721 (.274)
	Constant	.752	.397	.646	.510
	Pseudo R ²	.415	.418	.418	.452
	N	354	347 ^{††}	354	354

(standard errors in parentheses) *p<.05, **p<.01, ***p<.001, [†]p = .061.

^{††}Seven of the 354 core opinions in the updated dataset consisted of per curiam opinions, which were coded as having no gender and dropped from model 2.

1. *Transformativeness*

Since the 1994 *Campbell* case, the consideration of whether a defendant's use qualifies as "transformative" has emerged as among the most important to a court's overall fair use determination;⁷⁹ indeed, Netanel argues that it "overwhelmingly drives" that determination.⁸⁰ The original study suggested that by the end of 2005, courts' attention to the transformativeness inquiry, as compared to factor one more generally, was waning.⁸¹ However, as the gray line in Figure 7 shows, the proportion of fair use opinions considering transformativeness has returned to very high levels.⁸²

Other data further illustrate how big of a role a finding that the defendant's use is transformative can play in the court's overall fair use determination. The regression models suggest that when a court finds that the defendant's use is transformative, the ratio of the odds a defendant will prevail in its fair use defense to the odds it will fail is anywhere from 86 to 91 times greater. By this measure, a finding of transformativeness exerts by far the greatest impact of any finding on a court's likelihood of making an overall determination of fair use. More simply, as Table 6 indicates, of the 78 core opinions since *Campbell* in which a court found transformativeness, in all but three the court went on to find fair use. Tellingly, in each of the three outlying opinions, the court took pains to minimize the significance of its transformativeness finding.⁸³

⁷⁹ See generally Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019) (reviewing all federal court fair use opinions addressing transformativeness through January 1, 2017); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008) (reviewing all federal appellate court opinions addressing fair use from *Campbell* through 2007).

⁸⁰ See Netanel, *supra* note 9, at 734 ("[C]ontrary to Beebe's finding that the transformative use doctrine has had quite limited influence on fair use case law, the transformative use paradigm, as adopted in *Campbell v. Acuff-Rose* overwhelmingly drives fair use analysis in the courts today.").

⁸¹ See Beebe, *supra* note 6, at 603.

⁸² This is consistent with Netanel's findings. See Netanel, *supra* note 9, at 736–40.

⁸³ See *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 177–78 (2d Cir. 2018) (characterizing the use as "at least somewhat transformative"); *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008) (characterizing the use as "not consistently transformative"); *Castle Rock Ent. v. Carol Publ'g Grp.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (characterizing the use as transformative "only by a generous understanding of what it means for a work to be 'transformative'").

FIGURE 7
5-YEAR MOVING AVERAGE OF PROPORTION OF OPINIONS CONSIDERING VARIOUS FACTOR
ONE SUBFACTORS IN 579 FAIR USE OPINIONS, 1978–2019⁸⁴



TABLE 6
TRANSFORMATIVENESS FINDING BY OVERALL FAIR USE OUTCOME IN 246 CORE OPINIONS,
FROM *CAMPBELL V. ACUFF-ROSE* THROUGH 2019

Finding	Fair Use Found	Fair Use Not Found	Total
Use is transformative	75 (63.6%)	3 (2.3%)	78 (31.7%)
Use is not transformative	6 (5.1%)	95 (74.2%)	101 (41.1%)
Transformativeness not addressed	32 (27.1%)	23 (18.0%)	55 (22.4%)
Unclear	5 (4.2%)	7 (5.5%)	12 (4.9%)
	118 (100.0%)	128 (100.0%)	246 (100.0%)

⁸⁴ The figure includes reversed opinions because we are analyzing whether courts consider these subfactors relevant to a fair use analysis.

Yet it remains important to emphasize that while a finding of transformativeness is nearly sufficient to trigger an overall finding of fair use, it is far from necessary to trigger such a finding. The data indicate that the transformativeness inquiry has not in fact replaced the overall fair use analysis.⁸⁵ Consistent with Rebecca Tushnet's defense of non-transformative copying, even non-transformative copying of entire works will sometimes qualify as fair use.⁸⁶ As Table 6 shows, since *Campbell* 118 core opinions have found fair use. Of these, 32 (27.1%) did not consider transformativeness and six (5.1%) explicitly found that the defendant's use was not transformative.⁸⁷ Overall, only 75 (63.6%) of the 118 core opinions that found fair use explicitly found the defendant's fair use to be transformative in nature. Of the remaining 43 opinions that did not find transformativeness but did find fair use, 19 involved facts in which the defendant copied the entirety of the plaintiff's work.⁸⁸

The data further show that a finding of transformativeness continues to have a mixed effect on a court's treatment of other factors in the fair use analysis. Consistent with the original study, a finding of transformativeness still does not appear to stampede the factors. The mean stampede score for the 78 core opinions

⁸⁵ See Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for A Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321, 324 (2014) (expressing concern that the transformativeness test "has in practice often dominated or replaced" the four-factor test). Cf. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) ("We're skeptical of *Cariou*'s approach, because asking exclusively whether something is 'transformative' not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.").

⁸⁶ See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004) ("Courts should recognize that various kinds of copying, not united by some overall theory about creating new works, promote freedom of speech The point is not to denigrate fair use, but to recognize that many kinds of uses of copyrighted material may be justified, not just uses that put a critical spin on a prior work.").

⁸⁷ See *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014), *amended and superseded by* 756 F.3d 73 (2d Cir.); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); *Super Future Equities, Inc. v. Wells Fargo Bank Minn.*, 553 F. Supp. 2d 680 (N.D. Tex. 2008); *S&L Vitamins, Inc. v. Austl. Gold, Inc.*, 521 F. Supp. 2d 188 (E.D.N.Y. 2007); *Gulfstream Aerospace Corp. v. Camp Sys. Int'l*, 428 F. Supp. 2d 1369 (S.D. Ga. 2006); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572 (N.D. Cal. Jan. 3, 1997).

⁸⁸ See, e.g., *Swatch Grp. Mgmt. Servs.*, 742 F.3d 17; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994). See also Samuelson, *supra* note 28, at 2557 (discussing "iterative copying for orthogonal purposes").

since *Campbell* that found transformativeness was 1.99, with the mode stamped score of 2 reported by 38.5% of the opinions. As the original study explained, this makes sense because transformative uses most commonly target works classified as creative under factor two and often involve quite substantial uses of those works under factor three.⁸⁹ At the same time, however, a finding of transformativeness correlates very strongly with a finding that the defendant's use will have no substantial adverse effect on the potential market for the plaintiff's work under factor four. In the 78 core opinions since *Campbell* that found that the defendant's use was transformative, only six (7.7%) found that the defendant's effect on the plaintiff's mark disfavored fair use under factor four.⁹⁰

A subset of transformativeness cases consists of cases in which the defendant made a parody of the plaintiff's work. In nearly all of these, the defendant's conduct was deemed to be transformative and a fair use. Overall, the updated dataset consists of 35 opinions from 26 cases in which the court explicitly found that the defendant's work constituted a parody. In all but three of these cases, the defendant's use was ultimately found to be a fair use,⁹¹ and the last time a court found a parody not to be a fair use was 1988, six years before *Campbell*.⁹² Of the 23 cases in which the courts ultimately found the parody to be a fair use, 20 involved parodies deemed to be commercial in nature. Even more so than generally transformative works, the species of such works that qualify as parodic are especially privileged under factor one and the overall four-factor fair use analysis.

2. Commerciality

Though transformativeness continues to attract the bulk of scholarly attention, the commerciality of the defendant's use remains the subfactor that courts most consistently invoke in their factor one analysis, as the black line in Figure 7 shows.

⁸⁹ See Beebe, *supra* note 6, at 606.

⁹⁰ In three of these opinions, the court eventually overrode its transformativeness finding to find no fair use overall. These three opinions are referenced *supra* in note 81. The four opinions that found fair use (and in which transformativeness thus trumped factor four) were *Bouchat v. NFL Properties, LLC*, 910 F. Supp. 2d 798 (D. Md. 2012); *Fuentes v. Mega Media Holdings, Inc.*, No. 09-22979-CIV-MORENO/TORRES, 2011 U.S. Dist. LEXIS 70996 (S.D. Fla. June 9, 2011); *Warren Publishing Co. v. Spurlock*, 645 F. Supp. 2d 402 (E.D. Pa. 2009); *Williamson v. Pearson Education, Inc.*, No. 00 Civ. 8240 (AGS), 2001 U.S. Dist. LEXIS 17062 (S.D.N.Y. Oct. 19, 2001).

⁹¹ The three outliers are *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988); *DC Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984); and *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*, 517 F. Supp. 1202 (N.D. Tex. 1981).

⁹² See *New Line Cinema Corp.*, 693 F. Supp. 1517. See also Samuelson, *supra* note 28, at 2550 (noting that after *Campbell*, "every subsequent parody case has been adjudged a fair use").

Of the 545 fair use opinions following the 1984 Supreme Court majority opinion in *Sony*, which put substantial weight on the commerciality or noncommerciality of the defendant's use,⁹³ 85.3% have explicitly addressed the commerciality subfactor. The regression results further show the substantial effect that the commercial or noncommercial status of the defendant's use has on the overall outcome of the test, though the effect is not nearly on the order of that exerted by a finding of transformativeness. While transformative uses nearly always qualify as fair uses, noncommercial uses may fail to so qualify. Of the 47 core opinions since *Sony* that found that the defendant's use was noncommercial in nature, a respectable minority of 11 opinions (23.4%) found overall that it was nevertheless not a fair use. Meanwhile, commercial uses may occasionally qualify as fair uses. Of the 233 core opinions that found that the defendant's use was commercial in nature, 36.9% found the use to be a fair use.

Though there is thus some flexibility in the relation between the commerciality or noncommerciality of the use and a court's determination of whether it qualifies as a fair use, there remains a continuing problem in the case law under the factor one commerciality analysis, which is shown by the dashed line in Figure 7. As the original study detailed, the *Sony* majority opinion in 1984 quite explicitly established a presumption under factor one that a use "to make copies for a commercial or profit-making purpose . . . would presumptively be unfair," while the "contrary presumption" would apply to noncommercial uses.⁹⁴ Leading authorities have long condemned this formulation, with David Nimmer flatly stating in his treatise: "Such a categorical rule is unwarranted."⁹⁵ Clearly sensing that it had gone too far, the Supreme Court sought in subsequent cases to undo the *Sony* presumption, but it could never apparently bring itself simply to say that the *Sony* presumption was a mistake. Instead, even in *Campbell*, where the Court went to great lengths to criticize the "Court of Appeals's elevation of one sentence from *Sony* to a *per se* rule,"⁹⁶ the Court implied that the *Sony* treatment of commerciality was still essentially valid and that the Sixth Circuit had just misinterpreted it.⁹⁷ The result is that, as the original study showed, lower courts continued to cite to the *Sony* commerciality presumption under factor one without recognizing *Campbell*'s intervention, though, by 2005, the presumption appeared to finally be on its last

⁹³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447–53 (1984).

⁹⁴ *Id.* at 449.

⁹⁵ See NIMMER & NIMMER, *supra* note 4, at § 13.05[A][1][c].

⁹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994).

⁹⁷ See *id.*

legs.⁹⁸ Yet, Figure 7 shows that courts have since revived its force, with 37 opinions since *Campbell* (and 26 opinions since 2005) ignoring *Campbell*'s intervention and citing the original, unqualified *Sony* factor one commerciality presumption.⁹⁹ This all provides a good example of how the leading cases do not always reflect, let alone influence the everyday state of our fair use case law, especially when those leading cases decline to make clear when they are abrogating previous precedent.¹⁰⁰

3. Other subfactors

The original study concluded that despite courts' routine invocation of the equitable nature of the fair use defense, findings of good and bad faith did not have an appreciable effect on the overall outcome of courts' fair use analysis.¹⁰¹ The regression results reported in Table 5 suggest that this remains true for the updated dataset. To be sure, as in the original study, a finding that the defendant acted in bad faith still correlates strongly with a determination of fair use; of the 20 opinions in the updated dataset that found bad faith, only four found fair use overall.¹⁰² But 84.5% of the 579 opinions never bothered to address whether the defendant had acted in bad faith.

C. Factor Two: Nature of the Copyrighted Work

Fair use opinions continue routinely to denigrate factor two as unimportant to the overall fair use analysis,¹⁰³ and the updated data support the view that the factor typically has a relatively minimal impact on the outcome of the overall four-factor test. In general, courts rarely find that the factor supports a finding of fair use.¹⁰⁴

⁹⁸ See Beebe, *supra* note 6, at 601–03.

⁹⁹ See, e.g., *BMG Rights Mgmt. U.S., LLC v. Global Eagle Ent., Inc.*, No. 2:18-CV-03723-VAP-JEMx, 2019 U.S. Dist. LEXIS 206738, at *9 (C.D. Cal. Sept. 9, 2019); *Disney Enters. v. Vidangel, Inc.*, 371 F. Supp. 3d 708 (C.D. Cal. 2019); *Lucasfilm Ltd. v. Ren Ventures*, No. 17-cv-07249-RS, 2018 U.S. Dist. LEXIS 144116, at *5 (N.D. Cal. June 29, 2018).

¹⁰⁰ See Beebe, *supra* note 6, at 596–97 (noting that “the [Supreme] Court has repeatedly sought to reconstrue what it should have explicitly rescinded and replaced”).

¹⁰¹ See *id.* at 607–09. See also Leval, *supra* note 40, at 612–14 (strongly criticizing the consideration of good faith as part of the fair use analysis).

¹⁰² See *Swatch Group Mgmt. Servs. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014), *amended and superseded by* 756 F.3d 73 (2d Cir.); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989); *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019).

¹⁰³ See, e.g., *Estate of Smith v. Cash Money Recs., Inc.*, 253 F. Supp. 3d 737, 751 (S.D.N.Y. 2017) (“As the Second Circuit has noted, this factor ‘is rarely found to be determinative.’” (citing *Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001))).

¹⁰⁴ Of the 579 opinions in the overall dataset, only 22.6% found that factor two favored a finding of fair use as against 47.7% that found that the factor disfavored a finding of fair use.

Nevertheless, the data suggest that certain findings under both of factor two's subfactors—whether the work is creative or factual and whether the work is published or unpublished—continue to have an at least statistically significant effect on a court's overall determination. The regression results reported in Table 5 indicate, as expected, that the odds a court will find fair use increase when the plaintiff's work is factual in nature and decrease when it is creative in nature. More interestingly, and consistent with the original study and the irony it noted,¹⁰⁵ while the unpublished nature of the plaintiff's work has no apparent impact on a court's overall fair use determination, the fact that a work is published appears to increase the odds that a court will find fair use. Specifically, the ratio of the odds of a finding of fair use to a finding of no fair use more than doubles when the court finds that the plaintiff's work was published.¹⁰⁶

D. Factor Three: Amount and Substantiality of the Use

Overall, the status of factor three has not changed appreciably since the original study.¹⁰⁷ Its outcome continues to correlate very strongly with the overall test outcome, particularly when factor three is found to favor the defendant. In the 101 core opinions in which the court found that factor three favored a finding of fair use, all but two found in favor of fair use overall.¹⁰⁸ However, in contrast to the findings of the original study, Table 5 suggests that the fact that the defendant copied the entirety of the plaintiff's work no longer appears to significantly impact a court's overall fair use determination. In the updated data, of the 148 core opinions in which

¹⁰⁵ See Beebe, *supra* note 6, at 614 (“[T]he Supreme Court sought to establish that a certain finding (here, that the work is unpublished) *disfavors* fair use. Lower courts appear not to have acted on that dictum, however, other than to invert it to conclude that the opposite of that finding (here, that the work is published) *favors* fair use.”).

¹⁰⁶ Stated in terms of predicted probabilities, the regression results under model 1 suggest that the predicted probability that a court will find fair use when the work does not qualify as published is .42 (with all other variables set to 0) as against a predicted probability of .65 when the work qualifies as published.

¹⁰⁷ For a thorough quantitative analysis of the role of the third factor in the overall fair use analysis, see Anthony Reese, *How Much Is Too Much: Campbell and the Third Fair Use Factor*, 90 WASH. L. REV. 755 (2015).

¹⁰⁸ The two outliers were *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191 (3d Cir. 2003); *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, 2005 U.S. Dist. LEXIS 26302 (S.D.N.Y. Nov. 1, 2005).

the court found that the defendant's use copied the entirety of the plaintiff's work, a reasonably balanced 58.8% found no fair use and 41.2% found fair use.¹⁰⁹

One trend that has become clearer with the updated data is the increasing degree to which courts explicitly assess under factor three whether the defendant's use of the plaintiff's work was necessary to the defendant's purpose, and even if it was, whether the defendant used more than was necessary to accomplish that purpose.¹¹⁰ Figure 8 estimates a five-year moving average of the proportion of opinions by filing year approaching factor three in this manner. Though this gradual shift toward a necessity requirement could be understood to benefit plaintiffs, the data show no strong correlation between a court's invocation of necessity and either the outcome of factor three or the overall outcome of the fair use test.

FIGURE 8
5-YEAR MOVING AVERAGE OF PROPORTION OF OPINIONS ASSESSING NECESSITY
UNDER FACTOR THREE, 1978–2019



¹⁰⁹ By contrast, in the original data set of all opinions from 1978 through 2005, of the 99 opinions that found that the defendant had taken the entirety of the plaintiff's work, only 27.3% found fair use. See Beebe, *supra* note 6, at 616.

¹¹⁰ See, e.g., *Salinger v. Colting*, 641 F. Supp. 2d 250, 267 (S.D.N.Y. 2009) ("Because Defendants have taken much more from Salinger's copyrighted works than is necessary to serve their alleged critical purpose, the third factor weighs heavily against a finding of fair use."), *vacated*, 607 F.3d 68 (2d Cir. 2010).

E. Factor Four: Effect on the Market

The scholarly literature continues to debate whether the leading factor in courts' fair use analysis is currently factor one, with its focus on the "purpose and character" of the defendant's use, or factor four, with its focus on the effect of the defendant's use on the "potential market for or value of" the plaintiff's work. Looming in the background of this debate is the larger question of whether courts are generally pursuing a more defendant-friendly, purpose-centered approach to fair use or a more plaintiff-friendly, economic approach to fair use. Most scholars endorse the former approach, believing it to be more supportive of the public domain. This debate has largely relied on the latest headline-making cases. Prominent cases such as *Blanch v. Koons*,¹¹¹ *Cariou v. Prince*,¹¹² and *Authors Guild v. Google, Inc.*¹¹³ may serve as evidence that factor one and transformativeness have emerged as dominant. Other cases such as *Kienitz v. Sconnie Nation LLC*¹¹⁴ and *Fox News Network, LLC v. TV Eyes, Inc.*¹¹⁵ may indicate that factor four is dominant.

The updated data suggest that with respect to our fair use case law as a whole, beyond the headline cases, the status of factor four has not appreciably changed over the past three or four decades.¹¹⁶ It continues to be the factor whose outcome correlates most strongly with the overall test outcome, as Table 4 indicates. Of the 169 core opinions that found that factor four disfavored fair use from 1978 through 2019, all but three ultimately found no fair use, and none of the three outlying opinions that found fair use offers particularly compelling analysis to explain its divergence between factor four and the overall outcome.¹¹⁷ Meanwhile, of the 154 opinions that found that factor four favored fair use, all but nine found fair use. A majority of these nine outlying opinions ruled that factor four favored the defendant because there was no market for the plaintiff's work.¹¹⁸

¹¹¹ 467 F.3d 244 (2d Cir. 2006).

¹¹² 714 F.3d 694 (2d Cir. 2013).

¹¹³ 804 F.3d 202 (2d Cir. 2015).

¹¹⁴ 766 F.3d 756 (7th Cir. 2014).

¹¹⁵ 883 F.3d 169 (2d Cir. 2018).

¹¹⁶ But see Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, SING. J. LEGAL STUD. (forthcoming 2020) (discussing the "reinvigoration of the fourth factor" at least in prominent cases).

¹¹⁷ See *Bouchat v. NFL Props. LLC*, 910 F. Supp. 2d 798, 812 (D. Md. 2012); *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402, 427–28 (E.D. Pa. 2009); *Williamson v. Pearson Educ., Inc.*, No. 00 Civ. 8240, 2001 U.S. Dist. LEXIS 17062, at *19–20 (S.D.N.Y. Oct. 19, 2001).

¹¹⁸ See, e.g., *Designer Skin, LLC v. S & L Vitamins, Inc.*, 560 F. Supp. 2d 811, 824–25 (D. Ariz. 2008).

As with factor one, the very strong correlation between the outcome of factor four and the overall test outcome prompts the question of which subfactor factual findings drive the outcome of factor four itself. The problem with factor four, however, is that historically courts have not developed any subfactor factual findings under it. Instead, as I argued in the original study, courts typically treat factor four as essentially a “metafactor” in which they integrate their analyses of the preceding three factors.¹¹⁹ In doing so, they balance the justification for the defendant’s use of a work against its effect on the plaintiff’s economic incentives to create and further exploit that work. Crucially, however, when courts engage in this balancing test in the analytical space provided by factor four, courts do so in economic terms, within the wheelhouse of law and economic analysis. By contrast, had the four-factor test been designed so that the analysis of the justification for the defendant’s use came fourth, in the cleanup position, one imagines that outcomes might be different in close cases.

Recent scholarship has brought to light one important, more specific function that factor four plays—or should play.¹²⁰ In instructing courts to assess “the effect of the use upon the potential market for or value of the copyrighted work,” factor four requires courts to define the limits of the “potential market” and “value” that the copyright owner should have the exclusive right to exploit. Thus, for example, courts have established under factor four that the owner should not have the exclusive right to exploit the market for harsh reviews of its work or for parodies that ridicule the work.¹²¹ But here too factor four plays a largely synthetic role. Under it, the first three factors aid the court in determining whether the defendant’s use falls within the category of uses that should be reserved exclusively to the copyright owner as a matter of copyright policy or simply of industry custom.¹²²

¹¹⁹ See Beebe, *supra* note 6, at 617–18. Indeed, regressing the outcome of factor four (rather than the overall test outcome) on the various subfactor findings and other objective factors listed in Table 5 results in largely the same odds ratios as those reported in Table 5—which should not be surprising given the tight correlation between factor four and the overall test outcome.

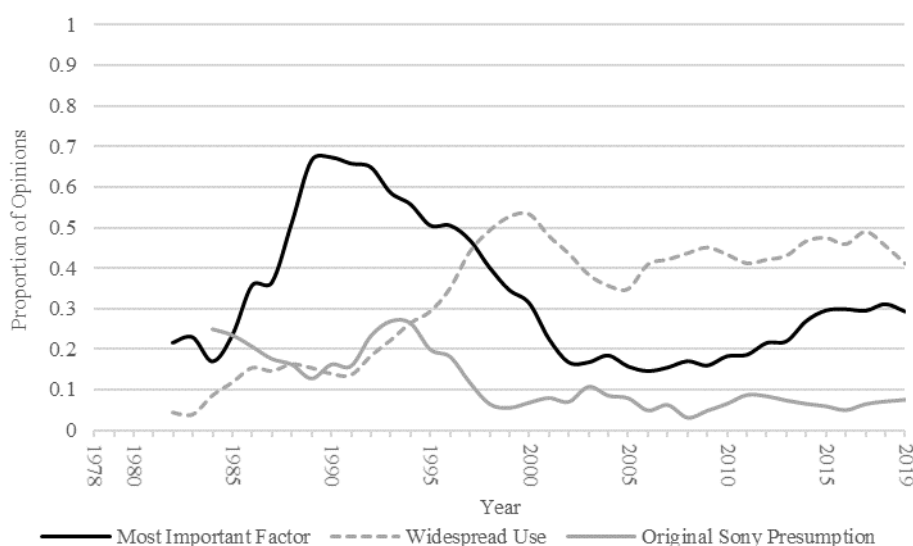
¹²⁰ See David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359 (2014); Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015); Xiyin Tang, *Can Copyright Holders Do Harm to Their Own Works? A Reverse Theory of Fair Use Market Harm*, 54 U.C. DAVIS. L. REV. (2021) (forthcoming). See also Shyamkrishna Balganesh, *Copyright as Market Prospect*, 166 U. PA. L. REV. 443 (2018); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009).

¹²¹ See Fromer, *supra* note 120, at 646–49.

¹²² On the role of industry custom in the fair use analysis, see Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1930–45 (2007).

What is remarkable is how little guidance the doctrine of factor four itself provides to this market-definition inquiry.¹²³ At best, a few doctrinal memes guide the courts. The first is that, as *Harper & Row* declared, factor four is “undoubtedly the single most important element of fair use.”¹²⁴ Though *Campbell* sought to override this dictum by emphasizing that courts should consider all the factors,¹²⁵ the proposition itself remains oft-cited, as Figure 9 shows. Courts’ citation to the principle does not correlate one way or the other with the outcome of factor four or the overall outcome of the fair use test. But its slight resurgence in recent case law may indicate that in the overall benefit-cost, access-versus-incentives fair use analysis, many courts have internalized the instruction that the costs to the plaintiff’s incentives are ultimately to be weighted more heavily than the benefits to the defendant in terms of access.

FIGURE 9
5-YEAR MOVING AVERAGE OF PROPORTION OF OPINIONS REFERENCING VARIOUS FACTOR
FOUR SUBFACTORS IN 579 FAIR USE OPINIONS, 1978–2019



¹²³ This may help to explain why factor four reported such a proportionally low word count in Figure 5.

¹²⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

¹²⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

The second doctrinal meme is the slippery slope principle first established by *Sony* and reinforced by *Campbell* that courts should “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.”¹²⁶ This proposition has gradually gained ground over time. By its terms, it is plaintiff-friendly, though as with the “most important element” proposition, there is no correlation between its citation and the outcome of factor four or the overall test.

Third and finally, as shown in Figure 9, courts continue to cite the presumption established by *Sony* under factor four that commercial uses presumptively harm the plaintiff’s market. The *Sony* court had stated:

What is necessary [under factor four] is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm [to the market for the plaintiff’s work] exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.¹²⁷

As it did with *Sony*’s factor one commerciality presumption, the *Campbell* court sought to defuse *Sony*’s factor four commerciality presumption, this time by stating that the presumption did not apply to any “case involving something beyond mere duplication for commercial purposes.”¹²⁸ But just as the original study noted for opinions through 2005,¹²⁹ so now, lower courts continue to ignore *Campbell*’s limitation. Since *Campbell*, 54 opinions have cited to *Sony*’s factor four commerciality presumption, 30 of them without recognizing *Campbell*’s limitation. All but three of these opinions ruled against the defendant and found no fair use.¹³⁰

¹²⁶ *Id.* at 590 (citations omitted) (omission in original).

¹²⁷ *Sony v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹²⁸ *Campbell*, 510 U.S. at 591.

¹²⁹ See Beebe, *supra* note 6, at 618–21.

¹³⁰ For an example of an opinion that relied on the *Sony* fourth factor commerciality presumption to find no fair use, see *TD Bank v. Hill*, Civil No. 12-7188 (RBK/JS), 2015 U.S. Dist. LEXIS 97409, at *52 (D.N.J. July 27, 2015) (where defendant’s book copied elements of plaintiff’s manuscript, finding that “[i]f the intended use is for commercial gain, [the] likelihood [of market harm] may be presumed.” (quoting *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 275 F. Supp. 2d 543, 565 (D.N.J. 2003) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001), *amended* (Apr. 3, 2001), *aff’d sub nom.* *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002)))).

CONCLUSION

In the spirit of the original study, this brief update has focused on the mass of everyday copyright fair use cases. On their own, most individual fair use cases may not seem to be particularly important except to the parties involved, if even to them. However, taken together, they form a body of case law whose patterns and characteristics reveal the daily life of our fair use case law, a daily life that is in some ways surprisingly different from the life of the “leading cases.” The lower courts sometimes ignore higher court cases or are simply unaware of them. Old, ill-advised dicta can keep cropping up like perennial weeds even decades after efforts to eradicate them. But perhaps most surprisingly, when viewed as a whole, the fair use case law presents itself as far more stable and predictable—and unchanging—than the headline-making cases might suggest.

DATA VALIDATION PROCEDURES USED FOR BEEBE ARTICLE

VOLUME 10 EDITORIAL BOARD OF THE NYU JOURNAL OF INTELLECTUAL PROPERTY
AND ENTERTAINMENT LAW (JIPEL)

In order to give academics and practitioners greater assurance in the results found in Professor Beebe's article, JIPEL assigned several staff editors to review the author's data coding across a representative sample set of cases for a population of this size. This set was determined to be 35 cases through consultation with a publicly available sample size calculator.¹

Several editors were then assigned to verify data coding for the following variables: disposition, reversal and appeal, venue, the outcome of each fair use factor, whether subfactor considerations were cited, the word count devoted to each fair use factor and fair use overall, and the number of times an opinion cited to a specific court. A senior editor then verified these results and tabulated the below output table.

JIPEL focused its data validation on data coding for variables that the author either discussed in detail in his article or which were associated with significant results. JIPEL did not review the data coding for third-party data sources, such as judge characteristics including race, gender, ideology, and partisan leanings. Professor Beebe provides the underlying sources for this data in the relevant portion of his analysis. JIPEL did not validate data coding for variables not utilized in the article.

Through reviewing this sample set of cases, JIPEL was able to verify that the coding of the overall population of cases analyzed by the author had a margin of error of less than 15 percentage points at a 95% confidence level. JIPEL calculated the p-values associated with 21 categories of data and 131 sub-categories to substantiate that there was no reason to reject the assumption that the population effect was accurate.² Overall, the staff reviewed close to 1500 data inputs and found very few errors.

¹ *Sample Size Calculator*, CLINCALC, <https://clincalc.com/stats/samplesize.aspx> (lasted visited Nov. 12, 2020).

² P-values were specifically checked for case dispositions, reversal and appeal rates, treatment of each of the four fair use factors, and treatment of most sub-factors. A p-value calculates the likelihood that a random sample of the same size as the current sample would have a difference between the population effect and the sample effect that is equal to or greater than the

Finally, JIPEL is providing the underlying data and data key used by Professor Beebe in his analysis. The professor encourages feedback and collaboration and has agreed to this data sharing full-heartedly.

- (1) Professor Beebe's underlying data coding (excel)
- (2) Professor Beebe's data key (pdf)

We acknowledge that this method is not suitable for every empirically-focused article. Nevertheless, we believe that making it available may help other journals move forward along the path toward adopting more rigorous and standardized review for the underlying data and assumptions in empirical legal works.³

TABLE 1: JIPEL DATA VALIDATION FOR REPRESENTATIVE SAMPLE SET OF 35 CASES

Variable	Total Entries Recorded by Author	Mistakes Found by JIPEL	Calculated Percent Error	P-value <0.05 for any sub-category
Disposition of the case	35	1	2.86%	1 of 17
Reversal and appeal	35	0	0%	0 of 5
Outcome of each fair use factor	140	3	2.14%	0 of 27
Venue	35	1	2.86%	N/a
Whether subfactors considerations were cited in the analysis of each fair use	560	9	1.61%	7 of 82 ⁴
Word count devoted to each fair use factor and fair use analysis as a whole	175	1	0.57%	N/a
Number of times an opinion cited to a specific Circuit Court or the SDNY	490	7	1.43%	N/a

current measured difference under the assumption that the population effect is accurate. Of the 131 p-values reviewed, only 8 p-values were <0.05, suggesting that there is no reason to reject the assumption that the population effect was accurate. *Introduction to Power Analysis*, UCLA <https://stats.idre.ucla.edu/other/mult-pkg/seminars/intro-power/> (Last visited Nov. 12, 2020).

³ A special thanks to a friend of JIPEL, economist Alissa Dubnicki Ph.D., for her assistance and advice in helping JIPEL to architect this data validation exercise.

⁴ JIPEL only checked p-values for sub-factors relied on in analysis, although data validation checked all categories. P-values checked included 15 sub-factors across four fair use factors and "other," a catch-all to consider whether factors besides the four factors was used, as well as bad faith.

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EDITORIAL, THE NEED FOR COLLECTIVE STANDARDS:
VALIDATING RAW DATA IN LEGAL EMPIRICAL
ANALYSIS

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For some time, legal academia has experienced an increase in articles utilizing empirical analysis.¹ Never before has fluency in statistical methods been more important. Whether it is collecting datasets of court decisions to analyze policing trends² or using natural language processing to analyze the likely replicability of patented inventions,³ legal scholars are using these tools to arrive at results that disrupt conventional wisdom and uncover doctrinal patterns.

* Volume 10 Editorial Board of the NYU Journal of Intellectual Property and Entertainment Law (JIPEL).

¹ See, e.g., Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009*, 2011 ILL. L. REV. 1739 (2011) (describing a growth of empirical methods being used in legal scholarship from 2000s through 2010s) (citing Shari Seidman Diamond & Pam Mueller, *Empirical Legal Scholarship in Law Reviews*, 6 ANN. REV. L & SOC. SCI. 581 (2010) (finding in a review of 60 law review volumes published between 1998 and 2008, nearly half of law review articles included some empirical content, although original research was less common)).

² Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (analyzing the role qualified immunity plays in constitutional litigation from a review of the dockets of 1,183 cases filed against state and local law enforcement defendants in five federal court districts over a two-year period).

³ Janet Freilich, *The Replicability Crisis in Patent Law*, 95 INDIANA L.J. (2020) (analyzing 500 patents and patent applications using methodological quality of experiments as a proxy for their reproducibility and finding that many experiments are probably not reproducible).

However, student-edited legal journals have largely failed to adapt their editorial systems to empirical works.⁴ Although law reviews have agreed on a common citational system,⁵ there exists no customary practices for validating statistical findings in published legal academia. This gap is exacerbated by the fact that journal editors are normally students lacking the necessary expertise to properly validate raw data, which is why some legal journals choose not to validate in the first place.⁶

This is a serious problem. Legislators, judges, and lawyers commonly cite to inferential legal studies when crafting policy, making decisions, and putting forward arguments.⁷ Whereas practitioners already adept at Stata or R may be able to access an author's raw data and recreate its results, others may be wary of relying on empirical studies without assurance in their accuracy. Even worse, they may cite to these studies without knowing that they are statistically invalid. Something must be done. It is time that legal journals fill this methodological gap by entering into commonly accepted practices for validating empirical legal works. Our community deserves to be confident that what it reads has been properly vetted.

For Professor Barton Beebe's article in particular (published in the fall edition of the 10th volume of our journal), the author worked with several research assistants to code various attributes associated with 579 cases—case disposition, venue, treatment of fair use factors, etc. Beebe then performed a number of regressions and other statistical analyses to discern trends and relationships in the underlying data. The critical findings to his article, of which there are many, are based on copyright

⁴ See, e.g., Kathryn Zeiler, *The Future of Empirical Legal Scholarship: Where Might We Go from Here?*, 66 J. LEGAL EDUC. 78, 78 (2016) ("This is partly because law review editorial boards, usually comprising solely law students, do not systematically require expert review of submitted work.").

⁵ See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 21 ed. 2020).

⁶ We have spoken with multiple law professors who explained that they have never had their raw data validated by the legal journal that accepted their work for publication.

⁷ See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2, 4-6 (2002) ("[R]esearch that offers claims or make inferences based on observations about the real world—on topics ranging from the imposition of the death penalty to the effect of court decisions on administrative agencies to the causes of fraud in the bankruptcy system to the use of various alternative dispute mechanisms—can play an important role in public discourse . . . and can affect our political system's handling of many issues.") (citing Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1431 (1998)).

cases decided over 40 years and in every judicial district. But the robustness of these results hinges on the initial accuracy of the data coding.

Reviewing the initial data coding to articles like Professor Beebe's is very much within the skillset of law journals. Reviewing cases to confirm disposition, venue, treatment of fair use factors, etc. is merely an extension of the work that law journals already take on. The only difference, then, is the scale to the work. Realistically, JIPEL and most other law journals do not have the resources to validate the data coding for 579 cases, especially where each case averages over 12 pages in length and is associated with over 100 data inputs.

Instead, JIPEL worked with an economist to devise what it believes is a defensible and reproducible strategy that other journals can undertake when reviewing the underlying data to similar statistics-based articles: reviewing a representative sample set of the data coding.⁸ A summary of this process can be seen in Appendix 1 of Beebe's work.

We acknowledge that this method is not suitable for every empirically-focused article. Nevertheless, we believe that making it available may help other journals move forward along the path toward adopting more rigorous and standardized review for the underlying data and assumptions in empirical legal works.

⁸ A special thanks to a friend of JIPEL, economist Alissa Dubnicki Ph.D., for her assistance and advice in helping JIPEL to architect this data validation exercise.

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CHARGING BULL, FEARLESS GIRL,
ARTISTIC COMPOSITION, AND COPYRIGHT

RICHARD CHUSED*

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* Professor of Law, New York Law School. I extend loving thanks to my artist wife, Elizabeth Langer, who has served as my editor and muse for decades, and to New York Law School for its continuing support of my work. I'd also like to extend my gratitude to the article editors of the Journal of Intellectual Property and Entertainment Law for the very helpful suggestions they made during the editing process.

INTRODUCTION

In the middle of the night on December 17, 1989, Arthur di Modica arranged for the sudden deposit of an eleven- by-sixteen-foot, 7,100-pound bronze sculpture—*Charging Bull*—in front of the New York Stock Exchange. Di Modica neither notified nor sought permission from the N.Y. Stock Exchange or City of New York before doing so.¹ The nocturnal² event created a major hubbub. Di Modica claimed that the bull was a Christmas present to the city, celebrating “the strength and power of the American people” in recovering from the economic pain of the financial and stock market crashes of 1987.³

Just over twenty-seven years later, another sculpture unexpectedly appeared in downtown New York City. On March 7, 2017—the eve of International Women’s Day—a diminutive, four-foot-tall bronze figure—*Fearless Girl*—was placed staring down the bull from a short distance away. This also caused consternation and amazement.⁴ It too was deposited late at night, without permission from either public authorities or private property owners. In the ensuing months, disagreements among artists, local groups, and city authorities led to both works being moved, contests over property and copyright interests, arguments over the propriety of one work “commenting” on another, and threats of litigation. The tale has the makings of a great novel.

Most relevant to this essay, the out-of-the-blue arrival of *Fearless Girl* led di Modica, creator of *Charging Bull*, to claim that he enjoyed a right to control the setting in which his work was displayed and the character and quality of artworks that could be placed nearby.⁵ This essay briefly tracks the history of *Charging Bull* and *Fearless Girl*, before investigating the nature of di Modica’s claims and the role

¹ Robert D. McFadden, *SoHo Gift to Wall St.: A 3 1/2 -Ton Bronze Bull*, N.Y. TIMES (Dec. 16, 1989), <https://www.nytimes.com/1989/12/16/nyregion/soho-gift-to-wall-st-a-3-1-2-ton-bronze-bull.html>.

² Christy Kuesel, *How “Charging Bull” Became a Symbol for New York and a Site for Activism*, ARTSY (Nov. 20, 2019), <https://www.artsy.net/article/artsy-editorial-charging-bull-symbol-new-york-site-activism>.

³ Philip H. DeVoe, *Wall Street’s Charging Bull Does Not Represent Oppression*, NAT’L REV. (Apr. 26, 2018), <https://www.nationalreview.com/2018/04/fearless-girl-charging-bull-position-misunderstands-history/>.

⁴ Bethany McLean, *The Backstory Behind That ‘Fearless Girl’ Statue on Wall Street*, ATLANTIC (Mar. 13, 2017), <https://www.theatlantic.com/business/archive/2017/03/fearless-girl-wall-street/519393/>.

⁵ See *infra* Section I.A.

of copyright law in resolving the disputes.⁶ What, if anything, does copyright law have to say about the importance of compositional choices made during the creation and display of a particular work, the compositional relationships between a work and other works placed nearby, and the compositional significance of the physical setting in which a work is displayed?

I

A TALE OF COMPOSITIONAL CONFLICT

A. *A Brief History of Charging Bull*

The story of *Charging Bull* and *Fearless Girl* has been told elsewhere in some detail.⁷ Only a brief retelling is warranted here. Shortly after the devastating financial crash of October 19, 1987, di Modica began contemplating the *Charging Bull* project.⁸ In di Modica's view, the bull's obvious reference to the rising stock prices of a bull market symbolized the vibrant and resilient fabric of American culture.

Almost immediately after *Charging Bull* was deposited in front of the N.Y. Stock Exchange, the trading mart complained to the city and the bull was moved to storage in Queens. The city agreed with the exchange's complaints that automobile and foot traffic around the work were causing disruptions.⁹ Cries of public dismay followed. The now renowned front page of the *New York Post*, pictured below,¹⁰ excoriated the N.Y. Stock Exchange for the sculpture's removal. Public calls for the work's return to public view led to discussions between di Modica, his spokesperson

⁶ Others have tackled some of these issues, but with different takes than here. One set is related to the interplay between intertextuality as a literary theory and its utility in intellectual property law. See Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, 9 U.C. IRVINE L. REV. 293 (2019). A commentary on the article can be found at E.S. Burt, *Translatable and Untranslatable: Discourse Theory and Copyright Law*, 9 U.C. IRVINE L. REV. 335 (2019). For a review of the array of ways that copyright law privileges the male gaze in a number of settings, including the *Charging Bull/Fearless Girl* controversy, see John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER 343, 382-391 (2018). There also is a student comment on the dispute. See Tzu-I Lee, Comment, *A Battle Between Moral Rights and Freedom of Expression: How Would Moral Rights Empower the "Charging Bull" Against the "Fearless Girl"?*, 17 J. MARSHALL REV. INTELL. PROP. L. 672 (2018). My analysis here focuses mostly on the nature of art and artistic composition.

⁷ McLean, *supra* note 4.

⁸ Kuesel, *supra* note 2.

⁹ Kuesel, *supra* note 2; McFadden, *supra* note 1.

¹⁰ The image may be found on Arturo di Modica's website. *History*, CHARGING BULL, <http://www.chargingbull.com/history/> (last visited May 19, 2020). It is attributed to J.B. Nicholas / Splash News.

Arthur Piccolo, who was also chairman of the Bowling Green Association, and Henry Stern, the New York City Parks Commissioner. The parties reached an agreement to retrieve the sculpture from storage and place it at Bowling Green, a small, cobblestone park located just a few blocks from the N.Y. Stock Exchange—but not within its view. Di Modica reportedly felt “fantastic” about the bull’s new location.¹¹ During the bull’s subsequent solo stay at Bowling Green, *Charging Bull* became a major tourist destination and was viewed by millions.¹²



The *New York Post*’s cover from December 16, 1989, showing *Charging Bull* and its initial removal from the N.Y. Stock Exchange.

¹¹ *Wall St. ’s Bronze Bull Moves 2 Blocks South*, N.Y. TIMES, Dec. 20, 1989, at B3.

¹² See, e.g., *Charging Bull, Fearless Girl & Cultural Tourism in Lower Manhattan*, N.Y. Almanack (May 31, 2020), <https://www.newyorkalmanack.com/2020/05/charging-bull-fearless-girl-cultural-tourism-in-lower-manhattan/>.

After *Fearless Girl* appeared years later, staring down the bull at Bowling Green,¹³ police and others once again voiced concerns over automobile congestion and tourists crowding around the two pieces. Fears of accidents, as well as concerns raised by di Modica, who was strongly opposed to the presence of the new work, led to the diminutive child's removal from Bowling Green. On December 10, 2018, about nine months after *Fearless Girl*'s first appearance, she was removed and taken a few blocks away to her current location: the front of the N.Y. Stock Exchange.¹⁴ The story came full circle. The two pieces swapped locations.



Fearless Girl in her original location staring down *Charging Bull* at Bowling Green.

At the time *Fearless Girl* was relocated, New York City Mayor Bill de Blasio claimed that *Charging Bull* would also be moved back near the N.Y. Stock Exchange, and that it was important to keep the two works together.¹⁵ Brian Boucher,

¹³ The *Fearless Girl* image below is from Sarah Cascone, *From 'Charging Bull' to the Bull Market: 'Fearless Girl' Heads to the New York Stock Exchange*, ARTNET (Apr. 19, 2018), <https://news.artnet.com/art-world/fearless-girl-new-york-stock-exchange-1269851>. It is credited to Volkan Furuncu/Anadolu Agency/Getty Images.

¹⁴ Sandra E. Garcia, 'Fearless Girl' Statue Finds a New Home: At the New York Stock Exchange, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange.html>.

¹⁵ At that point, the city's plans to move the bull to a spot near the girl were supposedly firm. *NYC Finalizing Plans to Move Wall Street Bull Statue*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/aponline/2019/11/08/us/ap-us-wall-street-bull.html>.

on behalf of *ArtNet News*, reported that di Modica was “steaming mad” at the prospect of the city reuniting the two sculptures.¹⁶

[T]he sculpture, by artist Kristen Visbal, was soon unmasked as the brainchild of ad agency McCann New York and investment firm State Street Global Advisors as part of a campaign to land more women on corporate boards. (Spoiler alert: State Street turned out to be not so great when it came to gender or racial equity.)

The arrival of *Fearless Girl* irked Di Modica, who maintains that the bronze lass turned his own sculpture into part of an ad campaign. He took legal action, retaining none other than civil rights crusader Normal Siegel to represent him. That led in turn to a tweeted criticism by Mayor Bill de Blasio, accusing Di Modica of not liking “women taking up space.” Ultimately, to better accommodate the crowds headed there just to see her, the *Girl* moved to a spot across from the NYSE. (That means *Charging Bull*’s relocation would put the beast close, again, to his nemesis.)¹⁷

After di Modica objected to his sculpture being relocated back to the N.Y. Stock Exchange in the presence of *Fearless Girl*, Mayor de Blasio apparently backed down, at least temporarily. De Blasio claimed that the city was still considering moving *Charging Bull* but that no definite plans had been made.¹⁸ In the fall of 2019, the city withdrew its application from the Public Design Commission to move di Modica’s work back to the N.Y. Stock Exchange, allegedly because it could not decide exactly where to place it. In June 2020, the Commission finally entertained a proposal from the Mayor’s office to move *Charging Bull*, only to turn it down.¹⁹ The local community planning board had previously declined to approve a similar

¹⁶ Brian Boucher, *The Artist Behind Wall Street’s ‘Charging Bull’ Is Seeing Red Over a Plan to Remove the Sculpture From the Financial Hub*, ARTNET (Nov. 19, 2019), <https://news.artnet.com/art-world/wall-street-bull-relocation-1708023>.

¹⁷ *Id.*

¹⁸ Elizabeth Kim, *City Delays Moving Charging Bull*, GOTHAMIST (Nov. 13, 2019), <https://gothamist.com/news/charging-bull-may-stay-put-after-all>; Julia Marsh, *De Blasio Backs Down, ‘Charging Bull’ Statue to Stay Put for Now*, N.Y. POST (Nov. 13, 2019), <https://nypost.com/2019/11/13/de-blasio-backs-down-charging-bull-statue-to-stay-put-for-now/>.

¹⁹ Julia Marsh, *NYC Panel Tells Mayor de Blasio He Can’t Move Wall Street’s ‘Charging Bull’*, N.Y. POST (June 22, 2020), <https://nypost.com/2020/06/22/nyc-panel-tells-de-blasio-he-cant-move-wall-streets-charging-bull/>.

proposal.²⁰

As of this essay's writing, the city's plan to move *Charging Bull* somewhere near the N.Y. Stock Exchange and *Fearless Girl* remains embroiled in controversy.²¹ The city continues to profess concern about automobile and pedestrian traffic if the two works are placed next to each other at the Exchange.²² Yet, while di Modica claims that there is an agreement to leave the bull in Bowling Green permanently, the existence of such a deal is disputed. There is no written evidence to support it.²³

Fearless Girl is not the only work to challenge di Modica's claim for control over the environment in which his sculpture is displayed. Both before and after *Fearless Girl*, various "commentators" have made their own guerilla statements about the bull, asserting positions quite different from di Modica's view of his work as an optimistic declaration of American resilience. On Christmas Eve in 2010, for example, artist Agata Oleksiak (typically called. "Olek") wrapped *Charging Bull* in crocheted pink, purple, and green yarn as an artistic statement, creating a rather less fearsome and softer creature.²⁴ The following year, Occupy Wall Street began its demonstrations by gathering around the bull.²⁵ A poster, displayed below, used the bull's image to promote the event.²⁶ In 2017, a woman splattered the bull with blue paint as a protest against President Donald J. Trump's withdrawal of the United

²⁰ See Zachary Small, *New York's Iconic 'Charging Bull' Sculpture Becomes Subject of Fierce Debate Among Politicians*, ARTNEWS (May 22, 2020, 11:04 AM), <https://www.artnews.com/art-news/news/new-yorks-charging-bull-move-controversy-1202688237/>. At a meeting of Community Board 1 covering the financial district, a proposal to move the bull to a site near the New York Stock Exchange was voted down in what was taken as a setback for Mayor de Blasio and the city. The city still claims the right to move the piece and di Modica persists in his claim that his consent is required. *Id.*

²¹ Tom Shea, *NYC Planning on Moving Iconic Charging Bull Statue From Bowling Green*, NBC N.Y. (Nov. 14, 2019, 10:38 AM), <https://www.nbcnewyork.com/news/local/nyc-planning-on-moving-iconic-charging-bull-statue-from-bowling-green/2181021/>; see also Small, *supra* note 20.

²² Shea, *supra* note 21.

²³ Small, *supra* note 20.

²⁴ See Malia Wollan, *Graffiti's Cozy, Feminine Side*, N.Y. TIMES (May 18, 2011), <https://www.nytimes.com/2011/05/19/fashion/creating-graffiti-with-yarn.html>.

²⁵ Julianne Pepitone, *Hundreds of Protesters Descend to 'Occupy Wall Street'*, CNN MONEY (Sept. 17, 2011, 7:07 PM), https://money.cnn.com/2011/09/17/technology/occupy_wall_street/index.htm.

²⁶ The image of the Occupy Wall Street poster in the text below is available at Michael Bierut, *The Poster that Launched a Movement (Or Not)*, DESIGN OBSERVER, <https://designobserver.com/feature/the-poster-that-launched-a-movement-or-not/32588>. The image of the poster is credited to Adbusters.

States from the Paris Accords, an international agreement on climate change.²⁷ Two years later, another paint splatter incident protesting climate change occurred, this time covering the bull in red to signify “blood on the hands” of the financial community.²⁸

As with many other artworks on public display, *Charging Bull*’s observers imposed their own points of view on the work. Di Modica could not prevent such reactions. But they typically lasted only a short while before being removed or cleaned up. The single exception occurred in 2019, when a Texas trucker wielding a metal banjo and cursing President Trump whacked the instrument against the bull, inflicting a significant gash on one horn.²⁹ The damage took some time and \$15,000 to repair.³⁰

B. Origins of Fearless Girl and Subsequent Controversy

The most famous of all the commentators on the bull remains the diminutive, four-foot tall *Fearless Girl* standing akimbo with hands on her hips and staring directly down at the oversized bull charging toward her. Overnight, the *Charging Bull* and *Fearless Girl* pieces combined to evoke an array of vigorous statements about the relationships between women and finance, women and men, and the gendered structure of modern society. *Fearless Girl* appeared to make a forceful case for women to play a more significant role in American society. Or did it?

The sculptor of *Fearless Girl* was Kristen Visbal, but the project was actually the brainchild of State Street Global Advisors, an international financial management company, and their large, national advertising representative, McCann New York.³¹ State Street intended to use the sculpture to draw attention to the lack of women in leadership roles across Wall Street and to market its new Gender Diversity Fund. The fund sought investments in firms scoring better than their

²⁷ Jackie Wattles, *Woman Arrested for Vandalizing Wall Street’s Famed Bull Statue*, CNN MONEY (Sept. 16, 2017, 5:55 PM), <https://money.cnn.com/2017/09/16/news/charging-bull-statue-vandalism/index.html>.

²⁸ See Kuesel, *supra* note 3.

²⁹ Katie Van Syckle & Ashley Southall, *Attack Leaves Wall Street’s Iconic Bull With a Gash on Its Horn*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/nyregion/wall-street-bull-vandalism.html>.

³⁰ See Ella Torres, *Wall Street ‘Charging Bull’ Repairs to Cost an Estimated \$15,000 After Banjo Attack Leaves Hole in Its Horn*, ABC NEWS (Sept. 10, 2019, 12:45 PM), <https://abcnews.go.com/US/charging-bull-repairs-cost-estimated-15000-banjo-attack/story?id=65508538>.

³¹ *Fearless Girl*, MCCANN WORLD GROUP, <https://www.mccannworldgroup.com/work/fearless-girl> (last visited Oct. 17, 2020).

industry peers on gender diversity.³² *Fearless Girl*, like *Charging Bull*, was intended to be a short-term display.³³ But again, public clamor led to both works being left in place, staring each other down.

There was a major irony to this part of the story: State Street was known to have a spotty record on gender inclusion.³⁴ As one commentator snarkily noted, “[W]hen de Blasio’s office says he feels it’s important for *Fearless Girl* to stand up to the bull and ‘what it stands for,’ he’s referring to a fake meaning imposed on the bull by the new statue, and not the artist’s original intent.”³⁵ In short, the notion that Kirsten Visbal placed *Fearless Girl* at Bowling Green as a guerilla commentary on the bull is misleading at best and fictional at worst. More accurately, it was a brilliant publicity move by a major Wall Street firm with a sketchy gender record.

Fearless Girl, like *Charging Bull*, has also attracted “commentaries” since its arrival in 2017. Perhaps the most creative was by Alex Gardega. Displeased that the statue staring down *Charging Bull* was merely an advertising stunt by a large investment firm with few women in leadership positions, Gardega placed *Pissing Pug*, next to the left leg of the girl urinating on her foot.³⁶ Manuel Oliver, whose son Joaquin Oliver was killed in the Marjory Stoneman Douglas High School mass shooting in Parkland, Florida, made another clever and powerful commentary.³⁷ In protest of gun violence and mass shootings in schools, Oliver placed a bulletproof

³² Jena McGregor, *Why This Giant Money Manager Put a Statue of a Defiant Girl in Front of Wall Street’s Famous ‘Charging Bull,’* WASH. POST: ON LEADERSHIP (Mar. 7, 2017, 10:15 PM), <https://www.washingtonpost.com/news/on-leadership/wp/2017/03/07/a-wall-street-advertising-stunt-spotlights-a-push-to-get-more-women-on-boards/>.

³³ See *id.* (State Street originally only applied for a one-week zoning permit).

³⁴ See DeVoe, *supra* note 3.

³⁵ See DeVoe, *supra* note 3.

³⁶ Nick Fugallo & Max Jaeger, *Pissed-off Artist Adds Statue of Urinating Dog Next to ‘Fearless Girl,’* N.Y. POST (May 29, 2017, 11:12 PM), <http://nypost.com/2017/05/29/pissed-off-artist-adds-statue-of-urinating-dog-next-to-fearless-girl/>. The image in the text is in this article and is credited to Gabriella Bass.

³⁷ He has been quite active in the gun control movement since the killing. See, e.g., Johnny Diaz, *Father of Parkland School Shooting Victim Joaquin Oliver Launches One-Man Show*, S. FLA. SUN-SENTINEL (Sep. 20, 2019), <https://www.sun-sentinel.com/local/broward/parkland/fl-fea-parkland-father-manuel-oliver-one-man-show-20190812-2kk2kjlknvcszdg2csoygk3hki-story.html>.

vest on *Fearless Girl*, turning her into what others have called *Fearful Girl*.³⁸ Finally, on the weekend after Justice Ruth Bader Ginsburg died, State Street arranged for a “Ginsburg Collar” to be placed on *Fearless Girl*, and displayed the result in a full-page advertisement in the New York Times to commemorate the justice’s death.³⁹



Left: Alex Gardega next to *Fearless Girl* and his own *Pissing Pug* statue.

Right: Manuel Oliver’s statement against school shootings, for which he placed a bulletproof vest on *Fearless Girl*.

³⁸ Meghan DeMaria, *Parkland Father Puts Bulletproof Vest on 'Fearless Girl' Statue to Protest Mass Shootings*, YAHOO! LIFE (Nov. 3, 2018), <https://www.yahoo.com/lifestyle/fearless-girl-statue-wore-bulletproof-vest-part-parkland-fathers-protest-mass-shootings-152806367.html>; Changing the Ref (@ChangeTheRef), TWITTER (Nov. 2, 2018, 11:02 AM), https://twitter.com/ChangeTheRef/status/1058373694207221760?ref_src=twsrc%7Ctwtcamp%5Eetweetembed%5E1058373694207221760%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.yahoo.com%2Flifestyle%2Ffearless-girl-statue-wore-bulletproof-vest-part-parkland-fathers-protest-mass-shootings-152806367.html.

³⁹ An image of the ad is shown below. Advertisement, N.Y. TIMES, Sep. 20, 2020, at A7.



Left: An Occupy Wall Street poster featuring *Charging Bull*.

Right: State Street's advertisement marking Justice Ginsburg's death, which included the tagline, "Here's to the original."

From this very brief telling of the tale, it is clear that the presence of *Fearless Girl*, whether facing *Charging Bull* or not, has produced a variety of observations about both itself and the bull. All of these events confirm that even if the creators of public sculptural works retain legal authority over the surrounding environments, they may be sharply limited in their ability to control public commentary about their endeavors.

C. The Legal Issues

From the moment *Fearless Girl* arrived at Bowling Green, Arturo di Modica expressed deep antagonism about his work being a focus of criticism and social commentary.⁴⁰ A letter from Norman Siegel and Steven Hyman, di Modica's attorneys, to Mayor de Blasio just over a month after *Fearless Girl* appeared made

⁴⁰ Di Modica had a similar reaction in 2019 when the city talked about moving *Charging Bull* back to the Stock Exchange. See Boucher, *supra* note 16.

this quite clear.⁴¹ Di Modica's attorneys raised a series of objections to *Fearless Girl*'s presence near *Charging Bull*.⁴² They claimed that leaving *Fearless Girl* near to *Charging Bull* violated di Modica's rights to control reproductions of the bull, to prepare derivative works, and to distribute copies of *Charging Bull*.⁴³ They also contended that di Modica's moral right to limit modification of his work was violated.⁴⁴

For purposes of this essay, two of these claims are notable—the derivative work and moral rights issues. Neither reproductive nor distribution rights were threatened.⁴⁵ The derivative work question is about the right of an artist to license works that rely on her or his original creation to make a new work.⁴⁶ The moral rights claim would have to rely on the Visual Artists Rights Act of 1990 (“VARA”). VARA, however, applies only to works created after its effective date.⁴⁷ *Charging Bull* was completed and placed at the Stock Exchange the year before the Act went into effect. But the modification terms of VARA are still worth exploring. They, like the provisions on derivative works, raise fascinating questions about the degree to which copyright law allows artists to control the environmental composition in which their works are publicly displayed.

These derivative work and moral rights issues are the primary focus of this essay.⁴⁸ Usually we think about derivative works as creations adding new original

⁴¹ Letter from Norman Siegel et al., Attorneys for Arturo di Modica, to Honorable Bill de Blasio (Apr. 11, 2017), (on file with New York University Journal of Intellectual Property and Entertainment Law).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* This is not to say that images of the two works together were not frequently taken and that many small replicas of the *Charging Bull* have not been made. But those sorts of copying issues have arisen without regard to *Fearless Girl* and still do now that the girl has been moved away from Bowling Green.

⁴⁶ 17 U.S.C. § 101 (2018).

⁴⁷ 17 U.S.C. § 106A(d)(2) (2018).

⁴⁸ Arthur Piccolo, di Modica's spokesperson, has also claimed that the sculptor owns physical property rights in the bull. *See* Small, *supra* note 20. This is up for grabs. A good argument can be made that di Modica abandoned his sculpture and no longer owns it. He also declared that it was a gift to New York City. Originally, di Modica viewed his actions as a temporary gift. But what is it now that its presence seems to be permanent? Assuming that the actions of the city may be construed as acceptance of the gift, then the city may own it. But note that the city has never undertaken the customary administrative process to formally accept permanent ownership of the property. So far, these issues have not directly surfaced between the parties. But if the city moves the bull back to the Stock Exchange and di Modica sues, ownership of tangible property interests probably would be contested.

material to a prior work that recasts, transforms, or adapts the original—like a movie made from a novel with the permission of the copyright owner.⁴⁹ But in this case, *Fearless Girl* is a far different “creature” than *Charging Bull*. Its physical and compositional features make no direct use of the bull. It is not wholly analogous to a derivative movie’s use of content in a novel. Nonetheless, its installation nearby clearly commented upon and changed the atmospherics surrounding di Modica’s work. Does that make it a derivative work? Does di Modica have any control over the creation of *Fearless Girl* or its location?

The moral rights provisions of the copyright code raise closely related issues. The placement of the girl facing the bull created a dramatically new two-sculpture composition. Does only State Street have control over the coupled imagery it created? The modification provisions of the copyright code bar modification of a work of fine art by a party other than the artist that is an “intentional distortion, mutilation, or other modification of that work which would be prejudicial to . . . [the artist’s] honor or reputation.”⁵⁰ As with the derivative work issue, *Fearless Girl* did not directly make any physical modifications to *Charging Bull*. If a change was made by the presence of the girl, it was in the alteration of the bull’s compositional impact. Does such a compositional change constitute a “modification” or “mutilation” within the meaning of VARA? If so, did it endanger di Modica’s honor or reputation?

Before directly approaching these copyright questions, it is important to have at least a basic understanding of various forms of artistic composition. That is taken up in the next section. Following that, I will explore more directly the ways some forms of composition were altered by *Fearless Girl* and consider the intellectual property consequences of those changes.

⁴⁹ See the definition of “derivative work” in 17 U.S.C. §101:

A “derivative work” is 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. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

⁵⁰ 17 U.S.C. §106A(a)(3)(A) (2018).

II

CHARGING BULL AND COMPOSITION

A. *A Brief Journey into the Aesthetics of Composition*

Sensitivity about both the composition of a work and its relationship to the environment in which it is displayed have been persistent themes in the history of Western art. Attentiveness to these issues touches the heart of artistic creativity. Theorizing a bit about the composition of two-dimensional works provides a baseline for thinking about the ways location and environment may have significant impacts on viewer reactions to any work of art. Models about composition of two-dimensional works have evolved in at least two directions. The first attempts to find scientific and rational notions to explain why many people react more favorably to the appearance of one work than to another. The second views composition as an ineffable, aesthetic, and instinctual judgment.

Some artists use well-known rational or mathematical concepts like the “golden triangle,” the “golden ratio,” or the “rule of three” to construct basic features of their work.⁵¹ The first divides a surface into four triangles, with the four edges of the canvas or other material forming the bases of each. The golden ratio is based on the Fibonacci Ratio, a set of points on a surface that creates an elaborate spiral form. The rule of three is the simplest. Simply draw a “tic-tac-toe” grid on the working surface. This standard suggests placing important parts of an image at the points where the tic-tac-toe lines intersect. Some cameras are actually made with a tic-tac-toe grid that can assist a photographer in using the “rule of three.”⁵² Other conceptual and minimalist artists, such as Sol LeWitt, clearly use mathematical norms to guide their work.⁵³

Not surprisingly, these and other logic systems have been subject to criticism, especially when applied to non-geometric compositions. The dissenters suggest that formulas may work in some cases, but that their fit with human artistic preferences

⁵¹ Greek and Roman public buildings were certainly designed using mathematical systems. See, e.g., Rocco Leonardis, *The Use of Geometry by Ancient Greek Architecture*, in *A COMPANION TO GREEK ARCHITECTURE* 191, 192–206 (Margaret Miles ed., 2016).

⁵² For a good explanation of this idea, along with another more complex system using the curving points of a Fibonacci mathematical formula called the Fibonacci Spiral or golden ratio, see Jon Sparkman, *Why the Golden Ratio is Better than the Rule of Thirds*, PETAPIXEL (Oct. 24, 2016), <https://petapixel.com/2016/10/24/golden-ratio-better-rule-thirds/>.

⁵³ For discussion of the copyright issues involved in such work, see Richard Chused, “Temporary” *Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUTER & TECH. L.J. 1 (2019) [hereinafter Chused, *Conceptual Art*].

in other settings is loose at best.⁵⁴ Regardless of the validity of the various “golden” claims, many modern artists find it very difficult to express why or how they decide on the overall composition of works they create. For them, composition is a notion beyond the capacity of logical thinking to describe or define. This view is more appropriate for discussion of the relationships between *Charging Bull* and *Fearless Girl*. It is hard to imagine that State Street thought about the girl’s compositional relationship to the bull with mathematical precision. They certainly planned the positioning of the girl so that it stared directly at the bull. But the rest of their spatial interaction—the main subject of this essay—is very difficult to analyze precisely. Such ambiguity in compositional theory signals that grappling with the legal relationships between *Charging Bull* and *Fearless Girl* is likely to be as open-ended and conflictual as art itself.

This open-endedness is confirmed by a lucid depiction of subjective sensibility about composition. It may be found in *Portraits*—a perceptive book written by Michael Kimmelman, a sensitive, sophisticated, and knowledgeable art and architecture critic for *The New York Times*.⁵⁵ Some years ago, Kimmelman invited a number of well-known artists to meet him at museums of their choosing and view works that they believed influenced their artistic development or that they simply liked. His experiences are described in *Portraits*. During his visit with Jacob Lawrence at the Metropolitan Museum of Art, Kimmelman asked Lawrence why he

⁵⁴ A good fit is claimed in Lauren Palmer, *See How Artists Discover Simplicity as an Art Form in Works which Reflect the Golden Ratio*, ARTNET (Oct. 2, 2015), <https://news.artnet.com/art-world/golden-ratio-in-art-328435>. Ratio based lines are drawn over a number of famous paintings that fulfill the mathematics of the ratio. But doing so after the fact does not convince me that the artist actually used that method in the absence of written evidence of the claim. Essays expressing greater dubiety about the concept include Adam Mann, *Phi: The Golden Ratio*, LIVE SCIENCE (Nov. 25, 2019), <https://www.livescience.com/37704-phi-golden-ratio.html>; Cat Lewis, *Scientific Studies on the Golden Ratio*, MAD SYMMETRY (MAY 29, 2017), <http://madsymmetry.com/science-surrounding-golden-ratio/>; Samuel Obara, *Golden Ratio in Art and Architecture*, U. GA. DEP’T MATHEMATICS EDUC., <http://jwilson.coe.uga.edu/EMT668/EMAT6680.2000/Obara/Emat6690/Golden%20Ratio/golden.html> (last visited Mar. 12, 2020).

⁵⁵ Michael Kimmelman, *PORTRAITS: TALKING WITH ARTISTS AT THE MET, THE MODERN, THE LOUVRE, AND ELSEWHERE* ix–xiii (1998).

found Sassetta's⁵⁶ painting *The Journey of the Magi*, shown below,⁵⁷ magical. Lawrence responded:

It's simplified but very complex at the same time. We say "simplicity" and imply something's easy to accomplish but this isn't easy. It's a highly refined composition, and I could describe why formally: the way the shapes balance one another, the way the image moves from dark to light. But there's something that I can't describe formally, which is a certain feeling, an intuitiveness, maybe. An emotional authenticity. I'm just projecting here, but I think it seems authentic to me because maybe the artist wasn't tied up too much in rhetoric, you know, talk, school talk, pedantics [sic]. When I was young I hung around painters and people in the arts, music, theater. I was just beginning to grasp what a theater person or artist meant when he talked about space or rhythm or movement. I couldn't talk the way they did. At the time I had a more intuitive sense of why I like something, and I still think that's the most important thing to have.⁵⁸

⁵⁶ Formally his name was Stefano di Giovanni di Consolo, but he is commonly known as Sassetta. See *Sassetta Biography*, NAT'L GALLERY ART, <https://www.nga.gov/collection/artist-info.1860.html> (last visited Oct. 1, 2020).

⁵⁷ Sassetta, *The Journey of the Magi* (painting), MET MUSEUM, <https://www.metmuseum.org/art/collection/search/437611> (last visited Aug. 9, 2020). The image below of the painting is in the public domain.

⁵⁸ KIMMELMAN, *supra* note 54, at 209. Elizabeth Langer, my artist wife, expresses similar notions. If I ask her how she knows where some shape should be placed in a collage, or why one work should be located next to another when it is publicly displayed, or when a work is finished, a precise answer is rarely forthcoming. She is simply unable to verbalize in a precise way why one composition works for her and another does not. Knowing when a composition is complete routinely becomes an unanswerable quest:

Often I don't know when a piece is finished. Knowing when to stop is one of the most difficult judgment calls a creative person is called to make. Countless times I have ruined a work by failing to stop. Other times I have looked at a drawing or painting and said to myself, "This is good, but it's not special; it doesn't grab me." I can take a risk by adding a color, some dissonant lines or a bold mark. Sometimes I hit the jackpot and the work sings. Other times (more often), I destroy the piece and I am unable to bring it back. But I always remember the voice in my head: "It's far better to take a risk and fail than to settle for something that is only good."

Kate Feiffer, *How Do You Know When You're Finished?*, MARTHA'S VINEYARD ARTS & IDEAS (July 2016), <http://www.mvartsandideas.com/2016/06/know-youre-finished/>.



Sassetta, *Journey of the Magi* (c. 1433–35)

Despite the uncertainty about our “knowledge” of the ways artists conceive of compositional forms or the reasons why people react to them in various ways, the overall appearance of a work of art is central to the relationships between artist and viewer. This has been true for centuries. Artists creating early religious paintings and iconography cared deeply about composition. The creation of triptychs is a perfect example. Their three-panel structure had deep resonance with Christian theology and therefore with the compositional choices made by artists in the panels themselves. The “architecture” of the style led naturally to the need to create relationships between the three segments of such works. But triptychs also were frequently placed in particular locations in churches.⁵⁹ Their environmental placement often was an important part in the artistic design of the triptychs themselves.

Artists have also experimented with ways to supplement traditional forms of religious painting with certain more elaborate “additions” for quite some time. Often these were designed to draw a viewer’s eyes to a particular figure in the composition or a phrase in a book. Artists of sacred art, for example, began to use gold leaf and

⁵⁹ See, e.g., PETER HUMFREY, *The Physical Environment*, in *THE ALTARPIECE IN RENAISSANCE VENICE* (2020) (ebook) (describing Byzantine and Gothic architectural and decorative elements in Venetian churches between the 1300s and 1500s, including interior decoration with triptychs).

other appliques to enhance their works. Similarly, an array of early book writers employed highly decorative calligraphy and images on some of their pages.⁶⁰ These flourishes also were critical aspects of composition. They accentuated reverence, authority, power, holy figures, or important religious concepts. Golden halos around the heads of important Christian figures, of course, were commonplace in medieval art.⁶¹ The Western artists of these early works combined different artistic techniques, added new elements to their compositions, and crafted a variety of ways to contrast, compare, and emphasize emotional, religious, narrative, and compositional aspects of their work.

Some of these early innovations were precursors to much twentieth century art. The use of figurative subject matter and landscapes gradually gave way to increasingly secular and abstract compositions. Painters were heavily influenced by the relationships of triptych panels and by the addition of “artificial” methods (such as the use of gold leaf) to emphasize characters or features in works of art. Later artists, like Doménikos Theotokópoulos (“El Greco”) in the sixteenth century, Diego Velázquez in the seventeenth century, and Francisco Goya around the turn of the nineteenth century, each enhanced Western art in distinct ways—abstraction in the case of El Greco, realism and visible emotion in the case of Velazquez, and pathos together with use of lighting effects in the case of Goya.

As depictions of non-religious figures, objects, and scenes blossomed, artists’ use of inanimate features as the central compositional feature of two-dimensional work—animals, home interiors, or still life arrangements—became plausible. By the turn of the twentieth century, everyday items such as newspaper clippings, photos, cloth, and other materials began to take on both compositional and, at times, narrative commentary. For such non-representational works, including collage, assemblage, and combinations of two- and three-dimensional elements, composition was of central importance. Lacking an easily “understood” narrative or central

⁶⁰ For a brief summary of early use of gold in art see Kelly Richman-Abdou, *Why Artists Use Gold Leaf and How You Can Make Your Own Ethereal Paintings*, My Modern Met (March 1, 2018), <https://mymodernmet.com/gold-leaf-art/2/>. For some examples of beautifully illuminated historic manuscripts, see Joshua J. Mark, *Twelve Greatest Illuminated Manuscripts*, Ancient Hist. Encyclopedia (Feb. 1, 2016), <https://www.ancient.eu/article/1185/twelve-greatest-illuminated-manuscripts/>.

⁶¹ JOHN BECKWITH, *Early Christian Art: The Synthesis of the Secular and the Religious Image*, in *EARLY CHRISTIAN AND BYZANTINE ART* (1986) (ebook) (describing origins of early Christian imagery and demonstrating early use of the halo even in sixth or seventh century Constantinople to signify divinity).

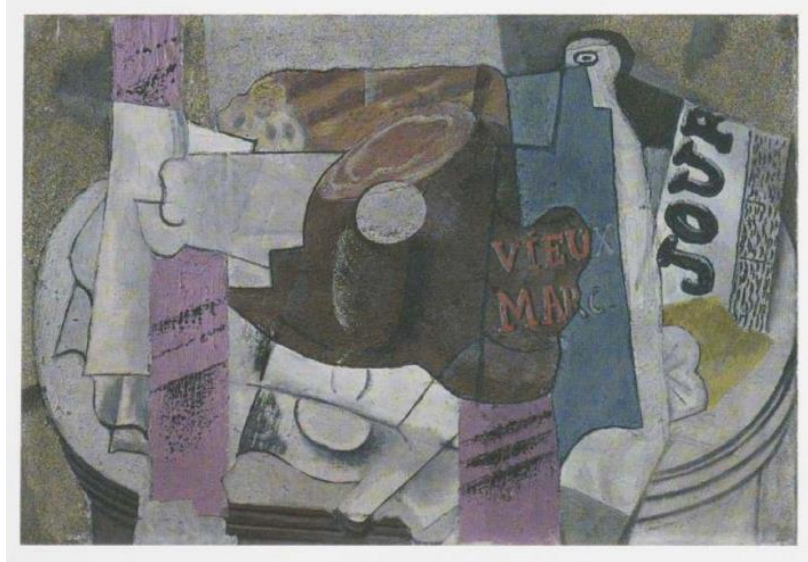
religious element, something else was needed to draw, excite, or hold viewers' attention.

Georges Braque and Pablo Picasso were central figures in the development of modern and contemporary art. Working together between 1907 and World War I, the two developed new compositional techniques in cubist painting and collage that still referenced more traditional artistic tropes.⁶² Below are two fine examples of the novel projects they created, made in Paris in the spring of 1914. The Picasso is a painting on canvas of a collage-like composition, while the Braque is a work of painting and collage using sand on canvas.⁶³ Both represent everyday objects, though each was painted rather than displayed as collage. In both works, the compositions lack a traditional focus. Each contain items that run off the edge of the canvas, cover most of the surface of the works, and juxtapose cleverly, leading one's eyes to run riotously across the surface and tumble in all directions as a viewer ponders them for a time. They are, in short, untraditional, modern, eye-catching, animated, and political.⁶⁴ But their compositions nonetheless are riveting, in part because they, like their medieval predecessors, used applique technique as a central compositional theme. By a century ago, Western art had reached the point where composition was ready to leap off the page into assemblages and combinations of traditional paintings with objects or even architecture.

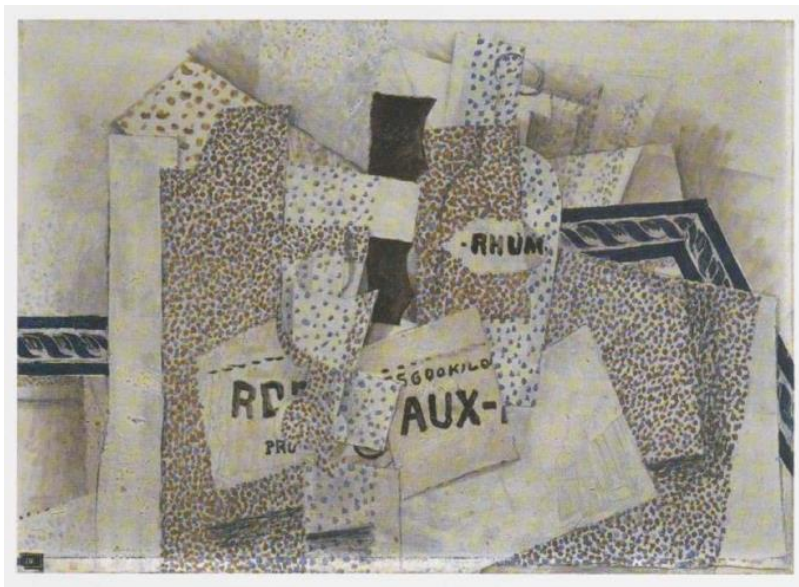
⁶² An important exhibition of their joint efforts was held by the Museum of Modern Art between September 24, 1989 and January 16, 1990. See *Picasso and Braque: Pioneering Cubism*, MOMA, <https://www.moma.org/calendar/exhibitions/1730> (last visited Apr. 7, 2020). The museum also published a book about the show. WILLIAM RUBIN, *PICASSO AND BRAQUE: PIONEERING CUBISM* (1989) (ebook), https://www.moma.org/documents/moma_catalogue_1730_300062926.pdf.

⁶³ RUBIN, *supra* note 62, at 324. The Braque was in a private collection at the time of the exhibition; the Picasso was at the Musée d'Art Moderne de la Ville de Paris. Both works shown below are reproduced in the book.

⁶⁴ These two works remind me of Michelangelo's *Last Judgment*, a fresco with a composition that wanders wildly over the huge surface of the apse around the altar in the Sistine Chapel. Complex, tumultuous composition is not only the property of the modern age. For more on the political motivation behind Picasso and Braque's anti-figuration movement, see Frances Pohl, Book Review, 29 *ARCHIVES OF AM. ART J.* 52, 52–56 (1989) (reviewing CÉCILE WHITING, *ANTIFASCISM IN AMERICAN ART* (1989)).



Pablo Picasso, *Ham, Wineglass, Bottle of Vieux Marc, Newspaper* (1914)



Georges Braque, *Bottle of Rum* (1914)

Three-dimensional art evolved through similar transitions, though the compositional issues were often more complex. The compositional instincts of ancient sculptors, such as those constructing Stonehenge, are sometimes complicated and obscure to contemporary viewers. Later sculpting of religious figures and objects, especially in altar settings, frequently took on triptych compositional configurations, sometimes in large and multifaceted ways. The altar

piece pictured below is one of many examples.⁶⁵ Whether occupying large spaces or a small niche, the environment in which a work was placed had an outsized impact on the way viewers perceived and comprehended the art itself. That compositional instinct, while surfacing at times with two-dimensional works produced for display in specific sites, is a more persistent factor in the creation and placement of three-dimensional works. From their use in religious settings, through their placement in particular secular locations, through recent tendencies to render sculpture using everyday objects, to their siting as abstract forms in open spaces, the intention is to grab and provoke our visual attention. Three-dimensional forms are often placed in unconventional settings—away from walls or in the middle of rooms—making the process of walking around them a critical part of the visual experience.



Michael Pacher, Sankt Wolfgang Altarpiece (c. 1479–81)

The work of contemporary artist John Chamberlin is a notable example of the use of everyday objects in three-dimensional art. Many of his pieces are composed of crushed and twisted parts of automobiles welded and bolted together in fascinating and joyous forms. Below is an image from a 2012 retrospective

⁶⁵ See Photograph of St. Wolfgang Altarpiece, in Donna L. Sadler, *The Medieval and Renaissance Altarpiece*, SMARTHISTORY (Jan. 29, 2020), <https://smarthistory.org/altarpiece-medieval-renaissance/>. The altarpiece is made from polychrome pine, linden, gilding and oil, spanning over 40 feet high and more than 20 feet wide. Its location is the Parish Church, Sankt Wolfgang, Austria. The image below is from this article.

exhibition of Chamberlain's work at the Guggenheim Museum in New York City,⁶⁶ followed by another from a 2000 show of his work at the Pace Gallery, also in New York City.⁶⁷ The Dia Beacon museum in Beacon, New York also routinely displays his work.⁶⁸ In all three settings, it is not possible to fully comprehend many of the works without circumnavigating them. And their placement with other Chamberlain works is an integral part of the overall viewing experience.



John Chamberlain, *Hatband* (1960)

⁶⁶ The exhibition was reviewed by Karen Rosenberg in *The New York Times*. The first image below of Chamberlain's work is included in that review. Karen Rosenberg, *Beyond the Junkyard*, N.Y. TIMES (Feb. 23, 2012), <https://www.nytimes.com/2012/02/24/arts/design/john-chamberlain-choices-at-guggenheim-museum.html>. I visited this exhibition with my wife. We both were mesmerized by many of the works. The photo attribution is to Sara Krulwich/The New York Times.

⁶⁷ See Photograph of a John Chamberlain Sculpture, in *John Chamberlain Recent Sculpture*, PACE GALLERY, <https://www.pacegallery.com/exhibitions/john-chamberlain-8/> (last visited June 19, 2020). The second image of Chamberlain's work below is included on that website. The works were exhibited at the Pace Gallery from May 12 to June 10, 2000 in an exhibition of Chamberlain's then-recent works.

⁶⁸ The Dia museum web site contains information about Chamberlain and images of a number of his works. See *John Chamberlain*, DIA, <https://www.diaart.org/exhibition/exhibitions-projects/john-chamberlain-exhibition/> (last visited July 17, 2020).



John Chamberlain (2000)

For many stand-alone, two- or three-dimensional works, their setting is not necessarily critical to the way in which a viewer perceives them. Though their placement in certain rooms or near compatible works may enhance or diminish their artistic power, especially with three-dimensional works, many are largely capable of carrying their own creative authority without much environmental assistance. A single Picasso collage or Chamberlain sculpture can be placed in an array of spots and retain remarkable attraction to the human eye. But compositional sensibilities change dramatically when site-specific works come into view.

B. “Site-Specific” Works

For purposes of this essay, the most important compositional features present in many artistic endeavors arise in “site-specific” works. Intentional location in a particular place is central to their aesthetic power. Site-specific works create unified compositions combining surfaces—canvases, walls, or horizontal planes—with three dimensional forms—sculpture, architectural spaces, or landscape designs. The most extreme examples involve sculpting the earth itself. Robert Smithson,⁶⁹ Nancy Holt,⁷⁰ and Michael Heizer⁷¹ have sculpted huge parcels of land into vast vistas.

⁶⁹ See *Robert Smithson Artworks*, Holt/Smithson Foundation, <https://holtsmithsonfoundation.org/artworks-robert-smithson> (last visited Oct. 14, 2020).

⁷⁰ See *id.*; see also *Nancy Holt Artworks*, Holt/Smithson Foundation, <https://holtsmithsonfoundation.org/artworks-nancy-holt> (last visited Oct. 14, 2020).

⁷¹ Michael Kimmelman, *Michael Heizer’s Big Work and Long View*, N.Y. TIMES (May 17, 2015), <https://www.nytimes.com/2015/05/17/arts/design/michael-heizers-big-work-and-long-view.html> (last visited June 20, 2020).

These works cannot be moved—they are a part of the landscape that they inhabit. While di Modica can never claim that *Charging Bull* is as tightly connected to a site as the work of these earth artists, he does claim that the bull only attains its fullest symbolic power when placed in certain spaces with no other works to detract from or alter the perspective of viewers.

Site-specificity has been a critically important feature of many works for centuries. Altar pieces are obvious examples. Their removal to new locations or disaggregation for purposes of selling each part separately significantly detracts from or even destroys their intended religious power and compositional authority. *The Dance* by Henri Matisse, made for the Barnes Foundation in Philadelphia and pictured below,⁷² is another renowned site-specific work made to be displayed in the particular arched doorways where it is currently located. Removing the work from this site would destroy the magnificent impact of the dancers gracefully flowing from lunette to lunette.



Henri Matisse, *The Dance* (1932–33)

Similar consequences would arise if Claude Monet's *Water Lilies* paintings were moved from their present location at the Musée de l'Orangerie in

⁷² See The Barnes Foundation, Photograph of Henri Matisse's *The Dance* in Phyllis Tuchman, *Matisse, in All His Glory: New Tome Chronicles the Artist's Work at the Barnes Foundation*, ARTNEWS (Jan. 29, 2016, 9:17 AM), <https://www.artnews.com/art-news/news/matisse-in-all-his-glory-new-tome-chronicles-the-artists-work-at-the-barnes-foundation-5739/>. This article also contains a brief history of the work. The image was taken at the Barnes Foundation in 2012.

Paris.⁷³ The space itself was designed in accordance with Monet's desires. The final dedication of the space took place in 1927, one year after the artist's death.⁷⁴ As the museum notes, the environment helps evoke a powerful set of images and themes:

According to Claude Monet's own suggestion, the eight compositions were set out in the two consecutive oval rooms. These rooms have the advantage of natural light from the roof, and are oriented from west to east, following the course of the sun and one of the main routes through Paris along the Seine. The two ovals evoke the symbol of infinity, whereas the paintings represent the cycle of light throughout the day.

Monet greatly increased the dimensions of his initial project, started before 1914. The painter wanted visitors to be able to immerse themselves completely in the painting and to forget about the outside world. The end of the First World War in 1918 reinforced his desire to offer beauty to wounded souls.

The first room brings together four compositions showing the reflections of the sky and the vegetation in the water, from morning to evening, whereas the second room contains a group of paintings with contrasts created by the branches of weeping willow around the water's edge.⁷⁵

⁷³ The museum's website gives an overview of the paintings and the galleries in which they are displayed. *Claude Monet's Water Lilies*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/claude-monets-water-lilies> (last visited June 19, 2020). The image below is in Alan Riding, *Paris's Jewel-like Orangerie, Home to Monet's Waterlilies, Reopens, Polished and Renovated*, N.Y. TIMES (May 16, 2006), <https://www.nytimes.com/2006/05/16/arts/design/16oran.html>. The image below appears in this article and the attribution is to Remy de la Mauviniere/Associated Press. Another classic setting designed with the collaboration of the artist is the Rothko Chapel on the campus of the Menil Collection in Houston. ROTHKO CHAPEL, <http://www.rothkochapel.org> (last visited June 19, 2020). For more on art that is integrated into a natural landscape, see Cristo and Jeanne Claude's *The Gates* installation in New York City, *The Gates*, CHRISTO AND JEANE-CLAUDE, <https://christojeanneclaude.net/projects/the-gates> (last visited June 20, 2020), and the works of Nancy Holt and Robert Smithson, *supra* note 70 and accompanying text.

⁷⁴ *The Installation of Water Lilies*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/installation-water-lilies> (visited Oct. 24, 2020).

⁷⁵ *The Set of the Orangerie*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/set-orangerie> (last visited June 19, 2020).

During a more recent renovation of the museum from 2000 through 2006, Monet's paintings, too large to move, had to remain in place.⁷⁶



Claude Monet, *Water Lilies* (c. 1914–26)

Meanwhile, di Modica's claims about *Charging Bull* involve a somewhat more complex contention—not that his work is aesthetically well suited for display in a particular space, but that its cultural content requires placement near the epicenter of the nation's financial markets. The bull's symbolism is so tightly related to the N.Y. Stock Exchange and its environs that placing it somewhere else, di Modica claims, is inappropriate. Furthermore, he argues, allowing other works like *Fearless Girl* to be placed nearby reduces the power of the work's intended symbolism and, thus, should be barred.

There are a number of site-specific works that raise similar issues. Consider, for example, the Statue of Liberty, formally dedicated in 1886.⁷⁷ Its size and location at the entrance to New York harbor makes it easily visible to arriving ships and spectators on surrounding shores. This location has played a significant role in the statue becoming both an iconic symbol and a renowned work of art.⁷⁸ Placed in Times Square, the statue would acquire entirely different and less evocative symbolism. The famous inscription on its base—"Give me your tired, your poor.

⁷⁶ Alan Riding, *Paris's Jewel-like Orangerie, Home to Monet's Waterlilies, Reopens, Polished and Renovated*, N.Y. TIMES (May 16, 2006), <https://www.nytimes.com/2006/05/16/arts/design/16oran.html>.

⁷⁷ *Liberty Enlightening the World*, NAT'L PARK SERV., <https://www.nps.gov/stli/index.htm> (last updated Oct. 7, 2020).

⁷⁸ The image above can be found in Mary Bellis, *Frederic August Bartholdi: The Man Behind Lady Liberty*, THOUGHTCO, <https://www.thoughtco.com/who-designed-the-statue-of-liberty-1991696> (last updated Jan. 11, 2020).

Your huddled masses yearning to breathe free.”—would lose much of its rhetorical power.⁷⁹



The *Statue of Liberty* at the entrance to New York harbor.

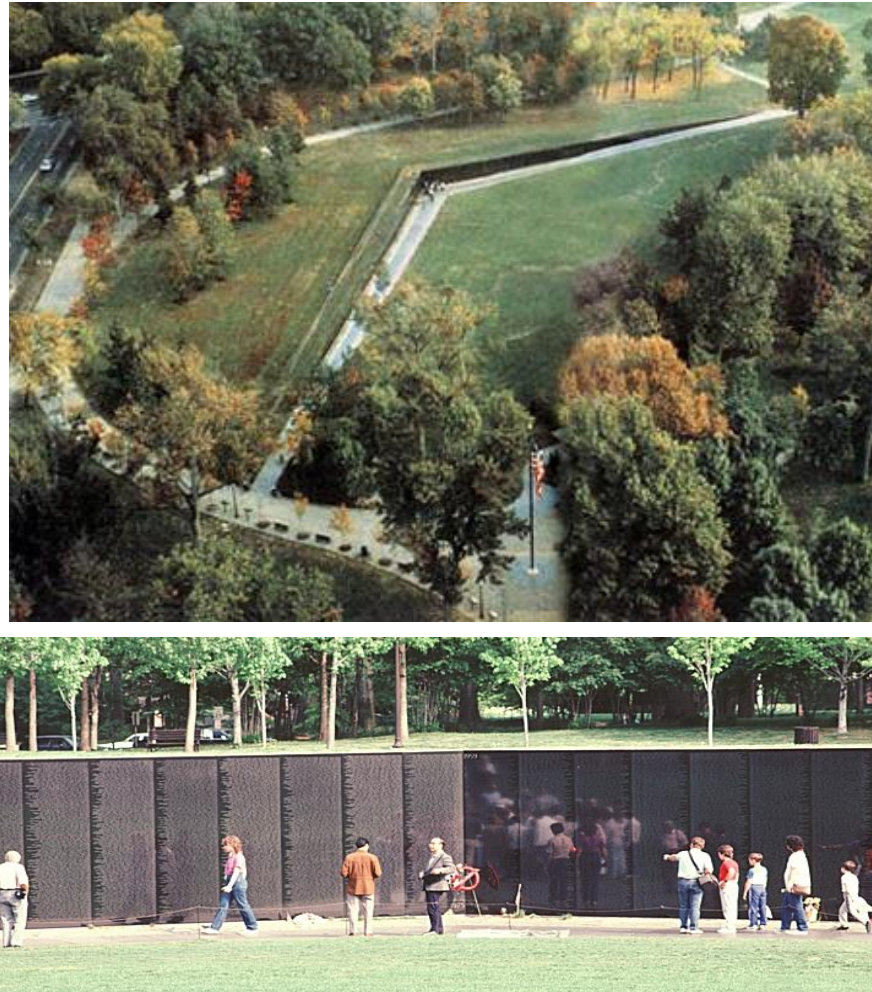
Landscape artists or architects sometimes create remarkably symbolic, site-specific sculptural works. And of course, sculptors and architects often work together to craft projects. In all these works, moving the three-dimensional forms from their original sites destroys a significant part, if not all, of the works' original visual and symbolic power. An extremely powerful connection between sculpture and site is evoked by Maya Lin's Vietnam Memorial in Washington, DC.⁸⁰ With one of the work's axes pointing to the Washington Monument and the other to the Lincoln Memorial, the work is a gash in the earth, invisible from behind, and framing a gradual decline from the front.⁸¹ The wall is both funereal and magnetic, drawing people to solemnly walk its length, to touch and trace the names of family members and friends, and to leave tokens of love and respect. The designed shapes of the earth and the wall are tightly integrated. They are “one” work—a moving, emotional

⁷⁹ Emma Lazarus, *The New Colossus*, NAT'L PARK SERV., <https://www.nps.gov/stli/learn/historyculture/colossus.htm> (last updated Aug. 14, 2020).

⁸⁰ *Vietnam Veterans Memorial*, NAT'L PARK SERV., <https://www.nps.gov/vive/learn/historyculture/vvmoverview.htm> (last visited June 20, 2020). The two images below are from Elizabeth Wolfson, *The Black Gash of Shame—Revisiting the Vietnam Veterans Memorial Controversy*, ART21 MAGAZINE (Mar. 15, 2017), <http://magazine.art21.org/2017/03/15/the-black-gash-of-shame-revisiting-the-vietnam-veterans-memorial-controversy/>.

⁸¹ Wolfson, *supra* note 80.

space.⁸² Its artistic, compositional contours are intimately tied to the site.⁸³



Top: The Vietnam Veterans Memorial, designed by Maya Lin, from above.

Bottom: Visitors observing names of 58,000 American servicemen etched into marble at the site.

⁸² I walked its length shortly after the opening, before the tourist crush arrived and the walkway was constructed along its length. After the slow stroll, I sat on the grass at the crest of the hill. Deeply moved by its power, I wept. Having lived through the Vietnam War and participated in demonstrations against it, the scope of the tragedy marked by this simple but magnificent memorial was overwhelming.

⁸³ The same would have been said about Richard Serra's *Tilted Arc*, removed from the Foley Plaza in front of the Javits Building in downtown New York on March 18, 1989, two years before moral rights protections were embedded in the copyright code. For more, see Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 615–21 (2018).

III *CHARGING BULL AND COPYRIGHT*

A. Terms of the Legal Debate

Where does *Charging Bull* fit in this complex configuration of artistic composition and environmental location? It certainly is easy to imagine the di Modica work sited in a museum gallery. In that setting it would retain its aesthetic power and, with the help of a note installed nearby, still convey a message of American resilience in troubled times. It cannot be denied that in such a setting, di Modica owns intellectual property interests in the three-dimensional sculptural work. But does he also retain some or all control over where and how the museum may display it? In other words, does he own something more than a copyright interest in the object itself? Are there merits to his contention that museum or other displays of *Charging Bull* may violate his right to control the work's environment?

At the other end of the spectrum, *Charging Bull* is not a wholly site-specific work. Di Modica cannot claim to be like Maya Lin—a designer of both a sculpture and its environment.⁸⁴ Nor is he similar to Monet who worked in collaboration with an architect in the 1920s to craft a special environment for his *Water Lilies*.⁸⁵ Di Modica was never involved with another person or institution to create a site-specific display for *Charging Bull*.⁸⁶ Quite the contrary. Recall that he placed the work on Broad Street, directly in front of the N.Y. Stock Exchange, in the dead of night without the cooperation of or permission from anyone other than those who performed the tasks associated with moving and placing the work.⁸⁷ Certainly, the location at the N.Y. Stock Exchange was integrated with di Modica's commentary about resilience in times of economic hardship. But that particular site is not the only place where a similar message may be evoked. If he has any compositional claims beyond the sculpture itself, they must arise from a feature of the work that requires its location in a certain type of space or that necessitates limitations on the ability of others to "comment" on the art. That set of issues—both compositional and copyright-based—is considered next.

⁸⁴ See *supra* note 80 and accompanying text.

⁸⁵ See *infra* text accompanying notes 121-122.

⁸⁶ The copyright status of projects created by more than one person are discussed a bit later. See discussion *infra* notes 121-122. Definitionally, in copyright law, "[a] 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (2018).

⁸⁷ Kuesel, *supra* note 2.

There is some logic in di Modica's position that the ideal location for *Charging Bull* is close to, if not within sight of, the N.Y. Stock Exchange. It is after all a sculpture that literally expresses the notion of a "bull market" in making a statement about American resilience in troubled times. There is also some logic in his position that placing other works, such as *Fearless Girl*, close to *Charging Bull* alters di Modica's apparent or perceived artistic intentions and injects quite different social and cultural messages. The bevy of onsite reactions to both the bull and the girl make that quite evident.⁸⁸ Whether either of di Modica's claims—that he controls the physical location of *Charging Bull* and holds the power to insulate the work from onsite, critical, artistic commentary—can be resolved in his favor under U.S. copyright law is unclear.

Two provisions of copyright law are critical to the analysis—the concept of a "derivative work" and the contours of moral rights law. The code 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."⁸⁹ If a person makes a work that recasts, transforms, or adapts a preexisting copyrighted work without the permission of the author of the original, it is an infringement.⁹⁰ Di Modica may claim that the presence of *Fearless Girl* near *Charging Bull* recasts, transforms, or adapts his sculpture in two ways: by transforming the compositional environment in which the bull is displayed; or by recasting the symbolic importance of the sculpture.

Moreover, the moral rights section of the code provides that an artist during her life has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."⁹¹ Here, di Modica must raise concerns similar to those made in his derivative work contentions—that placement of *Fearless Girl* or other artistic statements close to or upon *Charging Bull* so substantially recasts the bull by modifying it in ways that prejudice di Modica's honor or reputation. *Fearless Girl* so profoundly distorts his artistic intentions, he might claim, that such commentary should be barred.

⁸⁸ See *supra* Section I.A.

⁸⁹ 17 U.S.C. § 101 (2018)

⁹⁰ See 17 U.S.C §§ 106(2), 501 (2018).

⁹¹ 17 U.S.C § 106A(a)(3)(A) (2018).

B. Compare Guernica: Artistic Intention, Location, and Moral Rights



Pablo Picasso, *Guernica* (1937)

To begin the inquiry, consider the connections between *Charging Bull* and Pablo Picasso's famous *Guernica*, pictured above.⁹² The *Guernica* story is an important comparison for two reasons. First, like *Charging Bull*, there were disputes over the work's location. Second, when pressure to move *Guernica* to Spain increased during the 1970s, Picasso's heirs made moral rights claims about the work.

The history of Picasso's work is complex. In 1937, Picasso painted *Guernica*—a huge, mural-sized piece measuring 11'6" by 25'7".⁹³ At the time, the Spanish Republican government was in the midst of a civil war with the Francisco Franco-led Nationalists—one of a number of fascist movements gaining power across Europe. Early in 1937, Picasso was commissioned by the internationally recognized Republican government of Spain to create a work for display in the country's pavilion at the Paris Exposition scheduled to open later that year. Then living in Paris, Picasso was unsure about what to produce for the show.⁹⁴ But on April 26, a unit of Germany's Luftwaffe, loaned to and under the control of Franco's

⁹² The work is now housed at the Museo Nacional Centro de Arte Reina Sofía in Madrid, Spain. See *Guernica*, MUSEO NAC'L CENTRO ARTE REINA SOFIA, <https://www.museoreinasofia.es/en/collection/artwork/guernica> (last visited June 24, 2020).

⁹³ See *Guernica, 1937*, PABLO PICASSO, <https://www.pablocicasso.org/guernica.jsp> (last visited June 28, 2020). The image above can be found at this website and is attributed to www.PabloPicasso.org.

⁹⁴ GIJS VAN HENBERGEN, *GUERNICA: THE BIOGRAPHY OF A TWENTIETH-CENTURY ICON* 31–35 (2004).

forces, carpet-bombed the small town of Guernica, located not far from Bilbao in the Basque country of northern Spain. Hundreds, if not thousands, of innocent people were killed and wounded.⁹⁵



The ruins of Guernica, shortly after the 1937 bombing.

The bombing of Guernica galvanized Picasso to work on the well-known painting named for the town.⁹⁶ Picasso's leftist political leanings moved him to compose a painting protesting both the bombing of Guernica and the rising fascist movements on the continent. When the Paris Exposition ended, "there was no indication that Picasso had become either precious or obsessively protective about the painting. It had a job to do. It was as simple as that. And like a theatre backdrop, it could be easily untacked and rolled round a tube ready for transport."⁹⁷ And so, *Guernica* went on tours in Europe and other parts of the world to raise funds for the support of refugees from the Spanish Civil War. When Franco's forces took over

⁹⁵ The number of casualties is unknown. Estimates of deaths range from 200 to 1700. Casey Lesser, *What Makes Guernica Picasso's Most Influential Painting*, ARTSY (June 12, 2017, 1:55 PM), <https://www.artsy.net/series/-1583427101/artsy-editorial-guernica-picassos-influential-painting>; cf. HENSBERGEN, *supra* note 94, at 47 (claiming that 1645 died and 889 were injured). The image is from Federico López-Terra, *80 Years on from the Guernica Bombing and Spain is Still Struggling to Honour Historical Memory*, Local (April 26, 2017, 6:41 PM), <https://www.thelocal.es/20170426/80-years-on-from-the-guernica-bombing-and-spain-is-still-struggling-to-honour-historical-memory>. The image attribution is to the AFP archive.

⁹⁶ See HENSBERGEN, *supra* note 94, at 45–48.

⁹⁷ HENSBERGEN, *supra* note 94, at 82–83.

Spain in 1939, the work was on display at the Museum of Modern Art (“MoMA”) in New York City as part of a retrospective exhibition.⁹⁸

The painting remained at MoMA throughout World War II. During the early 1940s, Picasso requested that the museum serve as its guardian to protect it and to ensure that it would not be returned to Spain until “the reestablishment of public liberties” occurred there.⁹⁹ If he became unable to make such a decision, Picasso entrusted his lawyer, Roland Dumas, to determine when that condition was fulfilled. MoMA oversaw additional tours of the work until 1958, when MoMA’s staff deemed it too fragile to withstand further travel.¹⁰⁰ *Guernica* then remained at MoMA until its final move to Madrid in 1981. Arranging *Guernica*’s last move was not without controversy.

As early as 1968, Franco sought to have the painting brought to Spain.¹⁰¹ Picasso quickly refused that request, saying the move could not occur until democracy was restored in Spain. Picasso died in 1973, followed two years later by Franco. In 1973, Franco had designated Juan Carlos, grandson of the last reigning king of Spain, as his successor.¹⁰² Surprising many after he took over in November 1975, Carlos began the process of recreating a democracy. In 1977, the first general election was held. A new constitution went into effect the following year. In February 1981, an abortive military coup d’état was peacefully averted when Juan Carlos convinced the vast bulk of the armed services to stay on the sidelines. The first peaceful post-election transfer of power occurred the following year.

Though Spanish pressure to send *Guernica* to Spain began in earnest after Franco’s death in 1975, various roadblocks delayed the move another six years. Concerns raised by Dumas and four heirs of Picasso, delays by the MoMA, and practical issues about how and when to move the fragile work also caused problems. Both Dumas and Picasso’s heirs were concerned about the stability of Spain’s

⁹⁸ *Id.* at 124–125.

⁹⁹ Grace Glueck, *Picasso's Antiwar 'Guernica' Quietly Leaves U.S. For Spain*, N.Y. Times (Sep. 10, 1981), <https://www.nytimes.com/1981/09/10/arts/picasso-s-antiwar-guernica-quietly-leaves-us-for-spain.html>; *see also* James M. Markham, *Spain Says Bienvenida to Picasso's 'Guernica'*, N.Y. Times (Sept. 11, 1981), <https://www.nytimes.com/1981/09/11/arts/spain-says-bienvenida-to-picasso-s-guernica.html> (describing Picasso’s reluctance to move the painting until democracy was restored in Spain).

¹⁰⁰ *See* HENSBERGEN, *supra* note 94, at 210–12.

¹⁰¹ Markham, *supra* note 99.

¹⁰² HENSBERGEN, *supra* note 94, at 257.

fledgling democratic government during and after the 1981 coup attempt.¹⁰³ The heirs also claimed the right to control the painting's whereabouts under French moral rights law.¹⁰⁴ In addition, some heirs raised questions about whether Spain actually owned *Guernica*.¹⁰⁵ If Spain could not confirm its ownership of the work, *Guernica* would have fallen into Picasso's estate, a result of obvious benefit to the heirs.

Adolfo Suárez González, the first elected Spanish prime minister after Franco's death, appointed the veteran diplomat Rafael Fernandez Quintinella to verify that Spain held the strongest tangible property ownership claim to *Guernica*. He did so in 1981 by discovering documents confirming that Spain had paid Picasso about \$6,000 to create the work for the Paris Exposition.¹⁰⁶ In 1981, with their concerns about the strength of Spanish democracy and the work's ownership chain assuaged, the heirs consented to moving the painting to Madrid. This occurred at a June 1981 meeting in Paris, convened by MoMA, where all relevant parties were present, and the documents confirming Spanish ownership of *Guernica* were on hand.¹⁰⁷ Dumas signed off on the details of the move in August, after the parties resolved insurance, transportation, and security issues. *Guernica* arrived in Madrid and became available for viewing by the public on October 25, the centennial of

¹⁰³ KATHERINE O. STAFFORD, *Archeology of an Icon: Picasso's Guernica and Spanish Democracy*, in NARRATING WAR IN PEACE 109–10 (2015) (noting “[t]he greatest obstacles to the repatriation of the painting came from Picasso's contentious family,” including protestations over when the painting should be returned to Spain).

¹⁰⁴ See Grace Blueck, *Picasso's Antiwar 'Guernica' Quietly Leaves U.S. for Spain*, N.Y. TIMES, Sept. 10, 1981, at A1 (describing heirs' disagreement over when the painting should return to Spain and claims for certain moral rights to the work as the artist's survivors). In the United States, moral rights claims—including the ability to bar modification or mutilation of a work that undermines the reputation of the artist, and destruction of a work of recognized stature—end at the death of the artist. See 17 U.S.C. §§ 106A(a)(3), 106A(d)(1) (2018). Di Modica, of course, is still alive. Similar rights in France continue indefinitely, passing to heirs after the death of the artist. See Art. 6 du loi 57-298 du 11 mars 1957 sur la Propriété Littéraire et Artistique [Article 6 of Law 57-298 of March 11, 1957 on Literary and Artistic Property], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 14, 1957, p. 2724. Moral rights controls may not be transferred in France; they may be waived in the United States. Compare *id.* with 17 U.S.C. §106A(e) (2018).

¹⁰⁵ See RUSSELL MARTIN, *PICASSO'S WAR* 213–16 (2012).

¹⁰⁶ *Id.* at 218–24. A more complete version of the final part of the story than is presented here may be found at pp. 224–32. See also the finely detailed summary in HENSBERGEN, *supra* note 94, at 280–332.

¹⁰⁷ MARTIN, *supra* note 105, at 224.

Picasso's birth.¹⁰⁸

It was only after the 1981 meeting's resolution of the potential disputes between MoMA, Dumas, and the heirs over moving *Guernica* to Spain that a complex legal dispute was avoided. In reality, each side raised issues about the same problem—the location of the work. Dumas claimed that Picasso's desires should govern the outcome of the dispute, and that his oft-stated wishes governed both the meaning of the art and the propriety of its display in Spain. The heirs claimed that, as successor defenders of Picasso's moral rights in the painting, they controlled the decision about *Guernica*'s location. Recall that in France, transfer of moral rights, either by an artist or an artist's successors, is generally barred.¹⁰⁹ According to the heirs, prematurely moving it to Spain would not only undermine Picasso's intentions but would also alter or mutilate the meaning of the work itself.

Di Modica makes very similar claims about *Charging Bull*, declaring that his ownership of the work's intellectual property and the associated moral rights gives him control over the proper location for his work and the artistic environment that may come to surround the piece.¹¹⁰ The factual underpinnings for the disputes over location and environment emerge in both cases from statements and desires enunciated by the artists themselves.

There are, of course, significant differences in the story lines of the two works. Di Modica deposited his work unannounced on a city street. Picasso was commissioned to make a work. Di Modica objected to the relocations of his work, but Picasso was much more precise about the reasons for his desire to permanently display *Guernica* only in Spain. Because of its outdoor location, di Modica's work became an easy target for direct artistic confrontation and commentary. Picasso's work was rarely a physical target or a subject of onsite, artistic efforts to interpret or reinterpret its meaning.¹¹¹ Unlike *Charging Bull*, another work of art directly

¹⁰⁸ Much of the basis for the delay is expressed in the communiqué on *Guernica* issued in April 1977 by Maitre Roland Dumas, Picasso Family Lawyer (reprinted in an addendum at the end of this essay). Dumas, *infra* note 147.

¹⁰⁹ See discussion *supra* note 104.

¹¹⁰ The dispute can't be about physical ownership of either *Guernica* or *Charging Bull*. The former was purchased by Spain in 1937 and the latter was explicitly designated as a gift to the city of New York when di Modica deposited it in front of the Stock Exchange in 1989. Di Modica's claim of physical ownership is discussed in more detail above. See discussion *supra* note 48.

¹¹¹ *Guernica* was once marred by spray paint. See HENSBERGEN, *supra* note 94, at 276–77; Michael Kaufman, 'Guernica' Survives a Spray Paint Attack by Vandal, N.Y. TIMES (Mar. 1, 1974), <https://www.nytimes.com/1974/03/01/archives/guernica-survives-a-spraypaint-attack-by-vandal-floor-is-sealed-off.html>.

commenting on *Guernica* and intentionally placed nearby has never appeared. Di Modica never made arrangements with persons in authority to create or monitor the sculpture's placement. Picasso, in essence, appointed the MoMA, then voluntarily the custodian of *Guernica*, as its guardian.

The two works are, however, similar in at least three important ways. First, neither work has ever been displayed in a site specifically designed for an artistic contribution by the artist. Second, the closest either of the artists came to stating a preference about where their work should be displayed was to describe an area or a city. Put another way, both di Modica and Picasso only stated their general desires (near the N.Y. Stock Exchange and in Madrid) about placement of their creations. Third, neither di Modica nor Picasso made statements about where their works should be located until some time after they were first displayed to the public. They definitely were not site-specific creations. What is the impact of statements of intention made after a work's initial installation on the contours of the copyrights in either or both works? Do statements of intention about a work made after its initial installation and display alter its compositional or other artistic characteristics in ways that enhance the likelihood that works placed nearby constitute derivative works? Does a similar impact arise in the moral rights context?

C. Copyright, Intention, and Location

1. Intent

Artistic intention has long been relevant to determining the scope and contour of copyright protection in the United States.¹¹² It is especially pertinent to disputes over the relevance of artists' statements about the location of works that were not originally fashioned as site-specific creations. In these cases, a work's extant location may not clearly present inferences about the artist's preferred placement. Additional issues arise because the most important court opinions about copyright and intent are not about painting or sculpture. Exploring the disputes over *Charging Bull* and *Fearless Girl* therefore requires some thought.

One of the most cited cases about artistic intention and its relevance to determining the scope of intellectual property protection arose in a dispute over the fact-expression dichotomy. Though it is a staple of copyright law that expression is protected while facts are not, the definition of "fact" for these purposes means something quite different from its standard use as a synonym for "truth." A statement may be "factual" for copyright purposes not because it is true but because the author

¹¹² I've written about this issue in a different context—the temporary quality of installation and conceptual art. See Chused, *Conceptual Art*, *supra* note 53.

declares it to be factual. The best-known example of this strange phenomenon is *A.A. Hoehling v. Universal City Studios, Inc.*¹¹³ Hoehling wrote a book, which he described as historically accurate, claiming that the Hindenburg exploded in 1937 due to sabotage. In doing so, he rejected the widely accepted theory that static electricity caused the hydrogen-filled airship to burst into flames. When filmmakers later used his sabotage storyline in a movie, Hoehling sued for copyright infringement. The United States Court of Appeals for the Second Circuit concluded that the tale Hoehling labeled as factual was not copyrightable.¹¹⁴ The storyline (but not Hoehling's expression of it) was left in the public domain under the copyright code provision barring protection for "any idea, procedure, process, system, method of operation, concept, principle, or discovery."¹¹⁵ Facts are treated more like ideas, concepts, or discoveries than as expression.¹¹⁶ They are the cornerstone for conversation, politics, life, and culture—the sorts of discourse necessary for the maintenance of a flourishing public forum. While the form of a "factual" story—its expression—could be protected, the storyline itself was available for use in general civil discourse and other creative, expressive works.

Note well that the Second Circuit never made an actual determination that Hoehling's story was true in any epistemological sense. Again, his version of the tale was widely considered inaccurate. The court merely held that the author's description of the story as "true" resolved the issue of copyrightability. Hoehling's statements—his intention—determined the scope of the book's intellectual property protection.

At first glance, this conclusion is difficult to justify. How can the law classify

¹¹³ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

¹¹⁴ *Id.* at 978–79.

¹¹⁵ 618 F.2d. 17 U.S.C. § 102(b) (2018).

¹¹⁶ A related notion was discussed by Justice O'Connor in her opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The dispute was over the copyrightability of listings in the white pages of a telephone directory. Facts, O'Connor noted, are not protected, though original compilations of facts are. In describing the difference between unprotected facts and protected expression, she wrote that facts cannot be original. "This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery. The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." *Id.* at 347. This notion is at least as challengeable as the concept of "fact" in *Hoehling*. Just because someone "discovers" a fact does not mean that originality or creativity was missing when the "fact" was "discovered." There is, therefore, a dilemma in copyright law that newly found "facts" can never be protected from use by others. That puts historians in a particularly disfavored position. Clever fact finding based on something other than labor by itself goes unrewarded.

a story as factual for the purposes of copyrightability when virtually everyone who knows about the events in question declares it to be false? Over the centuries, the search for “truth” has been one of the most slippery tasks humanity has tackled. Is the *Hoehling* “solution” simply an efficient way for courts to avoid participating in the philosophical debate? For copyright purposes, this strategy might work tolerably well.

But the *Hoehling* result may also cause nightmares. On the one hand, it creates an incentive for artists and authors to label material as non-factual, thereby permitting intellectual property protection over their purportedly original, expressive works. On the other hand, consider a *Hoehling*-opposite dispute in which an author labels a story as fictional even though virtually everyone else in the world views the tale as true. This *Hoehling*-opposite case might well lead to a finding of non-copyrightability. What justifies granting an author protection for a story that has previously been in the public domain as a factual tale? If followed, the version generally recognized as accurate would be barred from use by anyone other than the author labeling it as false. Intent as a copyright guideline almost surely has its limits, especially with regard to issues of truth.¹¹⁷

Nonetheless, the underlying notion that intention has a substantial impact on copyrightability cannot be gainsaid.¹¹⁸ Consider another example, this one pictorial.

¹¹⁷ The most puzzling expression/fact problem I’ve confronted involves Norman Mailer’s *EXECUTIONER’S SONG*, published in 1979, the story of Gary Gilmore’s last crime spree and eventual execution in Utah. NORMAN MAILER, *THE EXECUTIONER’S SONG* (1979). Mailer himself labeled the tome as a “true life novel.” Tony Schwartz, *Is New Mailer Book Fiction, in Fact?* N.Y. TIMES, Oct. 26, 1979, at C24, <https://www.nytimes.com/1979/10/26/archives/is-new-mailer-book-fiction-in-fact-tries-to-explain.html>. In the book’s afterword, Mailer wrote that he made “the story . . . as accurate as one can make it. This does not mean it has come a great deal closer to the truth than the recollections of the witnesses. While important events were corroborated by other accounts wherever possible, [those corroborations] could not, given the nature of the story, always be done and, of course, two accounts of the same episode would sometimes diverge.” MAILER, *supra*, at 1020. In such conflict of evidence, the author chose the version that seemed most likely. *Id.* It would be vanity to assume he was always right. He also confessed to altering news articles, as well as interviews with and letters from Gary Gilmore. *Id.* at 1020–21. In short, he admitted the reality of dilemmas every reputable historian faces when writing a book: What is *really* true is often hard to know.

¹¹⁸ In a related vein, intent also governs whether a work may be treated as temporary or permanent. If an artist agrees to make a work for short-term public display, knowing that it will be destroyed when the exhibition concludes, she has no moral rights claim for destruction of the work. When its display ends according to the original intention of the artist, the scope of the work has been fully validated, not modified or mutilated. This result recently was adopted in the 5Pointz

Suppose an abstract artist has a canvas in her studio leaning against a wall that she painted over years ago with white gesso—a substance often used as a primer upon which to paint a composition. After painting on the gesso, she set it aside and never got around to using it. In that hypothetical setting, it probably is not an original work eligible for copyright protection.¹¹⁹ Though the level of originality required for protection is quite low,¹²⁰ a gesso-covered canvas leaning against a studio wall for years probably does not suffice. But what happens if the artist looks at the canvas after ignoring it for all these years and concludes that she now really likes the way she brushed the primer onto the canvas, gives it a name (say “Composition #36 in White”), and places it in an exhibition of her work at an important gallery? That step is a statement of intention that she thinks of the piece as a work of art. The likelihood that it is now original increases dramatically. There are many important and widely praised white canvases by well-known artists hanging in important museums around the world.¹²¹ While the search for the meaning of originality is often as open-ended as that for intention, there can be little doubt that the intention of an artist has an impact on the scope of originality. Just as a writer’s statement claiming a work to be factual may lead to a conclusion that a book is not copyrightable, so may an artist’s claim of beauty make her work both expressive and original.

Such examples help explain why the scope of protection for the works of di Modica and Picasso is much more challenging to decipher than in the case of Monet’s *Water Lilies* at Musée de l’Orangerie. The intentions of Monet were unequivocally concerned with both the painted images and their environment. He worked closely with the architect, Camille Lefevre, who in 1922 crafted plans for remodeling the l’Orangerie building into a viewing space for art.¹²² The museum

graffiti site litigation. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167–68 (2d Cir. 2020) (citing Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 597–98 (2018)). Though all the artists working at the world-famous graffiti site knew their creations were temporary, that did not give the property owner the right to whitewash them himself, outside the standard understanding of the graffiti culture he allowed to work there. When another party destroys a temporary work before its planned demise, that does violate moral rights.

¹¹⁹ 17 U.S.C §102(a) (2018) requires a work to be original to gain protection; the code does not define the term.

¹²⁰ The classic case is *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

¹²¹ Robert Ryman and Agnes Martin are two examples. Ryman’s work is in the collection of Dia Beacon. *Robert Ryman*, DIA, <https://www.diaart.org/collection/artist-a-to-z/ryman-robert> (last visited Oct. 23, 2020). So is Martin’s. *Agnes Martin*, DIA, <https://www.diaart.org/collection/artist-a-to-z/martin-agnes> (last visited Oct. 23, 2020).

¹²² *The Installation of the Water Lilies*, MUSÉE DE L’ORANGERIE, <https://www.musee-orangerie.fr/en/article/installation-water-lilies> (last visited July 3, 2020).

describes the links between the paintings and the rooms in which they are displayed to this day in this way:

From the late 1890s to his death in 1926, the painter devoted himself to the panoramic series of *Water Lilies*, of which the Musée de l'Orangerie has a unique series. In fact, the artist designed several paintings specifically for the building, and donated his first two large panels to the French State as a symbol of peace on the day following the Armistice of 12 November 1918. He also designed a unique space consisting of two oval rooms within the museum, giving the spectator, in Monet's own words, "an illusion of an endless *whole*, of water *without* horizon and *without* shore", and making the museum's *Water Lilies* a work that is without equal anywhere in the world.¹²³

Under contemporary American copyright law, this statement by l'Orangerie is highly likely to support a conclusion that Monet and Lefevre were authors of a joint work—"a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹²⁴ Put another way, the paintings and the environment in which they are still displayed are inseparable parts of the same original work. Removing the paintings from the architectural space would be a significant mutilation of the original work. That step would undermine the intentions of both Monet and Lefevre and probably violate the terms of American moral rights law if done in the United States during the lives of the artist and architect. The paintings and the rooms in which they hang are a unified compositional undertaking. Under the statute, an author may "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."¹²⁵ Similarly, modifications made to the environment in which Monet's paintings are displayed would create a derivative work, not only of the architectural work, but also of the joint work that includes the paintings themselves.¹²⁶ If the modifications were made without the permission of the authors, it would be an infringement. In short, place and painting may be linked in intimate and jointly copyrightable ways. The locational intentions

¹²³ *Claude Monet*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/artist/claude-monet-0> (last visited July 3, 2020).

¹²⁴ 17 U.S.C. §101 (2018).

¹²⁵ 17 U.S.C. §106A(a)(3)(A) (2018). Note well that American moral rights only exist for the life of the artist. Monet, of course, died some time ago, as did Picasso. Di Modica, however, still lives. Since he is the primary concern of this essay, it makes sense to consider how American law might operate in his case.

¹²⁶ For the definition and meaning of "derivative work," see *supra* note 49.

of di Modica and Picasso, however, are much less well-defined.

2. *Derivative Work*

Di Modica, recall, claims that others will violate his right to control the creation of derivative works of *Charging Bull* if they change the work's location. That is a difficult challenge to meet. Di Modica simply left his sculpture in a publicly accessible space for what he thought would be a short-term stay.¹²⁷ He also announced the work was a gift to the city. These actions are hardly evidence of intent about siting the bull in an aesthetic environment for the long term. Instead, di Modica's overnight placement of the work was more like commandeering a site than helping to craft one. Further, after *Charging Bull* was removed, di Modica enthusiastically consented a short time later to placing it in a new location at Bowling Green, several blocks away from the N.Y. Stock Exchange. If he has any control over location, it must be limited to an area, not a specific place.

In the absence of a contractual agreement between di Modica and the city about the permanence of *Charging Bull*'s current location at Bowling Green, it is unlikely that di Modica has any control over future siting decisions. It would stretch expression in copyright law to the breaking point to allow an artist to deposit a work in a public space, enthusiastically support its movement to another public location with the blessing of public officials, later proclaim that the work is legally and permanently bound to that location, and then top it all off by demanding that no other works of commentary be placed nearby. While di Modica may bar others from making souvenir models of his work, it is quite doubtful that he can control broader aspects of the bull's location under copyright law.

Similarly, di Modica's after-the-fact declaration that he has the power to preclude movement of *Charging Bull* to a new location without his approval also stretches the power of intention in copyright law to the breaking point. While di Modica approved of the bull's move to Bowling Green, that consent does not change the compositional contours of the work. There is nothing unique about Bowling Green that adds to the artistic qualities of the sculpture. It is difficult to see how it is an original addition to the pre-existing work that might make the location part of a new derivative work. If anything, the work's subsequent move detracted from the work's original novelty by moving it further from the N.Y. Stock Exchange and that institution's connection to bull markets.

¹²⁷ See Kuesel, *supra* note 2.

Picasso's *Guernica* presented similar predicaments. Picasso did enunciate a location preference for *Guernica*, but only after Franco's forces prevailed in the Spanish Civil War and World War II began. As the Public Broadcasting Service so eloquently noted, *Guernica* became a refugee just like so many others during World War II.¹²⁸ As with the bull, can such after-the-fact declarations be allowed to modify the copyrightable, compositional contours of a work and thereby create something derivative? Given the circumstances in which a willing party (MoMA) took custody of the painting and promised to follow the wishes of Picasso, there was some artistic control over the future location of *Guernica*. But that control did not arise naturally from the scope of copyright protection held by the artist. It arose from a separate contractual or trust-like undertaking between Picasso and the MoMA.¹²⁹ In addition, calling for *Guernica* to be located in Spain hardly referred to a well-defined space. May such a statement of intent and desire about location made long after a work's creation and public display in an array of locations be considered a modification of an underlying work that creates a new derivative work? Or is it simply a moral statement—an "ethical will"—that creates a social, and in this case political, sense of obligation? Indeed, the same questions may be posed about *Charging Bull*, especially since it was relocated to Bowling Green in large part because of negative public reaction to carting it away from the N.Y. Stock Exchange and placing it in storage.

For similar reasons, moving either work probably does not violate any conception of moral rights unless the new location serves to undermine the reputation of the artist. Given the somewhat haphazard process by which both di Modica and Picasso dealt with the location of their works during the time following their creation, it is difficult to see how the reputational authority of either di Modica or Picasso would be disturbed. In neither case may an element of their artistic creativity be decided by such post-creation statements of intent.

D. Copyright, Intention, and Proximate Artistic Commentary

Though it is difficult to justify giving either di Modica or Picasso management over the particular places their works are displayed under copyright law, there are other ways they may maintain some control over the nature of the spaces surrounding

¹²⁸ *Guernica in Exile, Treasures of the World*, PUB. BROAD. SERV., https://www.pbs.org/treasuresoftheworld/guernica/glevel_1/4_exile.html (last visited July 8, 2020).

¹²⁹ It is not even clear if Picasso had the right to create such an arrangement with MoMA. After all, Spain, not Picasso, owned the property rights in the object itself. *See supra* notes 48, 110.

their original works. The same rule structures discussed above—moral rights and derivative works—are in issue here as well. Reconsider the *Charging Bull/Fearless Girl* tale by picturing the girl placed eye-to-eye with and a quarter inch away from the bull—something like this:¹³⁰



Direct confrontation: author's rendering of more proximate placement for *Charging Bull* and *Fearless Girl* (edited)

This placement of *Fearless Girl* is a much more direct confrontation to *Charging Bull* than its original location some yards away. Di Modica, recall, claimed that both the original location of *Fearless Girl* at Bowling Green staring down *Charging Bull* and the proposed relocation of his work to the N.Y. Stock Exchange not far from the present location of the girl violate his rights to control the making of derivative works and his moral rights in the sculpture.¹³¹ By moving *Fearless Girl* to a spot directly in front of the bull, the compositional impact on *Charging Bull* rises dramatically. Viewing one piece simultaneously requires looking at the other. They arguably become more like a single composition. This raises the stakes for

¹³⁰ Assume that no physical changes are made to the bull itself. The image of the bull is from *NYC's Charging Bull Statue*, 19 DUTCH (May 17, 2019), <https://www.19dutch.com/blog/nyc-charging-bull-statue>. No image credit is listed. The image of the girl is from 'Fearless Girl' Gets New Home at New York Stock Exchange, JAKARTA POST (Dec. 12, 2018, 5:02 AM), <https://www.thejakartapost.com/life/2018/12/11/fearless-girl-gets-new-home-at-new-york-stock-exchange.html>. The image credit is to AFP/Timothy A. Clary.

¹³¹ This is just a reminder that, under United States law, di Modica does not have a moral rights claim since his bull was made before the statute went into effect. See 17 U.S.C. § 106A(d)(2) (2018); see also *supra* text accompanying note 47. I am simply treating the issue as live as a thought exercise.

both claims. Perhaps decoding this example will shed light on the actual settings involved in this dispute.

1. *Fearless Girl as a Derivative Work*

A derivative work is defined in the statute 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.”¹³² From earlier discussion of Monet’s *Water Lilies* at l’Orangerie and Maya Lin’s Vietnam Veterans Memorial,¹³³ we already know that a two- or three-dimensional art object may include within the parameters of its copyright areas outside the particular object itself, especially if the artist has a well-articulated intention to broaden her artistic frame of reference. Thus, the copyrightable scope of a work placed in a building designed for it or a work that is a combination of a number of objects in a particular setting may extend beyond the limits of that particular two- or three-dimensional work. The code also gives the holder of copyright in such an original work the right “to prepare derivative works based upon the copyrighted work.”¹³⁴ Outsiders may not unilaterally make a derivative work in the absence of fair use.¹³⁵ Presumably, therefore, an artist may approve (or disapprove) as a derivative work an “addition” to it that is outside the exact physical limits of the piece while still having the effect of recasting, transforming, or adapting the original. The dramatization of a novel performs a very similar role. By placing the book version in a new spatial setting with altered linguistic characteristics, a play makes use of the original while recasting and transforming it. Similarly, there is no reason why an artist may not claim the right to control some aspects of adjacent works if they also recast or transform the original. Di Modica’s argument, that he enjoys some level of control over works located near his bull, is therefore not without credence and different from his claim about location. Exactly what the scope of such protection may be is as ineffable as the artistic notion of composition. Proximity and compositional authority speak with related tongues; logical results, therefore, may be difficult to discern.

¹³² 17 U.S.C. §101 (2018).

¹³³ See discussion *supra* Section II.B.

¹³⁴ 17 U.S.C. §106(2) (2018).

¹³⁵ Fair use allows copyrighted works to be used in subsequent creations when it creatively uses the original without damaging its market. The law of fair use is complex and impossible to fully describe in a brief statement. Its contours are beyond the scope of this essay. See 17 U.S.C. §107 (2018).

For example, suppose di Modica had rendered another bronze sculpture of a woman that raised sensibilities quite different from *Fearless Girl*. Picture a bold figure of Sojourner Truth standing beside the bull with one arm wrapped supportively around its neck. Truth, born into slavery in 1797, escaped from bondage in 1826 to become a critically important leader in the abolitionist and women's civil rights movements before her death in 1883.¹³⁶ Placing a statue of Truth next to *Charging Bull* would present a quite different image about gender than *Fearless Girl*. Rather than confronting the bull, Truth would portray a message supportive of di Modica's original intention about American resilience in difficult times, while reducing the masculine qualities of a bull standing alone with a somewhat threatening countenance.



Photograph of Sojourner Truth (c. 1864)

The Truth work, viewed together with the original bull, would be a derivative work. The work would recast di Modica's original bull by adding compositional and cultural implications to his message about resilience. An artist other than di Modica who made and installed such a sculpture without his permission would be infringing—just as a play made from a novel without permission would be infringing. For similar reasons, the placement of *Fearless Girl* eye-to-eye, directly in front of the bull might also be derivative—as a critique of *Charging Bull* but

¹³⁶ See LARRY G. MURPHY, *SOJOURNER TRUTH: A BIOGRAPHY* (2011). The biography contains a detailed timeline of her life. *Id.* at xvii–xxiv. See also NELL IRVIN PAINTER, *SOJOURNER TRUTH: A LIFE, A SYMBOL* (1996). The image of Truth used in the text is in the collection of the Library of Congress. *Sojourner Truth*, LIBR. CONG. (1864), <https://www.loc.gov/item/98501244/> (last visited Oct. 23, 2020).

nonetheless derivative. Such a conclusion rests on one pivotal supposition—that an artist has some control over the spatial and compositional characteristics of artistic works in the area surrounding a creation that may recast or transform the nature of the original work. Given the analysis to this point that is a logical and appropriate conclusion about the meaning of artistic composition, the nature of artistic spaces, and the impact of artistic intention.

How far does this legally protected compositional space extend? Surely it would be inappropriate to conclude that a museum could never mount an exhibition without obtaining permission from all artists whose work is scheduled to be shown in the same room. One creative soul should not have the ability to veto showing the work of another because it connotes negative commentary on the first. Each work must have its own arena of compositional authority. Implicitly, this suggests that the two *Fearless Girl* cases posited here—one with the girl placed across a square and the other with her standing belly to nose next to the bull—might not be treated the same way.

Given the impetus in American culture to encourage open discussion and critical commentary about artistic works, the extent of spatial control by one artist over the creations of another, sited without the knowledge or participation of the original artist, should not be extensive. While placing *Fearless Girl* adjacent to *Charging Bull* might well infringe upon di Modica's derivative work rights, locating *Fearless Girl* some distance away from the bull probably does not. Kristen Visbal, the sculptor of *Fearless Girl*, and State Street, Visbal's financial backer, certainly were free to critique di Modica's use of masculine imagery about financial markets as a symbol of American cultural persistence and resilience. While they may not be free to place their critique directly adjacent to and almost touching the bull, locating *Fearless Girl* across a plaza should be permitted. And, even if the placement of *Fearless Girl* across a plaza is derivative, its critical observations are surely fair use, even if its power as a symbol of gender diversity is tainted by its sponsor's own history.¹³⁷ Crafting of social and political commentary is archetypal activity protected by the fair use doctrine.¹³⁸ Though *Fearless Girl* may transform the

¹³⁷ See 17 U.S.C. §107 (2018), see also *supra* note 132.

¹³⁸ The classic case is probably *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986). Hustler Magazine ran a caustic, scatological, "advertisement" for Campari with commentary about the first time Jerry Falwell "did it" with his mother in an outhouse. Falwell responded by putting an image of the "ad" in a fund-raising brochure for Moral Majority, his conservative, religious charitable organization. Hustler then sued copyright infringement and lost

imagery of the bull, it does so in a productive burst of controversial social commentary typically protected by the doctrine of fair use. Note well that when placed some distance apart, each work may be perceived either independently or in tandem, either as a solitary cultural comment or as combined evidence of social conflict. The echoes of compositional power are strong but not insurmountable.

2. Fearless Girl and Moral Rights

A similar outcome arises under moral rights concepts. Placement of *Fearless Girl* directly adjacent to *Charging Bull* significantly alters the compositional power of the larger sculpture. While not destroying the bull, this placement of *Fearless Girl* may “mutilate” the original work. Though not physically altering the sculpture as the banjo-wielding Texan did, the girl modifies the force and power of di Modica’s intentions for the bull and weakens his compositional authority. Neither “mutilation” nor “modification” is defined in the copyright code. But given the importance of spatial composition—the artistic ability to encompass a volume of space outside the physical boundary lines of a work—it would be quite strange if placing one work directly next to another could never be a modification or mutilation. The more difficult problem is deciding whether such a step “would be prejudicial to his or her honor or reputation”—a requirement for protection under the moral rights provision of the statute.¹³⁹

The most frequently cited case on the meaning of “prejudicial to his or her honor or reputation” is *Carter v. Helmsley-Spear, Inc.*¹⁴⁰ Using common meanings given to the phrase, the *Carter* court concluded that reputation may refer to both the artist and the work at issue, and that the artist need not be well known to claim rights under VARA. Rather, the focus is on whether alteration or mutilation of a work

on fair use grounds. Even though Falwell used the Hustler “parody” for monetary purposes, the court noted:

There was no attempt to palm off the parody [in Hustler] as that of the Defendants. In fact, the opposite was true. Falwell was not selling the parody, but was instead using the parody to make a statement about pornography and Larry Flynt, the publisher of Hustler.

Section 107 [the fair use portion of the Copyright code] expressly permits fair use for the purposes of criticism and comment. . . . Therefore, the public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness [that arises from the financial use of the ad].

Id. at 1153 (footnote omitted).

¹³⁹ 17 U.S.C. § 106A(a)(2) (2018).

¹⁴⁰ There are three reported opinions: *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), and *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

“would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community.”¹⁴¹ A coherent argument certainly may be made that placement of *Fearless Girl* directly adjacent to *Charging Bull* would humble, if not demean, the power of the original work and thereby diminish its reputation in the community of visitors, artists, and critics.¹⁴² The presence of *Fearless Girl* insinuates that the optimistic view of American resilience di Modica intended to convey would wilt, replaced by an image of the powerful bull diminishing the experience of women. The closer the girl is to the bull, the more powerful is its ability to diminish the reputation of the original work and its artist.¹⁴³

CONCLUSION

This essay has revealed a critically important truth about the relationships between copyright law, two-dimensional art, sculpture, and architecture. Too often, the copyright law of pictorial works is considered easily separable from the copyright law of sculpture and architecture. There is a reason why so many people hang pictures on their walls and place decorative objects on surfaces shortly after moving into a new home. Those images help to define the nature of walls, transforming a room into a living experience and giving the architecture of a space depth and meaning. Traditional wall and table-top art define space, and space defines traditional wall and table-top art. In day-to-day lived experience, a space and the objects in it cannot be quickly and easily aesthetically separated. They are an interconnected, lived reality.

Taking that idea into account alters the ways we typically apply copyright law. Rather than viewing a traditional painting as independent of the space in which it hangs, the art and the environment should more frequently be considered as a combined entity. In our homes we may act like curators mounting exhibitions, considering the nature of each painting, their relationships to other pieces in the room, and the impact of each work on the display space. The success of an exhibition can rise or fall depending on the sophistication of the curator’s arrangement.

These relationships between a single work, nearby compositions, and the space in which a group of works are displayed should routinely be taken into account when evaluating the meaning of copyright “terms of art”¹⁴⁴ like “compilation,”

¹⁴¹ *Carter*, 861 F. Supp. at 323.

¹⁴² See, e.g., *supra* text accompanying note 35.

¹⁴³ It may, of course, have the opposite impact of enhancing the reputation of the first work. Maybe that happened here!

¹⁴⁴ Here I use “term of art” not in an aesthetic sense but as an indication of the ways a complex legal term may be understood.

“collective work,” “work of visual art,” “derivative work,” or “moral rights.” In each case, analyzing a single work without regard to its environment may overlook important aesthetic considerations, especially the nature of artistic composition. *Charging Bull* and *Fearless Girl* forcefully convey this idea. When placed in close proximity to each other, they are no longer standalone objects. They become parts of a composition in ways that may have a critical impact on the application of copyright law.

Intuitively, we sense this as we stroll around certain environments, especially urban historic neighborhoods. Most preservation laws require that the design of a new building in a protected historic area be reviewed and approved by preservation authorities before construction begins. Debate about whether a proposed structure “fits” with a neighborhood is essential to deciding whether it may be built. Is it designed to be contextual and fit with aesthetic features of the existing environment? Does it “clash” with the neighborhood’s ambiance in acceptable or unacceptable ways?

One of the most interesting examples of this problem mirrors the *Charging Bull/Fearless Girl* controversy. It reflects the sometimes-ineffable qualities of decisions about the meaning and impact of “composition” on aesthetic choices in architecture and urban planning—an arena tightly related to the world of deciding how best to place a sculpture in an appropriate environment. The original house at 18 West 11th Street in New York City’s Greenwich Village—an historic 1845 Greek Revival building—was destroyed in a 1970 explosion when members of radical leftist group Weather Underground were living in the building.¹⁴⁵ A new house was constructed at the site in 1978 after a review by the Neighborhood Community Board and the New York City Landmarks Preservation Commission determined that the plan was “appropriate.”¹⁴⁶

¹⁴⁵ The calamity was caused by an accident while five individuals associated with the Weather Underground, a radical offshoot of the Students for a Democratic Society, were assembling bombs on the property for possible use at an army base and Columbia University. Three people perished; two survived and were imprisoned. A summary of the history of the original house and its replacement may be found in Michelle Young, *Greenwich Village’s Weather Underground Townhouse that Exploded in 1970 is For Sale*, UNTAPPED N.Y. (Jan. 27, 2020), <https://untappedcities.com/2020/01/27/greenwich-villages-weather-underground-townhouse-that-exploded-in-1970-is-for-sale/>. The image in the text may be found in this article.

¹⁴⁶ As vague as this standard is, that is what the commission uses to decide if a new building may be constructed in a historic district. See N.Y.C. Admin. Code § 25-307 (2020); see also *Public Presentation Guidelines*, N.Y.C. LANDMARKS PRES. COMM’N, <http://home2.nyc.gov/html/lpc/html/permit/presentation.shtml> (last visited Aug. 9, 2020).



Exterior of the reconstructed 18 West 11th Street

As is evident from the picture above, the top floor of the new house is contextual while the first two floors are provocatively unusual. The jutting, angular bay is a vivid reminder of the dislocation and destruction caused by the 1970 explosion. Yet, the Landmarks Preservation Commission concluded that the new house was “appropriate.” Like the controversy over *Fearless Girl*, the new building raises questions about what level of commentary about neighboring architectural designs is acceptable. While the question on 11th Street involves historicity, the issues are quite similar to those raised by di Modica. What is the impact of compositional proximity and aesthetic commentary? The new house was only partially derived from the neighboring designs. Does that explain why the Landmarks Preservation Commission was both granted some control over its construction and eventually approved the design? Or is it so much in conflict with the overall ambiance of the block that its erection is similar to a moral rights violation—a mutilation of the neighborhood’s composition that should never have been built? Perhaps your answer to these questions about whether the new house at 18 West 11th Street should have been constructed will help you find answers to the questions posed in this Article about the *Charging Bull/Fearless Girl* compositional controversy. Reaching definitive answers, however, may best be left in the hands of those who love to dance on the heads of pins.

COMMUNIQUE RE GUERNICA

Issued in April 1977 by Maître Roland Dumas, Picasso Family Lawyer

The status and fate of Guernica—the famous painting by Picasso of 1937 executed following the destruction of the small Basque village by Nazi planes—is the object of unfounded rumors and speculation.

The commotion concerns, particularly, the sending of the masterpiece to Spain by The Museum of Modern Art in New York, where it has been on extended loan since September 1939 consistent with the wishes of Pablo Picasso.

Pressed by a request from the Spanish government for Guernica—which he deemed improper—Pablo Picasso charged me in 1969 with preparing documents describing his express wishes concerning the future of his picture.

Pablo Picasso confirmed in writing what he had already on several occasions declared—notably to Mr. Barr, the Director of The Museum of Modern Art in New York, and to Mr. Rubin, Director of that Museum's Department of Painting—namely that “Guernica and its preparatory studies belong to the Spanish Republic,” but that the transfer to Spain could only be envisaged after the complete reestablishment of individual liberties in that country.

Pablo Picasso spoke of this decision on several occasions, both to his close friends and to the representatives of The Museum of Modern Art in New York, and to myself.

The fragility of the painting, he said, precludes any further travel after its installation in Madrid. Furthermore, he continued, a certain time should be allowed to pass to verify that once established, the democratic regime is no longer subject to a forcible coup which might reopen this question and that, finally, political relaxation should accompany a general détente.

All those who have heard directly from Picasso the instructions which he gave for Guernica are unanimous in believing that, while the wishes of the famous painter to see this prestigious work in Madrid were distinct and without ambiguity, he intended prudence in the realization of his decision.

He spoke to me numerous times about this anguishing subject. His preoccupation about Guernica took precedence over everything else. He furnished proof of this in agreeing to make arrangements in writing, which he has not done for

any other problem touching on either his succession or his work. He did me the honor of confiding in me the responsibility of overseeing the execution of his wishes.

Admittedly, some progress had been realized in Spain. And a not negligible evolution has occurred since the death of General Franco. But I cannot consider that his evolution has as yet terminated.

Neither have the conditions posed by Picasso himself touching on the security of the paint and the stability of a new and totally democratic regime been achieved.

The transfer of Guernica, finally, demands manifold technical precautions. These arrangements will require several months from the day when the decision of transfer shall be made.

For all these reasons and in accord with The Museum of Modern Art in New York which agrees to continue as “guardian”, a mission which was initially confided to it by Picasso himself, Guernica shall stay in New York, to remain there until a new order is achieved in Spain,

Consequently, its transfer to the Prado in Madrid—which is agreed upon in principle—cannot be realized for several years.

The present communication has been read to Rubin, Director of the Department of Painting of the Museum of Modern Art in New York, who has been good enough to agree to its terms.

Roland Dumas¹⁴⁷

¹⁴⁷ Press Release, Roland Dumas, Picasso Family Lawyer (Apr. 1977), <https://guernica.museoreinasofia.es/en/document/roland-dumass-communique-guernica> (also archived in Museum of Modern Art Archives, Department of Public Information/Communications Records, New York, PI II.B.1639)

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CREDITING PROCOMPETITIVE JUSTIFICATIONS FOR
DIGITAL PLATFORM DEFENDANTS: CONTINUED
SALIENCE OF A BROAD, EFFICIENCIES-FOCUSED
APPROACH

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INTRODUCTION

In 2020, digital platform businesses are everywhere. They help us park our cars, walk our dogs and find us places to stay when we travel. Hidden beneath the slick veneer of these platforms' user interfaces, however, is a dizzying array of complicated mathematical and economics problems, ranging from auction rules to set prices for advertisements to recommendation engines programmed to make suggestions for new content. Big data, along with powerful algorithms and large user networks, have become critical competitive advantages, and indeed, barriers to entry for smaller startup firms. Along with success, however, comes litigation—digital platform businesses are increasingly being investigated and sued for antitrust offenses in the United States and around the world.¹ In October 2020, the Department of Justice and eleven state Attorneys General filed a civil lawsuit against Google alleging monopolization in the markets for digital search and search advertising, and less than two months later, the Federal Trade Commission and 46 state Attorneys General filed suit against Facebook for monopolization in the personal social networking market.² The critical question that this Note asks is whether the current assessment of procompetitive justifications within rule of reason

¹ The Department of Justice and several states are currently investigating Google's practices in areas of search and digital advertising sales; the Federal Trade Commission and several states are currently investigating Facebook's practices in areas of online advertising and data privacy; and the Federal Trade Commission and several states are investigating Amazon's treatment of third-party sellers on its online marketplace. Cecilia Kang et al., *U.S. is Said to Plan to File Antitrust Charges Against Google*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/technology/google-antitrust-investigation.html>; Brent Kendall & John D. McKinnon, *Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google*, WALL ST. J. (May 15, 2020), <https://www.wsj.com/articles/justice-department-state-attorneys-general-likely-to-bring-antitrust-lawsuits-against-google-11589573622>; Taylor Telford & Tony Romm, *New York, 7 Other States and D.C. Launch Antitrust Investigation into Facebook*, WASH. POST (Sept. 6, 2019), <https://www.washingtonpost.com/business/2019/09/06/new-york-announces-antitrust-investigation-into-facebook-kicking-off-bipartisan-effort/>; Tyler Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation Into its Online Marketplace Led by the FTC and Attorneys General in New York and California*, BUS. INSIDER (Aug. 3, 2020), <https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>.

² Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>; Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

analysis is sufficiently broad and flexible to consider, and where appropriate, credit as procompetitive the range of ways that digital platform businesses enable efficiencies in the markets where they compete. As discussed more thoroughly in this Note, digital platform businesses may be responsible for a range of efficiency improvements, such as reducing the time and effort to find desired goods and services, reducing contracting costs, increasing product and services quality, increasing the rate of innovation, and improving allocative efficiency. To the extent that some of these efficiencies are enabled by or require a restraint to competition, it is critical for antitrust analysis to consider this balancing of effects. Otherwise, slight decreases or impediments to competition would make a defendant's business model susceptible to antitrust challenge even if on net the conduct ultimately benefits competition and consumers.

In the twenty years since *United States v. Microsoft*, the first major antitrust case involving a digital platform defendant, the question of when to credit a procompetitive justification for any defendant, let alone a defendant operating in a highly technical and rapidly evolving industry, remains murky.³ In *Federal Trade Commission v. Indiana Federation of Dentists* (hereinafter "*Indiana Federation of Dentists*"), the Supreme Court suggested looking to see whether a defendant's conduct demonstrates a benefit to competition, such as through a "creation of efficiencies."⁴ Yet this vague efficiencies-focused approach gives little guidance to lower courts regarding what conduct constitutes an efficiency improvement and when it should be credited. This is the approach that the D.C. Circuit followed in *Microsoft* and is used by a majority of circuit courts.⁵

Despite ambiguity in the Supreme Court's doctrine, this Note confirms that the existing approach to crediting procompetitive justifications within rule of reason analysis is superior to alternatives suggested in legal scholarship or taken up by a minority of circuit courts because it is sufficiently broad and flexible to consider the range of ways that digital platform businesses enable efficiencies in the markets in which they compete. The existing efficiencies-focused approach permits defendants, including digital platform defendants, to assert a wide variety of justifications for

³ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁴ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (describing a procompetitive justification as "some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services . . .") (citations omitted).

⁵ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 463 (7th Cir. 2020); *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

their conduct, which they must then substantiate with record evidence. Further, the existing rule of reason analysis is well designed to reject justifications where a defendant does not carry its burden of proof, a plaintiff shows a less restrictive means to achieve the same benefit, or balancing shows that the anticompetitive harm from a defendant's conduct outweighs its procompetitive benefit.

Whereas the breadth of what falls within improving competition through “creation of efficiencies”⁶ may feel too indeterminate to practically apply, this Note confirms that several historical and more recent cases demonstrate the contours of which efficiencies are likely to be cognizable. And, this Note confirms that courts have not struggled to apply the broad efficiencies-focused approach—or, more generally, rule of reason—to the conduct of digital platform defendants. Attempts to limit or cabin what can be credited as a procompetitive justification are worse paths forward and run the risk of leaving antitrust hostile to innovative technologies and business methods used by digital platform defendants.

This Note argues, however, that the existing efficiencies-focused approach could be improved if reviewing courts were to provide greater clarity about what criteria they are using when assessing procompetitive justifications. Courts can do so by applying the definition for “procompetitive justification” developed in *Microsoft* (itself an outgrowth of *Indiana Federation of Dentists*) as a series of steps for review: (1) assess if a procompetitive justification is cognizable, i.e., if it implicates an efficiency improvement; (2) determine if it is substantiated in fact; and (3) assess whether there is a less restrictive alternative to achieving the same result, should the plaintiff assert that such an alternative exists.⁷

Below, this Note outlines relevant background antitrust principles, including how courts generally apply rule of reason analysis and when they credit procompetitive justifications. This Note then summarizes some distinguishing economic characteristics of platform businesses and the efficiencies that they bring to bear in markets where they compete. Next, this Note reviews whether *Microsoft* presents a sufficiently clear and flexible standard by which to judge procompetitive justifications asserted by digital platform defendants. Finding that it does not, this Note proceeds to analyze and reject suggestions in legal scholarship that would alter or streamline review of procompetitive justifications for failing to adequately

⁶ *Ind. Fed'n of Dentists*, 476 U.S. at 459.

⁷ *Microsoft*, 253 F.3d at 59 (“[A] procompetitive justification . . . [is] a nonpretextual claim that [a defendant's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal . . .”).

account for the efficiencies enabled by digital platform businesses. Finally, this Note presents a way forward that largely clarifies existing doctrine and demonstrates its continued flexibility and adaptability to assessing digital platform conduct. While the result is a broad, flexible, fact-driven approach to reviewing procompetitive justifications, this approach continues to produce the best and most consistent results.

I

ANTITRUST ENFORCEMENT AND PROCOMPETITIVE JUSTIFICATIONS

Below, this Note outlines some background principles of antitrust review. Next, it summarizes when case law suggests that procompetitive justifications should be credited from a review of historical and modern cases.

A. Introduction to Antitrust Review and Principles

1. Overview to Antitrust Review

Antitrust cases are typically litigated under the Sherman Antitrust Act (“Sherman Act”) or the Clayton Antitrust Act (“Clayton Act”). Sherman Act Section 1 is most commonly invoked to prevent two rivals from working together to restrict output and raise prices,⁸ while Section 2 is invoked to prevent a single firm, if shown to have monopoly power, from maintaining that power through anticompetitive means.⁹ The Clayton Act prevents mergers that are likely to negatively affect

⁸ See 15 U.S.C. § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trades or commerce among the several States or with foreign nations, is declared to be illegal.”); see also *Procaps, S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1079–80 (11th Cir. 2016) (describing the interchangeability of the terms contract, combination, and conspiracy in antitrust case law).

⁹ 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”). Monopolization has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). Merely possessing a monopoly without anticompetitive conduct to maintain it is insufficient to violate the Sherman Act. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (“It does not follow because ‘Alcoa’ had such a monopoly, that it ‘monopolized’ the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it.”).

competition in a market.¹⁰ Federal agencies, state attorneys general and private plaintiffs may bring suit under the Sherman Act or Clayton Act.¹¹ Because this Note is most interested in how courts have assessed alleged procompetitive justifications for the conduct of digital platform defendants, the Sherman Act, and in particular, jurisprudence addressing Section 2 claims, is most relevant to this Note's analysis.

The first step of a Sherman Act Section 1 case is distinguishable from a Section 2 case. If a plaintiff brings a case under the Sherman Act's Section 1, the first step of the analysis requires her to show that there was an agreement between two parties to restrain trade.¹² A mere tacit understanding is likely to fail.¹³ If the plaintiff brings a case under Section 2, the first step of the analysis requires the plaintiff to show that the defendant has monopoly power in a relevant antitrust market.¹⁴ Monopoly power is "the power to control prices or exclude competition."¹⁵ The plaintiff may show monopoly power directly, through demonstrating that the defendant has profitably imposed higher prices,¹⁶ or indirectly, through evaluating

¹⁰ Clayton Act Section 7 prohibits any person engaged in commerce from acquiring another company, in whole or in part, directly or indirectly, "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

¹¹ U.S. Dep't. of Just., Antitrust Enforcement and the Consumer 3 (2015), <https://www.justice.gov/atr/file/800691/download>.

¹² *Procaps S.A.*, 845 F.3d at 1080 ("[T]o establish a Section 1 violation, the plaintiff must first show that there was concerted action between two or more persons—a 'conscious commitment to a common scheme designed to achieve an unlawful objective'—in restraint of trade.") (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)).

¹³ See, e.g., *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872–79 (7th Cir. 2015) (Posner, J.) (concluding plaintiffs had failed to show sufficient evidence of an agreement to set a restraint on prices to avoid summary judgment where they merely showed coordination or evidence of some tacit understanding).

¹⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) ("A firm violates [the Sherman Act's Section] 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'") (citing *Grinnell*, 384 U.S. at 571); see also *Aluminum Co. of Am.*, 148 F.2d at 430 (Hand, J.) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

¹⁵ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

¹⁶ See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶501 (4th ed. Cum. Supp. 2013–2020) (noting that only a firm with market power could profitably restrict output and raise prices to a supracompetitive level—any firm without market power that undertakes this conduct would expect to lose considerable market share).

the defendant's market share and barriers to entry in the relevant market in order to proxy its ability to profitably raise prices.¹⁷ The relevant antitrust market is determined through defining a set of firms that offer products or services "reasonably interchangeable by consumers for the same purposes."¹⁸ Barriers to entry include fixed costs like equipment, intellectual property protections or established contractual relationships.¹⁹ As a rule of thumb, a plaintiff should be able to show that a defendant has at least sixty percent market share to assert monopoly power.²⁰

The second step to a Section 1 or Section 2 case is substantially the same:²¹ a plaintiff must show that the defendant's restraint is either unreasonable per se or unreasonable under a rule of reason analysis.²² A restraint is per se unreasonable where it "always or almost always tend[s] to restrict competition and decrease output."²³ Any agreement between rivals to restrict output or fix prices will fall into

¹⁷ See, e.g., *Grinnell*, 384 U.S. at 571.

¹⁸ In practice, a "SSNIP" analysis asks which substitutes consumers would switch to if a hypothetical small but significant price increase were imposed. *E.I. du Pont de Nemours & Co.*, 351 U.S. at 395.

¹⁹ *Microsoft*, 253 F.3d at 51 ("Entry barriers' are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.") (citation omitted).

²⁰ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (suggesting a market share of ninety percent would be sufficient for a finding of market power, about sixty percent would be "doubtful" and closer to thirty percent would "certainly . . . not" be enough).

²¹ *Microsoft*, 253 F.3d at 58, 95–97 (applying the same rule of reason, three-part burden-shifting analysis for Sherman Act Section 1 and Section 2 claims).

²² *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457–58 (1986) ("[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason'"); see also *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (applying rule of reason and its three-step, burden-shifting analysis to Sherman Act Section 1 claims, as the restraint was not found to be unreasonable per se). Courts may also review conduct under an intermediate "quick look" approach, though when and if to apply this type of review evades a bright line rule and puts parties in the position of arguing their case under rule of reason at least in the alternative. See, e.g., *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) (rejecting the Ninth Circuit's application of "quick look" review in favor of a "more extended examination of the possible factual underpinnings" to the case, yet *not* requiring "the fullest market analysis," and admitting, "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear.").

²³ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) ("[C]ertain agreements or practices are so 'plainly anticompetitive,' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination") (citations omitted); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

this category.²⁴ Alternatively, a restraint is unreasonable under the rule of reason if the anticompetitive effect of the defendant's conduct outweighs any credited procompetitive justification.²⁵ Conduct reviewed under the rule of reason may take any of the following forms: an intrabrand restraint, exclusive dealing arrangements, a refusal to deal, tying arrangements or volume-based discounts.²⁶ Specific to refusal to deal cases, courts have sometimes reviewed anticompetitive conduct under a "sacrifice test," where the court will evaluate whether the defendant's conduct makes sense for some reason other than to restrict the opportunities of a rival.²⁷

Rule of reason is a multi-pronged, burden shifting test. At the first step, the plaintiff bears the initial burden to show that the defendant's conduct has an anticompetitive effect.²⁸ Then, at the second step, the burden shifts to the defendant to show any offsetting procompetitive justification for its conduct.²⁹ If so shown, as a third step, the burden shifts back to the plaintiff.³⁰ The plaintiff gets a final opportunity to show that a less restrictive means to achieve the same benefit to

²⁴ *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) ("It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable.").

²⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

²⁶ See generally PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 144 (7th ed. 2013) (describing the evolution of legal doctrine to determine which restraints are reasonable under rule of reason analysis). See also AREEDA & HOVENKAMP, *supra* note 16, at ¶700, ¶755 (describing common exclusionary practices undertaken by monopolists, especially vertically integrated monopolists). The Supreme Court has not explicitly held that tying arrangements are subject to rule of reason review. Nonetheless, the Court has allowed defendants to provide procompetitive justifications for tying arrangements. See *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992). The D.C. Circuit required for tying arrangements in platform software markets to be reviewed under rule of reason in *Microsoft*, a holding that has been unchallenged for 20 years. *Microsoft*, 253 F.3d at 84.

²⁷ Under this review, instead of arguing for a procompetitive justification for their conduct, a defendant can offer merely a business justification with neutral implication to consumer welfare or competition. Some accepted business justifications include a goal to reduce free riding or prevent market share stealing. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985); *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁸ *Microsoft*, 253 F.3d at 58–59.

²⁹ *Id.*

³⁰ *Id.*

competition was available,³¹ or that the anticompetitive effect of the defendant's conduct outweighed the procompetitive effect.³² The fact-finder finally weighs these considerations and determines whether the defendant's conduct is on net anticompetitive.³³

Conduct is determined to have an anticompetitive effect where it reduces social welfare through decreasing output, raising prices, lowering quality or otherwise harming competition; for example, imposing barriers to entry or squeezing out rivals through behavior that does not reflect competition on the merits.³⁴ Conduct that merely imposes "harm to one or more competitors will not suffice" to show an anticompetitive effect.³⁵ Instead, conduct "must harm the competitive *process* and thereby harm consumers."³⁶

Just what constitutes a procompetitive justification is poorly defined in case law. The Supreme Court has described a procompetitive justification as "some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services."³⁷

³¹ C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 938 (2016) (noting two possible roles for the plaintiff when the burden flips back in rule of reason analysis: to show that there was a less restrictive means to achieve the same benefits, and/or to propose balancing).

³² *Id.* (noting substantially the same review for Sherman Act Section 1 and Section 2 claims at step two).

³³ *Microsoft*, 253 F.3d at 59. *But see* Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 370 (2016) (arguing that "balancing" is "not a good description of what courts actually do in rule of reason cases under the Sherman Act," as it is difficult in practice to "balance" effects that cannot be cardinally measured and weighed against each other; rather, courts seem to consider the net effect of countervailing practices.).

³⁴ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (describing how anticompetitive effects can be shown directly or indirectly, where direct evidence includes "reduced output, increased prices, or decreased quality in the relevant market" and indirect evidence requires "market power plus some evidence that the challenged restraint harms competition.").

³⁵ *Microsoft*, 253 F.3d at 58; *see also* *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . .").

³⁶ *Microsoft*, 253 F.3d at 58; *see also* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The [Sherman Act] directs itself . . . against conduct which unfairly tends to destroy competition itself."); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.").

³⁷ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

What constitutes a cognizable efficiency will be more fully considered throughout this Note.

Courts have also permitted a limited set of non-competition improving justifications to be balanced against the anticompetitive effects of a restraint within rule of reason analysis. In at least refusal to deal cases, the Supreme Court has permitted justifications it described as “valid business reason[s]” for the defendant’s conduct.³⁸ In *Microsoft*, the D.C. Circuit permitted the defendant’s justifications where they were found to be lawful extensions of copyright protection and technologically required to execute certain software functions.³⁹ Other circuit courts have permitted a limited set of justifications found to further social policy goals. In *United States v. Brown University*, the Third Circuit permitted the defendant’s justification that its restraint promoted access to higher education for students from lower income households.⁴⁰

2. Goals of Antitrust Enforcement

The goals of antitrust enforcement have been hotly debated since at least the 1960s.⁴¹ Some scholars have argued that antitrust enforcement serves to further economic efficiency and protect consumer interests in low prices and numerous, varied output.⁴² Others have argued that it serves to protect political and social values

³⁸ *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992) (“Liability turns, then, on whether ‘valid business reasons’ can explain Kodak’s actions.”); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985) (“[A] company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.”).

³⁹ *Microsoft*, 253 F.3d at 63–64, 67.

⁴⁰ *United States v. Brown Univ.*, 5 F.3d 658, 675–78 (3d Cir. 1997) (permitting an agreement among Ivy League colleges to only award financial aid to students on the basis of financial need, where the defendant argued that the restraint prevented access to higher education for other students).

⁴¹ See, e.g., Harry First, *American Express, the Rule of Reason, and the Goals of Antitrust*, 98 NEB. L. REV. 319 (2019) (summarizing conflicting views in scholarship and case law regarding the goals of antitrust and situating the Supreme Court’s most recent articulations of these goals in *Ohio v. Am. Express*, 138 S. Ct. 2274 (2018) within that long-running dispute).

⁴² Consider Phillip Areeda’s conception of what Robert Bork intended consumer welfare to mean: “Competitive rather than monopolistic price levels; more rather than less output; innovation; minimum cost production; and the availability of free choices in the market-place for consumers and producers alike. All of these benefits of competition are often summed up in the shorthand

of dispersed control over limited economic resources.⁴³ Still others have argued for equal opportunity in the marketplace, especially for smaller producers.⁴⁴ Some courts have articulated that antitrust enforcement serves to protect competition as a standalone virtue.⁴⁵

Most commonly, courts have construed the goals of antitrust as serving to protect “consumer welfare,” which they have interpreted to mean an interest in low prices and numerous, varied output.⁴⁶ Several scholars have recently argued to expand or change courts’ focus on output and price effects in light of digital platforms’ business models, which they argue pass along low prices to consumers while monopolizing markets and harming smaller producers.⁴⁷ Other scholars have

term ‘consumer welfare.’” Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 571–72 (1986); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX 90 (1978) (“Consumer welfare . . . is merely another term for the wealth of the nation.”); First, *supra* note 41, at 324–25 (describing Robert Bork’s conception of “consumer welfare” as conflating total economic efficiency with outcomes that specifically make consumers, not just producers, better off).

⁴³ *See, e.g.*, Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 383 (1965) (“In short, antitrust operates to forestall concentrations of economic power which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy. Reliance on competitive markets accommodates our interest in material well-being with our distrust of concentrations of political and economic power in private or governmental hands.”).

⁴⁴ *See, e.g.*, Milton Handler, *The Brandeis Conception of the Relationship of Small Business to Antitrust*, 1960 16 A.B.A. SEC. ANTITRUST L. 13, 13–17 (describing Justice Louis Brandeis’s conception of antitrust goals as opposing big business aggregation of labor and capital and promoting small business market competition, even to the extent that he would allow cooperation and joint bargaining agreements among small businesses).

⁴⁵ *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 195 (2010) (“[T]he ‘central evil addressed by Sherman Act § 1’ is the ‘elimin[ation of] competition that would otherwise exist.’”) (quoting AREEDA & HOVENKAMP, *supra* note 16, at ¶1462b).

⁴⁶ First, *supra* note 41, at 326 (“Whatever the ambiguities of the term ‘consumer welfare,’ however, until recently it appeared that Bork had set the frame for the debate over goals and that methods more than goals were being contested.”) (citing Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2160 (2013) (“The core debate is how to design and apply antitrust principles so that robust markets are likely to result or be preserved, not what are the goals of antitrust.”)).

⁴⁷ *See, e.g.*, Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101 (2019); Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017); JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019). *But see* Jonathan Baker & Steven Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015-2016) (suggesting continued resilience of the consumer welfare standard); Timothy J. Muris & Jonathan E.

argued to more broadly consider allocative efficiency or innovation rates as part of antitrust analysis.⁴⁸ Several federal agencies held a series of hearings on the continued efficacy of the “consumer welfare” standard in late 2018.⁴⁹

B. When to Credit a Procompetitive Justification

1. Treatment of Procompetitive Justifications in Historical Cases

Several noteworthy historical cases have considered when to credit procompetitive justifications within rule of reason analysis. While these cases help to establish some principles and guidelines around when a justification might be credited or should be denied, no clear standard emerges by which to assess asserted justifications in future cases.

The earliest case to take up this question was *Board of Trade of City of Chicago v. United States* (hereinafter “*Chicago Board of Trade*”), wherein Justice Louis Brandeis outlined the contours of modern rule of reason analysis.⁵⁰ The defendant, a trade organization that oversaw grain trading in Chicago, had set certain rules for its members that limited after-hours price-making for a limited set of grain exchanges.⁵¹ While acknowledging that the rule was a price restraint, the Supreme Court considered whether it nonetheless “helped to improve market conditions,” finding that it did so through creating a market for “to arrive” grain, attracting a

Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, (Geo. Mason L. & Econ. Research Paper No. 18-15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186569.

⁴⁸ See, e.g., Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth* (Penn. Faculty Scholarship, Research Paper No. 10-2017, 2017) (describing current mismatch between goals of improving allocative efficiency and antitrust review); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313 (2012) (suggesting a need for a greater sensitivity to whether conduct improves innovation in antitrust review). *But see* David A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1170 (2016) (arguing allocative efficiency outcomes will not be improved with changes to the consumer welfare standard).

⁴⁹ Press Release, Fed. Trade Comm’n, FTC Testifies before Subcommittee of Senate Committee on the Judiciary Regarding Oversight of Antitrust Enforcement, (Oct. 3, 2018) (<https://www.ftc.gov/news-events/press-releases/2018/10/ftc-testifies-subcommittee-senate-committee-judiciary-regarding>).

⁵⁰ 246 U.S. 231, 238 (1918) (rejecting a per se determination that a price restraint was unreasonable in favor of an approach that would consider whether the “restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition”).

⁵¹ *Id.* at 236–38.

greater number of buyers and sellers to transact, and reducing information asymmetries about the prevailing market price.⁵² The Supreme Court also noted that the restraint helped to remove “risk” from private deal-making, as market participants could be sure that they would be able to find a deal-making partner.⁵³ Further, the restraint helped to improve allocative efficiency, as it ensured that country dealers and farmers—market participants least likely to have access to timely market information—could nonetheless determine the market price for trades.⁵⁴ Finally, the rule contributed to more efficient grain transportation routes.⁵⁵ In sum, the Court permitted the restraint’s efficiency-improving benefits to be balanced against its anticompetitive harm, and the restraint overall was found not to unreasonably hinder competition.⁵⁶

In the more recent *Broadcast Music, Inc. v. CBS, Inc.* (hereinafter “*BMP*”) decision, the Supreme Court permitted defendants, licensing organizations for composers, to issue and set fees for blanket licensing agreements for copyrighted musical compositions.⁵⁷ Since 1914, licensing organizations have served as a clearinghouses for composers—the exclusive owners of the copyright to perform their work in public for profit—in order to negotiate licenses for third parties to perform these works and monitor compliance.⁵⁸ At the court of appeals, the defendant’s blanket licenses were found to be price fixing and illegal per se under the Sherman Act.⁵⁹ The Supreme Court agreed that the blank licenses involved price fixing “in the literal sense,” but the Court noted Congress’s intent for copyright owners to be able to vindicate their rights and the practical impossibility of forming contracts and monitoring compliance without blanket licenses.⁶⁰ The Court also described how the blanket licenses were valuable for reducing transaction costs in

⁵² *Id.* at 240 (describing how the price restraint “created a public market for grain ‘to arrive’”; solved the information asymmetries wherein previously “[m]en had to buy and sell without adequate knowledge of actual market conditions”; and “brought buyers and sellers into more direct relations,” i.e., increased traders in the market during the trading window).

⁵³ *Id.*

⁵⁴ *Id.* (“Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 441 U.S. 1, 4 (1979).

⁵⁸ *Id.* at 4–5 (describing how in the scheme, 22,000 participatory composer members would grant the licensing organization nonexclusive rights to license performances of their works and receive in return royalties according to a schedule that reflected the nature and amount of performances of their music, among other factors).

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 18–19, 20.

contract formation and monitoring, contributing to lower costs for buyers and sellers of composition performance rights.⁶¹ The Supreme Court determined that rule of reason analysis should apply in order to permit a reviewing court to consider these offsetting efficiencies from reduced transaction costs as procompetitive justifications for the blanket licenses, and the Court reversed and remanded the case to proceed below.⁶²

In *National Society of Professional Engineers v. United States* (hereinafter “*Professional Engineers*”), the Supreme Court affirmed the district court’s determination that a professional engineering society’s code of ethics prohibiting its members from bidding competitively for projects violated antitrust law even where the restraint was adopted to reduce the risk of low-quality engineering work from excessive price competition.⁶³ Justice John Paul Stevens wrote that the defendant’s conduct, a refusal to compete on price, had the same effect as price-fixing in terms of impeding “the ordinary give and take of the market place [sic]” to set prices and further deprived consumers of the ability to compare prices.⁶⁴ Because “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services,” the asserted justification of a quality improvement from a direct price restraint could not be credited.⁶⁵

2. *Treatment of Procompetitive Justifications in Recent Cases*

In the over 100 years since *Chicago Board of Trade* and 40 years since *BMI*, antitrust doctrine has not yet coalesced around a clear standard for when to credit a procompetitive justification within rule of reason analysis. In *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* (hereinafter “*NCAA*”), the Supreme Court suggested crediting conduct that “increase[s] output and reduce[s] . . . price,” “mak[es] possible a new product,” “widen[s] consumer

⁶¹ *Id.* at 21 (“This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses.”).

⁶² *Id.* at 24–25.

⁶³ 435 U.S. 679, 681 (1978).

⁶⁴ *Id.* at 692–93.

⁶⁵ *Id.* at 695 (“The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

choice,” or “enhance[s] public interest [in the relevant product].”⁶⁶ The decision’s reasoning, however, mostly focused on whether application of the per se rule was appropriate for the case, not when to credit a procompetitive justification.⁶⁷ The Supreme Court referenced these efficiencies sporadically throughout the opinion—it did not refer to them as a defined list by which to judge future asserted justifications.⁶⁸ In *Indiana Federation of Dentists*, the Supreme Court used a broad, efficiencies-focused approach to assess whether to credit a defendant’s asserted procompetitive justification, citing *BMI*, *Chicago Board of Trade*, *NCAA*, and *Professional Engineers* in doing so.⁶⁹ Yet, lower courts lack clear guidelines for which efficiencies to credit and when. In *Indiana Federation of Dentists*, the Supreme Court provided no further guidance than that lower courts should look for “some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.”⁷⁰ The Supreme Court did not specifically reference the justifications discussed two years earlier in *NCAA*, nor did it state whether and which of these justifications might be credited within the efficiencies-focused approach it set out. Presumably, most of the categories discussed in *NCAA* would improve market competition through creation of efficiencies and be permitted, as they refer to conduct with the net effect to reduce price, increase output, or improve product quality and variety.⁷¹ And, the Supreme Court, by citing to *BMI*, *Chicago Board of Trade*, *NCAA*, and *Professional Engineers*, appeared to intend to encapsulate and carry forward the reasoning in those cases in the approach that it set out, suggesting the continued salience of those earlier cases for asserting procompetitive justifications.

⁶⁶ Affirming the lower court’s review of the restraint, the Supreme Court described, “[i]f the NCAA’s television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games.” In summarizing the holding of *BMI*, the Supreme Court noted that a restraint that “mak[es] possible a new product by reaping otherwise unattainable efficiencies” would be procompetitive, as would “a joint selling arrangement . . . so efficient that it will increase sellers’ aggregate output.” Further, the Supreme Court noted that “[A]ctions [to] widen consumer choice—not only the choices available to sports fans but also those available to athletes . . . can be viewed as procompetitive.” The Court also noted, “It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.” 468 U.S. 85, 102–03, 113–14, 117 (1984).

⁶⁷ *Id.* at 86.

⁶⁸ *Id.* at 102–03, 113–14, 117.

⁶⁹ 476 U.S. 447, 459 (1986).

⁷⁰ *Id.*

⁷¹ 468 U.S. 85, 102–03, 113–14, 117 (1984).

As far as other categories of justifications that might be credited, in *California Dental Association v. FTC*, the Supreme Court suggested openness to crediting conduct shown to remove false or misleading claims from the market, although it did not do so to decide the case.⁷² In the vertical restraint context, the Supreme Court permits conduct that stimulates interbrand competition among manufacturers selling different brands of the same product by reducing competition among retailers selling the same brand.⁷³ The Supreme Court has suggested openness to crediting conduct to stimulate interbrand competition in monopolization cases as well.⁷⁴

The majority of circuit courts follow the broad, efficiencies-focused approach outlined in *Indiana Federation of Dentists*. The D.C. Circuit appeared to follow this approach in *Microsoft*, where it defined “procompetitive justification” as “a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal,” although it did not specifically cite to *Indiana Federation of Dentists* in doing so.⁷⁵ The Second, Third, Seventh, and Ninth Circuits have followed this efficiencies-focused approach as well, citing to the definition for “procompetitive justification” outlined in *Microsoft*.⁷⁶ Yet, some circuit courts have also credited conduct with no direct effect on competition, such as conduct designed to execute a technical command, protect an intellectual property right, or increase diversity in higher education.⁷⁷ A minority of circuit courts have experimented with a “categorical” approach that only permits justifications that fall into predetermined categories. The Eleventh Circuit will credit a procompetitive justification if the defendant shows that its conduct has the effect to “reduce cost, increase output or

⁷² 526 U.S. 756, 778 (1999).

⁷³ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007) (“The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same brand.”).

⁷⁴ In *Ohio v. American Express Co.*, the Supreme Court suggested willingness to crediting conduct designed to curb “negative externalities . . . and promote interbrand competition.” 138 S. Ct. 2274, 2289 (2018).

⁷⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

⁷⁶ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 463 (7th Cir. 2020); *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015).

⁷⁷ *Microsoft*, 253 F.3d at 63–64, 67; *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1997) (permitting an agreement among Ivy League colleges to only award financial aid to students on the basis of need, where the defendant argued the restraint facilitated access to higher education for students from impoverished backgrounds).

improve product quality, service, or innovation.”⁷⁸ The Tenth Circuit will allow a justification if the defendant can point to “increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice.”⁷⁹

II

ECONOMIC CHARACTERISTICS OF DIGITAL PLATFORM BUSINESSES

The following section summarizes some useful definitions and economic principles applicable to platform businesses. The section then describes market efficiencies that platform businesses often enable in the markets where they compete.

A. Platform Businesses

A platform brings together at least one group of users and facilitates the provision of products or services.⁸⁰ A platform might help an organization develop and innovate its internal business processes, or may be an external services offering for customers.⁸¹ Platforms allow users to innovate and interact more easily, or in ways practically not possible outside the platform, with the potential for increased utility and value creation.⁸² In a given market, participants may use a single or multiple platforms to purchase goods and services, the latter referred to as “multihoming.”⁸³ Whether users will seek out multiple platforms is a function of switching costs—where switching costs are high, users are likely to use one platform.⁸⁴

A digital platform is a technology-enabled platform that is built using software and may be offered over the internet.⁸⁵ Early digital platform providers made software and services for the personal computer, such as Microsoft’s Windows

⁷⁸ *McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015).

⁷⁹ *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

⁸⁰ See Jacques Bughin et al., *The Right Digital-Platform Strategy*, MCKINSEY QUARTERLY (May 7, 2019), at 1, <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/the-right-digital-platform-strategy>; see also MICHAEL A. CUSUMANO ET AL., *THE BUSINESS OF PLATFORMS* 12–13 (1st ed. 2019) (“Platforms, in general, connect individuals and organizations for a common purpose or to share a common resource.”) (ebook).

⁸¹ Cusumano et al., *supra* note 80, at 12–13.

⁸² *Id.*

⁸³ Thomas Eisenmann et al., *Strategies for Two-Sided Markets*, HARV. BUS. REV., October 2006, at 96.

⁸⁴ *Id.* at 99.

⁸⁵ Cusumano et al., *supra* note 80, at 11.

operating system and Netscape's internet browser.⁸⁶ More recent digital platform providers make software and services for smartphones, such as Uber's ridesharing application ("app") and Airbnb's home rental app.⁸⁷

Platforms are described as "two-sided" where changes in pricing for one group of users on the platform affects the participation rate of another group of users.⁸⁸ Two-sided platforms present unique pricing challenges, as the platform operator must choose not just the right price level but also the right price structure to maximize platform participation and returns.⁸⁹ Examples of platforms that connect two groups of users include credit card providers (merchants / cardholders) and newspapers (advertisers / readers).⁹⁰ Examples of digital platforms that connect two groups of users include computer operating systems (app developers / users) and ridesharing applications (drivers / users).⁹¹ Digital platform businesses are an increasingly popular way to transact goods and services.⁹²

While there are several ways to classify platforms, one helpful distinction is between innovation and transaction platforms. An innovation platform enables a range of products and services to be built on top of it through providing tools to third-party developers like application programming interfaces ("APIs") and software development kits ("SDKs").⁹³ A transaction platform helps match two groups of users together to enable a transaction, such as Airbnb matching renters and travelers or Uber matching drivers and riders.⁹⁴ Some economists have theorized a

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 664–65 (2006) ("[A] market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board.").

⁸⁹ *Id.* at 648.

⁹⁰ Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N. 990, 992 (2003).

⁹¹ See Eisenmann, *supra* note 83, at 95.

⁹² See Patrick Barwise & Leo Watkins, *The Evolution of Digital Dominance: How and Why We Got to GAFA*, in DIGITAL DOMINANCE: THE POWER OF GOOGLE, AMAZON, FACEBOOK, AND APPLE 21, 22 (Martin Moore & Damian Tambini ed., 2018); see also Martin Kenney & John Zysman, *The Rise of the Platform Economy*, ISSUES SCI. & TECH, 61, 61 (2016).

⁹³ Martha Lagace, *How to Be a Digital Platform Leader*, HARV. BUS. SCH. WORKING KNOWLEDGE (Jul. 22, 2019), <https://hbswk.hbs.edu/item/how-to-be-a-business-platform-leader>; CUSUMANO ET AL., *supra* note 82, at 3–7.

⁹⁴ Lagace, *supra* note 93; CUSUMANO ET AL., *supra* note 80, at 3–7.

third group of platforms, audience makers, which aggregate large groups of users together in order to sell advertisements to them.⁹⁵

B. Economic Characteristics Specific to Platform Businesses

Platform businesses are distinguishable from other businesses due to the significance of network effects, increasing returns to scale, and upstart and ongoing pricing challenges. These effects persist whether a platform is digital or not but may be magnified on digital platforms.⁹⁶

Network effects refers to a positive feedback loop whereby having more users on a platform increases the value of participating in that platform.⁹⁷ With more users on a platform, there are more participants to interact or transact with, and the value that a user will assign to transacting through the platform grows.⁹⁸ Network effects may be direct or indirect. Network effects are direct where an increase in the number of participants from a single group of users increases the value of participating in the platform for all users.⁹⁹ A classic example of direct network effects is the landline telephone: as the number of households with connected telephones increases, the product is more valuable to all users, as they can all communicate with more friends and family members.¹⁰⁰ Network effects are indirect where the increase in the number of participants in one group of users on the platform increases the value to participating on the platform for some second group of users.¹⁰¹ A classic example of indirect network effects is a local farmer's market: having more farmers take part in a local farmer's market makes attending the market more valuable for shoppers.¹⁰²

⁹⁵ These platforms typically offer a complementary service to users to attract and sustain their attention, such as Google providing search results or Facebook providing information about users' "friends." See Eisenmann, *supra* note 83, at 94–96.

⁹⁶ David S. Evans, *The Antitrust Analysis of Rules and Standards for Software Platforms 2* (Univ. Chi. Coase-Sandor Inst. L. & Econ. Research, Working Paper No. 708, 2014).

⁹⁷ David S. Evans, *Some Empirical Aspects of Multi-sided Platform Industries*, 2 REV. NETWORK ECON. 191, 192 (2003); CUSUMANO ET AL., *supra* note 80, at 13.

⁹⁸ CUSUMANO ET AL., *supra* note 80, at 13 (“[T]he usefulness of an industry platform can grow with the power of the network: Each additional user, at least theoretically, can benefit from access to all the other users and innovations already available through the platform.”).

⁹⁹ Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, 82 ANTITRUST L.J. 835, 840 (2019); see also Eisenmann, *supra* note 83, at 96.

¹⁰⁰ Coyle, *supra* note 99 (“Direct network effects refer to the positive externality or spillover one user derives from other members of a network; for instance, a telephone is more valuable the more other people have telephones.”).

¹⁰¹ *Id.*; see also Eisenmann, *supra* note 83, at 96 (noting indirect network effects are also called “cross-side” network effects).

¹⁰² See Yuqing Zheng & Harry M. Kaiser, *Optimal Quality Threshold of Admission in a Two-Sided Farmers' Market*, 45 APPLIED ECON. 3360, 3360–61 (2013).

The same effect is true in the corollary: having more shoppers take part in a local farmer's market makes attending the market more valuable for farmers.¹⁰³ Indirect network effects are common in digital platform businesses that bring together two groups of users.¹⁰⁴

Network effects are important for several reasons, including causing platform businesses to experience increasing returns to scale.¹⁰⁵ Whereas traditional businesses experience diminishing demand for their product at higher levels of output, the opposite is true for platform businesses.¹⁰⁶ With network effects, the value to transacting through the platform grows as the number of users on the platform increases, thereby driving up user demand to participate in the platform and willingness to pay for access.¹⁰⁷ Thus, as platforms increase in size and users increasingly demand to participate, platforms can charge a higher price for platform access.¹⁰⁸ Because network effects make platforms more valuable as they scale, platform providers are incentivized to try to cultivate network effects through growing user participation with strategic decisions about pricing, design, and marketing.¹⁰⁹

Network effects also contribute to two pricing challenges that prevail in two-sided platform markets: getting users to join the platform in the first place and maintaining an optimal price level and structure to maximize ongoing platform use. First, before users find value to transacting through the platform, there must already be existing users on the platform. An e-commerce buyer, for example, will only use a platform if there are already participating sellers, and a seller will only offer

¹⁰³ *Id.*

¹⁰⁴ See Eisenmann, *supra* note 83.

¹⁰⁵ *Id.* at 94 (“Because of network effects, successful platforms enjoy increasing returns to scale. . . . This sets network platforms apart from most traditional manufacturing and services businesses.”).

¹⁰⁶ *Id.* (“In traditional businesses, growth beyond some point usually leads to diminishing returns: Acquiring new customers becomes harder as fewer people, not more, find the firm’s value proposition appealing.”); see also Marco Iansiti & Karim R. Lakhani, *Managing Our Hub Economy*, HARV. BUS. REV., Sept.-Oct. 2017, at 84, 90 (describing how for a traditional product and service business, gaining additional customers does not continue to add value after a certain point but platform businesses become increasingly valuable with greater levels of participation).

¹⁰⁷ See Eisenmann, *supra* note 83, at 94; see also Iansiti & Lakhani, *supra* note 106.

¹⁰⁸ See Eisenmann, *supra* note 83, at 94 (“Users will pay more for access to a bigger network, so margins improve as user bases grow.”).

¹⁰⁹ David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* 9 (Nat’l Bureau of Econ. Rsch., Working Paper No. 18783, 2013), <http://www.nber.org/papers/w18783>.

merchandise if there are participating buyers.¹¹⁰ To solve this conundrum—what is referred to as the “chicken-and-egg” problem—a platform provider typically has to induce at least one set of users to join the platform through offering a subsidy.¹¹¹ Failure to adequately attract both sets of users at this initial stage will doom a platform.¹¹² Second, in the ongoing operation of a two-sided platform, a platform owner must consider not just the appropriate price level for the service overall, but also how to distribute that price across two groups of platform users.¹¹³ Often, two groups of platform users will have differentiated demand for platform services.¹¹⁴ This difference will determine which group of users will pay less or be subsidized during ongoing operation of the platform, whereas the other group will pay more or even bear the whole cost of receiving platform services.¹¹⁵ Overcharging one group of platform users comes at a significant cost—potentially causing the entire platform to unravel.¹¹⁶

¹¹⁰ Bernard Caillaud & Bruno Jullien, *Chicken & Egg: Competition Among Intermediation Service Providers*, 34 RAND J. ECON. 309, 310 (2003) (“Indirect network externalities give rise to a ‘chicken & egg’ problem: to attract buyers, an intermediary should have a large base of registered sellers, but these will be willing to register only if they expect many buyers to show up.”); *see also* Evans & Schmalensee, *supra* note 109, at 21.

¹¹¹ *See* Caillaud & Jullien, *supra* note 110, at 310.

¹¹² *See* David S. Evans & Richard Schmalensee, *Failure to Launch: Critical Mass in Platform Businesses*, 9 REV. NETWORK ECON. 1, 22 (2010) (“[W]e have shown here why even without fixed costs or economies of scale, platform businesses typically need to attain critical mass when they are launched in order even to survive.”); *see also* Evans, *supra* note 97, at 195.

¹¹³ *See* Rochet & Tirole, *supra* note 88, at 648; *see also* Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125, 129 (2009) (“In a one-sided market, we can characterize the price-cost mark-up in terms of elasticity of demand and the marginal cost. But in a two-sided market, pricing decisions will also include the elasticity of the response on the other side and the mark-up charged to the other side.”).

¹¹⁴ *See* Rochet & Tirole, *supra* note 90, at 991–92; *see also* Rysman, *supra* note 113, at 129 (“[P]ricing to one side of the market depends not only on the demand and costs that those consumers bring but also on how their participation affects participation on the other side and the profit that is extracted from that participation.”).

¹¹⁵ *See* Rochet & Tirole, *supra* note 90, at 1012–13; *see also* Evans, *supra* note 97, at 193; Evans & Schmalensee, *supra* note 109, at 7 (“Because of indirect network externalities there is interdependence between the demands of the two sides, and the price structure is used to balance membership and usage to maximize platform value.”).

¹¹⁶ *See* Evans, *supra* note 97, at 197.

C. Market Efficiencies Specific to Platform Businesses

Platforms improve market efficiencies where they bring together two groups of users more efficiently than if the two groups transacted directly.¹¹⁷ Platforms do so in several discrete ways, including reduced time and effort to find desired goods and services, reduced contracting costs, increased product and services quality, increased rate of innovation, and improved allocative efficiency. While these efficiencies are not necessarily specific to *digital* platforms, digital platforms' ability to aggregate and analyze large data sets, provide recommendations using machine learning, and dynamically push out updates to users in real-time helps to capitalize on these efficiencies.

A topic not adequately addressed in the present Note is when platform efficiencies should be characterized as not merely improving market competition but also furthering *consumer welfare*. The former, for example, might be distinguishable from the latter where improvements to market competition merely increase upstream producer surplus without passing along benefits to consumers in terms of greater output and variety or lower prices.¹¹⁸ The former might also be distinguishable where only a discrete group of consumers is made better off, not consumers generally.¹¹⁹ Yet, many scholars would view an improvement to market competition as necessarily improving consumer welfare without these further showings—so perhaps this is merely distinction without difference.¹²⁰ For most purposes of this Note, “efficiencies” merely refers to improvements to market competition, not necessarily specific benefits flowing through to consumers. Where applicable, this Note considers what effects an efficiency might have on “consumer welfare” improvements or changes to “consumer surplus” through postulating what changes to product and services output, variety, and pricing are likely to result from certain platform efficiencies.

While not the focus of the present Note, many scholars have devoted considerable effort to cataloguing digital platform conduct likely to result in

¹¹⁷ *Id.* at 192 (summarizing scholarship published by Jean-Charles Rochet, Jean Tirole, Mark Armstrong, Geoffrey Parker and Marshall W. Van Alstyne; and stating that platforms can improve market efficiencies where: “(1) there are distinct groups of customers; (2) a member of one group benefits from having his demand coordinated with one or more members of another group; and (3) an intermediary can facilitate that coordination more efficiently than bi-lateral relationships between the members of the group.”).

¹¹⁸ See discussion *supra* 2. Goals of Antitrust Enforcement.

¹¹⁹ See discussion *supra* 2. Goals of Antitrust Enforcement

¹²⁰ See *supra* note 44 and accompanying text.

anticompetitive harm.¹²¹ Some of the most invidious conduct includes: creating closed standards and walled gardens;¹²² limiting data portability;¹²³ erecting barriers to consumer switching;¹²⁴ imposing algorithmic price discrimination;¹²⁵ and acquiring nascent rivals.¹²⁶ Some of the previously discussed economic characteristics of platform businesses may also have the effect of limiting expansion by rivals or entry by new competitors.¹²⁷ Network effects and increasing returns to scale, for example, may make a smaller firm's offering inherently disadvantaged against a larger rival.¹²⁸ A larger rival's strategy to maintain a closed ecosystem of services and prevent data portability may also ingrain existing leadership where network effects are strong.¹²⁹ As such, while there are many market efficiencies that platforms enable, a fact-based, holistic consideration of the net effect of platform activity (as rule of reason generally endeavors to undertake) is especially important.

1. *Reduced Search Costs*

Platforms, and especially transaction platforms, improve market efficiencies through reducing search costs to find a viable deal-making partner and improving the quality of matches between buyers and sellers, among other groups of users. In brick and mortar stores, search costs within a single location are limited, as a store's

¹²¹ See, e.g., David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 ANTITRUST BULL. 801 (1998); Richard Schmalensee, *Antitrust Issues in Schumpeterian Industries*, 99 AM. ECON. REV. 192 (2000); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002); John E. Lopatka & William H. Page, *Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157 (1999); Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1 (2001); Nicholas Economides, *Antitrust Issues in Network Industries*, in THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES 343 (Ioannis Lianos & Ioannis Kokkoris eds., 2010).

¹²² Coyle, *supra* note 99, at 857–59 (“Open and interoperable standards can be important enablers of competition . . .”).

¹²³ *Id.* at 858 (“Ease of switching could reduce entry barriers, make multihoming easier, and potentially increase competitive pressure more directly.”).

¹²⁴ *Id.* (“[F]requent complexity and length of the terms and conditions of use posted by digital [two-sided platforms] is a challenge . . .”).

¹²⁵ *Id.*

¹²⁶ *Id.* at 854 (“The acquisition of small innovators is more likely than not to weaken the competitive dynamic.”).

¹²⁷ See *supra* B. Economic Characteristics Specific to Platform Businesses.

¹²⁸ See Iansiti & Lakhani, *supra* note 106.

¹²⁹ See *id.*; see also Coyle, *supra* note 99.

physical size and layout limit the number of products that can be displayed.¹³⁰ However, comparison shopping across store locations and vendors can be challenging, requiring research of stores that sell a certain product or service and trips to several locations to assess that item.¹³¹ Without a platform intermediary, search costs can result in retailer markups for nearly identical goods, resulting in higher prices for consumers without any benefit to product quality.¹³²

Digital platforms like Amazon and eBay aid shoppers with tools like search functions and filters, which allow consumers to view a broad range of products,¹³³ and to quickly narrow their results by product attributes like price.¹³⁴ In doing so, platforms may reveal differing prices for comparable goods, enabling consumers to benefit from lower prices.¹³⁵ Platforms also offer algorithmic matching capabilities that help to promote search results that match a user's preferences.¹³⁶ Further, network effects encourage the development of thicker markets, that is, the accumulation of large groups of users on both sides of a platform, which may help users discover products that they are interested in.¹³⁷ In sum, platforms can reduce a consumer's search time and improve the quality of their results, as well as pass along lower prices.¹³⁸ To the extent that reducing search costs passes on lower prices to

¹³⁰ Michael Dinerstein et al., *Consumer Price Search and Platform Design in Internet Commerce*, 108 AM. ECON. REV. 1820, 1820–23 (2018) (describing how in traditional markets “the number of products is limited and consumers are likely to be reasonably familiar with most of the products.”).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1820–21 (“[C]onsumers shopping online can use either price search engines or (more often) compare prices at e-commerce marketplaces, or internet platforms, such as eBay or Amazon.”).

¹³⁴ *Id.* at 1823 (“But in online markets, where there are hundreds or sometimes thousands of different competing products available for sale at a given time, and product churn is high, consumers cannot be expected to consider, or even be aware of, all these products. This is the context in which the platform has an important role in deciding which products to make visible to a given consumer.”).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Gregory Lewis & Albert Wang, *Who Benefits from Improved Search in Platform Markets?* 1–2 (April 8, 2013) (unpublished manuscript), <https://ssrn.com/abstract=2249816> (“Platforms help to overcome several key frictions: (1) they provide market thickness; (2) they reduce transaction costs; and (3) they reduce search costs.”).

¹³⁸ In the airline industry, for example, online travel booking platforms like Kayak allow consumers to search for flights across several airlines without using a travel agent's services or

consumers and improving matches passes on better quality products and services, this market efficiency improvement also increases consumer surplus.

2. *Reduced Contract Formation Costs*

Digital platforms improve market efficiencies through reducing the costs of forming a contract.¹³⁹ Whereas Ronald Coase famously theorized that bargaining parties will be able to achieve an economically efficient outcome regardless of the original endowment of property rights between them,¹⁴⁰ in practice, transaction costs and information asymmetries hold up mutually beneficial deals.¹⁴¹ Platforms may reduce contract formation costs in several ways. First, platforms may lower contract formation costs through standardizing deal terms.¹⁴² A platform provider might require that all participants use certain default contracts or may set certain rules limiting negotiation, such as requiring price caps and imposing rules against surcharges.¹⁴³ Second, platform providers may take on tasks that reduce the risk of forming a deal on the platform. A platform provider may take on contract monitoring and oversight costs, or it may require that all users provide identity verification and only transact through the platform's payment processing tools.¹⁴⁴ Third, platforms may guarantee deals by standing ready to accept returns or provide refunds.¹⁴⁵ On net, these activities may make contract formation easier and less risky than

contact multiple airlines for ticketing information, thereby reducing search costs. They also provide search tools and filters for routes, flight legs, and relative pricing with different combinations of departure and return dates, allowing consumers to maximize cost savings or quality. The net effect of the prevalence of online travel booking platforms in the airline industry has been greater price competition among airlines and reduced costs to consumers. Airlines may benefit from greater insight into customer demand preferences but also face downward pricing pressure due to greater price transparency. Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and "Two-Sided" Payment Markets*, 2005 COLUM. BUS. L. REV. 617, 621–22 (2005).

¹³⁹ Contracting costs are theorized as a subset of transactional costs—the costs necessary to affect the transfer of goods from seller to buyer. *Id.* at 618–19.

¹⁴⁰ Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 2–15 (1960).

¹⁴¹ See Carlton & Frankel, *supra* note 138, at 622–24.

¹⁴² See Rochet & Tirole, *supra* note 88, at 650 (discussing how a platform might impose a uniform rule like no surcharges or a price cap of ninety-nine cents for songs).

¹⁴³ *Id.*

¹⁴⁴ Feng Zhu & Marco Iansiti, *Why Some Platforms Thrive and Others Don't*, HARV. BUS. REV., Jan.-Feb. 2019, at 119. See also Andrei Hagiu, *Multi-Sided Platforms: From Microfoundations to Design and Expansion Strategies* 6–7 (Harvard Bus. Sch., Working Paper No. 09-115, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=955584.

¹⁴⁵ Zhu & Iansiti, *supra* note 144.

transacting outside the platform, allowing a greater number of deals to be realized.¹⁴⁶ To the extent that these market efficiencies are passed on to consumers in the form of lower prices and greater output, they also improve consumer surplus.

Some platforms also improve market efficiencies through facilitating auctions, which help buyers and sellers to arrive at a market clearing price in real-time.¹⁴⁷ While auctions have existed for centuries,¹⁴⁸ digital platform auctions are distinguishable because of the amount of data that they can aggregate about potential trading partners and the speed with which they can process matches.¹⁴⁹ Digital platforms can also facilitate a series of complex auction rules and conditional bidding schemes.¹⁵⁰ Further, digital platforms can integrate third party data about

¹⁴⁶ Apple's App Store digital platform, which brings together app developers and smartphone users, helps to reduce transaction costs between platform participants by standardizing contracts for app purchases and screening new applications for malware. The net effect is that users trust applications available in the App Store and are more willing to purchase applications from a developer that they do not know. These contract standardization and oversight and monitoring activities help to reduce contracting friction and allow more transactions between application developers and smartphone users to take place. See Laura Barnes, *Apple's App Store Strategy: Quality over Quantity*, HARV. BUS. SCH. DIGIT. INITIATIVE BLOG (Mar. 8, 2018), <https://digital.hbs.edu/platform-digit/submission/apples-app-store-strategy-quality-over-quantity/>; see also *App Store Principles and Practices*, APPLE, <https://www.apple.com/ios/app-store/principles-practices/> (last visited Aug. 29, 2020).

¹⁴⁷ See, e.g., Robert Wilson, *A Bidding Model of Perfect Competition*, 44 REV. ECON. STUD. 511 (1977) (describing market efficiencies in blind bidding auctions); Roger B. Myerson & Mark A. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265 (1983).

¹⁴⁸ Sweden claims to have opened the earliest auction house for arts, crafts, and antiques in 1674. *About Us*, STOCKHOLMS AUKTIONSVERK, <http://auktionsverket.com/about-us/about-stockholms-auktionsverk/> (last visited Aug. 29, 2020). Sotheby's Auction house opened to auction fine arts, rare books and other relics in 1744. *The History of Sotheby's Auction House*, SOTHEBY'S, <https://www.sothebys.com/en/about/our-history> (last visited Aug. 29, 2020).

¹⁴⁹ Aaron L. Bodoh-Creed et al., *How Efficient Are Decentralized Auction Platforms?* 1 (Becker Friedman Inst. for Res. in Econ., Working Paper No. 2016-23, 2016) ("On a platform, a large number of buyers and sellers participate in essentially simultaneous auctions each period, and agents know that if they are unsuccessful in consummating a trade today, they can return to the market in future periods to try again.").

¹⁵⁰ Patrick Bajari & Ali Hortacsu, *The Winner's Curse, Reserve Prices, and Endogenous Entry: Empirical Insights from eBay Auctions*, 34 RAND J. ECON. 329, 329–30 (2003) (describing eBay's allowance for conditional bids and rules to limit the effect of the "winner's curse," i.e., preventing overpayment by the auction winner by setting the market clearing price to be the second highest bid price).

inventory characteristics to improve buyer knowledge of inventory quality.¹⁵¹ On net, auctions facilitated by digital platforms help buyers and sellers to quickly resolve ambiguities about inventory quality and pricing as well as execute a deal, thereby reducing transaction costs.¹⁵² To the extent that these market efficiencies are passed on to consumers in the form of lower prices, greater output and high quality goods, they also improve consumer surplus.

3. *Self-Regulation and Improved Information Sharing*

Platforms improve market efficiencies through acting as regulators for platform transactions. As discussed above, standard setting can reduce contract formation costs.¹⁵³ Standard setting on transaction and innovation platforms can further improve the quality of products and services available through the platform. Many platforms self-regulate through setting rules for who may join the platform and what types of conduct can take place on the platform.¹⁵⁴ These rules prevent fraud, distribution of malicious software, sale of counterfeit goods and other undesirable activities.¹⁵⁵ Many platforms also provide information back to users about other platform participants in the form of reviews or quality rankings.¹⁵⁶ This information sharing helps to protect users from less trustworthy deal-making partners and incentivizes good behavior on the platform.¹⁵⁷ Ultimately, users may be

¹⁵¹ Dipayan Ghosh, *Facebook Is Changing How Marketers Can Target Ads. What Does That Mean for Data Brokers?*, HARV. BUS. REV. (Apr. 9, 2018), <https://hbr.org/2018/04/facebook-is-changing-how-marketers-can-target-ads-what-does-that-mean-for-data-brokers> (describing how Facebook typically allowed advertisers to integrate data from three sources on its platform: first-party advertiser data about their customers, such as names, emails and recent purchasing information; Facebook data about users' web browsing and profile information; and third-party information from data brokers like Acxiom, Oracle, Epsilon and Experian, which pool information from credit card purchases, website cookies and other sources).

¹⁵² Empirical studies of buyer and seller surplus on eBay support a finding that both parties are made better off through coordinating transactions through the platform. Ravi Bapna et al., *Consumer Surplus in Online Auctions*, 19 INFO. SYS. RSCH. 400, 400 (2008).

¹⁵³ See *supra* 2. Reduced Contract Formation Costs.

¹⁵⁴ Kevin J. Boudreau & Andrei Hagiu, *Platform Rules: Multi-sided Platforms as Regulators*, in PLATFORMS, MARKETS AND INNOVATION 163, 172 (Annabelle Gawer ed., 2009).

¹⁵⁵ *Id.*

¹⁵⁶ Meng Liu et al., *Do Digital Platforms Reduce Moral Hazard?* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 25015, 2018).

¹⁵⁷ *Id.* (describing more direct routes for Uber drivers than taxi drivers when driving passengers to airports and postulating that Uber drivers were incentivized to stick to direct routes to ensure that they received high ratings from riders, which affect their ability to pick up future riders).

flagged and removed from the platform for conduct that violates platform rules.¹⁵⁸ On net, market efficiencies are improved because users can spend less time evaluating deal-making partners, more transactions can take place, and the transactions that take place will be for higher quality goods and services.¹⁵⁹ To the extent that users value higher quality products and services, albeit at somewhat higher prices, this efficiency improvement improves consumer welfare.

4. *Increased Rate of Innovation*

Innovation platforms improve market efficiencies by making it easier for third-party developers to reach the market with a product offering.¹⁶⁰ They do so by reducing the costs to create a viable product and enabling these products to launch at scale.¹⁶¹ Innovation platforms provide the ecosystem, infrastructure, or set of standards that enable third-party developers to interact with users in a common system.¹⁶² Microsoft's Windows operating system, for example, allowed Netscape to offer its browser product to users without also having to create an operating system.¹⁶³ Innovation platforms may also provide tools to third-party developers that enable innovation, like software developer kits ("SDKs").¹⁶⁴ SDKs reduce the costs for third-party innovation through providing a start-up bundle of code to build upon.¹⁶⁵ Innovation platforms may also provide open interface APIs, thereby facilitating compatibility between third-party applications and the platform.¹⁶⁶ Developers no longer have to write software to enable platform compatibility and can instead focus on developing their unique application offerings.¹⁶⁷ This compatibility with the platform also reduces costs that the developer would have had to absorb to market and distribute its application to consumers.¹⁶⁸ On net, innovation

¹⁵⁸ David Evans, *Governing Bad Behavior by Users of Multisided Platforms*, 27 BERKELEY TECH. L.J. 1201, 1201 (2012) (describing the right of removal for existing platform participants that violate the platform's governing rules as a "Bouncer's Right").

¹⁵⁹ See Barnes, *supra* note 146 (describing Apple's vetting for third-party applications sold through its App Store, which both reduces contract formation costs and results in higher quality applications being available on the store).

¹⁶⁰ Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 321 (2012).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ CUSUMANO ET AL., *supra* note 80, at 3–7; Lagace, *supra* note 93.

¹⁶⁵ CUSUMANO ET AL., *supra* note 80, at 3–7.

¹⁶⁶ *Id.*; Lagace, *supra* note 93.

¹⁶⁷ CUSUMANO ET AL., *supra* note 80, at 3–7.

¹⁶⁸ Wu, *supra* note 160.

platforms improve market efficiencies by creating an ecosystem that brings together developers and users while reducing the cost for developers to create, market and distribute their applications. Because consumers benefit from a greater range of compatible product and service offerings, this market efficiency also improves consumer welfare.

5. *Improved Allocative Efficiency*

Platforms improve market efficiencies by dynamically adjusting the supply of platform services and pricing during periods of high demand. Platform providers create rules for the provision of platform goods or services that may increase availability in the face of increased consumer demand.¹⁶⁹ Ridesharing applications like Uber group together riders in shared cars when there is sufficient local demand, improving the efficiency of that driver's service offering.¹⁷⁰ Platform providers may also create rules that dynamically adjust pricing with demand.¹⁷¹ Ridesharing applications impose "surge" pricing during periods of heavy demand, which likely reflects the real-time marginal cost of receiving a desired service when so many other users are simultaneously demanding the same service.¹⁷² A platform policy to dynamically update prices with demand may also improve allocative efficiency in future interactions by encouraging more price sensitive users to seek out services during periods of lower demand.¹⁷³ Thus, dynamic adjustment helps consumers to receive goods and services that they desire, but they may have to pay a higher price. Where this market efficiency improvement results in a net increase in the supply of a good or service, it represents a benefit to consumer surplus. To the extent consumers face price discrimination, it is not clear whether consumer welfare is improved.

III

CREDITING PROCOMPETITIVE JUSTIFICATIONS FOR PLATFORM BUSINESSES DEFENDANTS

Below, this Note reviews the standard for crediting procompetitive justifications applied in the *Microsoft* case to determine if the decision provides a clear and consistent standard that may be used in other cases to assess the conduct of digital platform defendants. Finding it does not quite meet the mark, this Note

¹⁶⁹ Benjamin G. Edelman & Damien Geradin, Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber, 19 STAN. TECH. L. REV. 293, 298 (2016).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 301.

¹⁷² *Id.*

¹⁷³ *Id.*

assesses whether other approaches advanced in legal scholarship and some circuit courts provide a better way forward. Finally, this Note argues that the existing rule of reason analysis and the standard to credit a procompetitive justification where conduct is shown to improve market efficiencies remains the best approach. This Note substantiates this view through review of several recent cases addressing the conduct of platform business defendants where courts were found to appropriately apply rule of reason analysis and the broad efficiencies-focused standard with good results.

A. *The Microsoft Case*

The *Microsoft* decision is notable as the first court of appeals decision to apply rule of reason analysis to the conduct of a digital platform business exhibiting network effects.¹⁷⁴ As the D.C. Circuit described, before its decision, scholars were split as to whether platform businesses should be treated more harshly under antitrust review on a theory that network effects posed a barrier to entry for rivals or more leniently on a theory that incumbent companies operating in dynamic, high-technology markets were likely to see their market share eclipsed with technological change.¹⁷⁵ Most relevant to this Note, the D.C. Circuit's decision expended significant time and effort to review several procompetitive justifications Microsoft asserted for its conduct. In its analysis, the D.C. Circuit provides a helpful working definition of "procompetitive justification" that has been adopted in several other circuit courts.¹⁷⁶ However, the *Microsoft* decision does not ultimately provide a very instructive standard by which to judge asserted procompetitive justifications in other cases.

In *Microsoft*, the United States Department of Justice and 20 states sued Microsoft alleging monopolization of the operating system market and attempted monopolization of the browser market.¹⁷⁷ In a significant victory for the plaintiffs, the district court found liability on the monopolization and attempted

¹⁷⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001).

¹⁷⁵ Whereas the D.C. Circuit required rule of reason analysis, not per se illegality, to apply when evaluating a tying arrangement imposed by a digital platform defendant, suggesting more lenient review, the court rejected Microsoft's request for market power to be treated more leniently as well, pushing back on a theory of specialized treatment. *Id.* at 49–50, 52–54.

¹⁷⁶ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 463 (7th Cir. 2020); *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015).

¹⁷⁷ *Microsoft*, 253 F.3d at 45.

monopolization claims and granted a structural remedy to separate major lines of Microsoft's business.¹⁷⁸ The D.C. Circuit largely upheld the district court's finding of monopolization in the operating system market.¹⁷⁹ However, it reversed the district court's finding of attempted monopolization, remanded for further review of plaintiff's tying claims under the rule of reason, and remanded for further fact finding related to the remedy.¹⁸⁰ No structural separation ever took place, but Microsoft agreed to conduct remedies in a subsequent settlement with the Department of Justice and several states.¹⁸¹

Plaintiffs' theory of the case in *Microsoft* was that the defendant undertook conduct to prevent the rise of Netscape's Navigator, an internet browser, and Sun Microsystems's Java, a middleware software product, in order to protect its market share for Windows, a personal computer operating system.¹⁸² Specifically, Plaintiffs argued that Microsoft was concerned that the rise of these products in adjacent markets would encourage the development of cross-operating system compatible applications, thereby reducing the value to operating systems like Windows.¹⁸³ As opposed to creating innovative updates and proprietary applications that might induce consumers to buy its operating system, Plaintiffs alleged that Windows endeavored to get original equipment manufacturers ("OEMs") like Intel to refuse to provide Navigator pre-installed on users' machines, the most popular sales channel for distributing browsers.¹⁸⁴ Microsoft also formed contracts with internet access providers to refuse to distribute or limit their distribution of Navigator.¹⁸⁵ To prevent the dissemination of cross-platform Java to application developers, Microsoft represented to developers that they could write applications using Microsoft's custom version of Java that would be cross-platform compatible.¹⁸⁶ However, Microsoft only ever designed its Java version to be compatible with Windows.¹⁸⁷

¹⁷⁸ *Id.* at 46.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ After the case was appealed and remanded in part, Microsoft and the Department of Justice settled, with Microsoft agreeing to curtail certain conduct and provide easier access to its software for third-party developers. Press Release, U.S. Dep't of Just., Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit (Nov. 2, 2011), https://www.justice.gov/archive/atr/public/press_releases/2001/9463.htm.

¹⁸² *Microsoft*, 253 F.3d at 78–79.

¹⁸³ *Id.* at 47, 59–60, 78–79.

¹⁸⁴ *Id.* at 59–60.

¹⁸⁵ *Id.* at 59–60, 71.

¹⁸⁶ *Id.* at 74–75.

¹⁸⁷ *Id.*

Reviewing the district court's finding that Microsoft had monopolized the operating system market, the D.C. Circuit affirmed at the first step of rule of reason analysis that Microsoft had market power in the operating system market.¹⁸⁸ At step two, the D.C. Circuit reviewed six categories of Microsoft conduct alleged to be anticompetitive and largely affirmed the lower court's findings of anticompetitive effect.¹⁸⁹ At steps three and four, the D.C. Circuit reviewed Microsoft's procompetitive justifications for its conduct as well as any proposed less restrictive alternatives or balancing from Plaintiffs in light of these claimed justifications.¹⁹⁰ On net, the D.C. Circuit largely upheld the findings of the lower court that Microsoft's conduct was anticompetitive.¹⁹¹

Microsoft's alleged anticompetitive conduct included: (1) contract provisions in licensing agreements with OEMs that prevented OEMs from removing any desktop icons and folders, altering the startup boot sequence, or otherwise altering the Windows desktop appearance;¹⁹² (2) technologically binding Internet Explorer to Windows by commingling code, making Internet Explorer software irremovable in the "Add/Remove Programs" utility, and overriding a user's choice of a non-Internet Explorer browser;¹⁹³ (3) licensing Internet Explorer to internet access providers ("IAPs") for free on the condition that IAPs commit to promoting and distributing Internet Explorer as their exclusive, compatible browser;¹⁹⁴ (4) licensing Internet Explorer to internet software vendors ("ISVs") for preferred support, early integration with new Windows versions and other technical information in exchange for ISVs making Internet Explorer their default browsing software;¹⁹⁵ (5) promoting a Java middleware version that would be compatible with Windows and third-party operating systems and inducing developers to use this middleware in designing applications while never adding cross-platform compatibility;¹⁹⁶ and (6) other course of conduct claims.¹⁹⁷ Microsoft's procompetitive justifications for its conduct were, respectively, that: (1) it was merely "exercising its rights as the holder of valid copyright[s]";¹⁹⁸ (2) greater technical integration "is highly efficient and provides

¹⁸⁸ *Id.* at 50–51.

¹⁸⁹ *Id.* at 58, 62, 65, 77.

¹⁹⁰ *Id.* at 61–78.

¹⁹¹ *Id.*

¹⁹² *Id.* at 61.

¹⁹³ *Id.* at 64–65.

¹⁹⁴ *Id.* at 67.

¹⁹⁵ *Id.* at 72.

¹⁹⁶ *Id.* at 74–75.

¹⁹⁷ *Id.* at 78.

¹⁹⁸ *Id.* at 62.

substantial benefits to customers and developers”;¹⁹⁹ (3) it was merely attempting “to keep developers focused upon its APIs”;²⁰⁰ and (4) licensing and distribution agreements were “part of a multifaceted set of agreements” between parties.²⁰¹

The D.C. Circuit’s treatment of Microsoft’s asserted procompetitive justifications is notable for several reasons. First, the D.C. Circuit helpfully defined a “procompetitive justification” as “a nonpretextual claim that [the defendant’s] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.”²⁰² This definition comports with the Supreme Court’s reasoning in *Indiana Federation of Dentists*, which advised crediting a justification where it led to “creation of efficiencies in the operation of a market or the provision of goods and services.”²⁰³ It also aligns with *BMI*, which suggested crediting a justification if its effect was to “increase economic efficiency and render markets more, rather than less, competitive.”²⁰⁴ Yet, this definition does not quite amount to an applicable standard, as it provides no guidance as to which efficiencies to credit and when.

The D.C. Circuit’s analysis of Microsoft’s asserted justifications provides some more guidance on how to apply this definition to the facts of a given case. Reviewing Microsoft’s justifications, the D.C. Circuit seemed to be looking for two criteria: whether Microsoft had asserted a cognizable justification—i.e., a justification that demonstrated some improvement in market efficiency or consumer appeal, and whether Microsoft had substantiated this justification with record evidence. In application of the first criteria, the D.C. Circuit swiftly rebutted Microsoft’s asserted justifications of attempting “to keep developers focused upon

¹⁹⁹ *Id.* at 66.

²⁰⁰ *Id.* at 71.

²⁰¹ *Id.* at 74. The Java integration claim was not rebutted with a procompetitive justification. The D.C. Circuit rejected the course of conduct claims against Microsoft for failing to show an independent basis for liability, thus no procompetitive justification applies. *Id.* at 77–78.

²⁰² *Id.* at 59. Where this definition derives from is a bit of a mystery. The D.C. Circuit cited a Second Circuit case, *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, that merely described the burden-shifting framework of rule of reason analysis more generally. 996 F.2d 537, 543 (2d Cir. 1993). The Second Circuit also cited Phillip Areeda and Herbert Hovenkamp’s ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, which in the relevant provision also merely describes the burden shifting in rule of reason analysis. 7 PHILLIP AREEDA & PHERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1502, at 371 (1986). *Capital Imaging* itself cited a Ninth Circuit case, *Bhan v. NME Hospitals, Inc.*, which also merely described the burden-shifting framework of rule of reason analysis. 929 F.2d 1404, 1413 (9th Cir. 1991).

²⁰³ 476 U.S. 447, 459 (1986).

²⁰⁴ 441 U.S. 1, 20 (1979).

its APIs” and forming licensing and distribution agreements that were merely “part of a multifaceted set of agreements” between parties because neither claim demonstrated an improvement to competition like advancing an efficiency. The D.C. Circuit noted that the first claim was “not an unlawful end, but neither is it a procompetitive justification for the specific means in question here”²⁰⁵ and the second claim was wholly “irrelevant” to the inquiry.²⁰⁶ Yet, the D.C. Circuit provided no affirmative statement regarding what conduct might be credited as efficiency enhancing, just that these two claims clearly missed the mark. In application of the second criteria, the D.C. Circuit rejected Microsoft’s claim that greater technical integration “is highly efficient and provides substantial benefits to customers and developers” because it neither “specifie[d] nor substantiate[d]” these claims with record evidence.²⁰⁷ Again, the D.C. Circuit did not elaborate on what types of evidence might be necessary or helpful in making out a claim. Finally, the D.C. Circuit permitted some limited justifications where Microsoft had narrowly asserted that its conduct was a valid exercise of its intellectual property rights,²⁰⁸ and where integration of Internet Explorer and Windows code was shown to be functionally necessary.²⁰⁹

In sum, it is possible for courts deciding subsequent antitrust cases to try to apply Microsoft’s definition of procompetitive justifications as a standard by which to assess asserted justifications. A court could do so by looking for two criteria: (1) whether the defendant had asserted a cognizable justification—i.e., a justification that demonstrated some improvement in market efficiency or consumer appeal; and (2) whether the defendant had substantiated this justification with record evidence.

²⁰⁵ “Significantly, Microsoft’s only explanation for its exclusive dealing is that it wants to keep developers focused upon its APIs—which is to say, it wants to preserve its power in the operating system market. . . . That is not an unlawful end, but neither is it a procompetitive justification for the specific means here in question, namely exclusive dealing contracts with IAPs.” *Microsoft*, 253 F.3d at 71.

²⁰⁶ “Microsoft offers no procompetitive justification for the exclusive dealing arrangement. It makes only the irrelevant claim that the [provision at issue in the] deal is part of a multifaceted set of agreements between itself and Apple [T]hat does not mean it has any procompetitive justification.” *Id.* at 74.

²⁰⁷ “Although Microsoft does make some general claims regarding the benefits of integrating the browser and the operating system . . . it neither specifies nor substantiates those claims. Nor does it argue that either excluding IE from the Add/Remove Programs utility or commingling code achieves any integrative benefit. . . . Microsoft failed to meet its burden of showing that its conduct serves a purpose other than protecting its operating system monopoly.” *Id.* at 66–67.

²⁰⁸ *Id.* at 63–64.

²⁰⁹ *Id.* at 67.

A plaintiff would then be permitted to argue that a less restrictive means to achieve the same benefit was available and that on net, the defendant's conduct resulted in a greater anticompetitive effect than procompetitive benefit. More helpful to courts reviewing future cases, however, would have been a clearer statement from the D.C. Circuit that it meant for its definition to be applied in this way. It would also have been helpful for the D.C. Circuit to specifically list and demonstrate use of the criteria that seemed to be animating its reasoning. Further, subsequent cases would have been improved with more guidance regarding which categories of efficiencies might be cognizable and what types of evidence might be helpful to substantiate a claim. Finally, future cases would have benefited from greater consideration of less restrictive alternatives in the *Microsoft* decision. However, because the Plaintiff did not offer any such rebuttals to the Microsoft claims found to be cognizable, there was nothing for the appellate court to review.²¹⁰

Ultimately, the reasoning of *Microsoft*, while helpful for setting out a definition for "procompetitive justification," fails to offer a very instructive framework or standard to use when determining whether to credit asserted procompetitive justifications arising out of the operation of digital platform businesses.

*B. Rejecting Proposals for Reforming Review of Procompetitive Justifications
Advanced in Legal Scholarship and Minority Circuit Courts*

Several scholars have noted that when to credit a procompetitive justification within rule of reason remains poorly defined in case law.²¹¹ Whereas these scholars agree that a more uniform approach could improve the predictability of antitrust outcomes and reduce error risks, they diverge on what approach to adopt.²¹² Three proposed approaches for when to credit a procompetitive justification include: (1) where the conduct solves a market failure; (2) where the conduct improves the competitive process; or (3) where the conduct falls within some predetermined set of categories for permitted justifications.²¹³ None of these approaches, however,

²¹⁰ Plaintiff did not rebut Microsoft's integration claim for code that was strictly necessary. *Id.* at 67. It is not clear whether the plaintiff rebutted Microsoft's claim that a limited subset of contract restrictions would be necessary to protect its copyrighted work, as the decision does not reference any rebuttal in permitting this claim. *Id.* at 64.

²¹¹ John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 503 (2019) (citing Lawrence A. Sullivan et al., THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 5.3f, at 223 (3d ed. 2016) ("[W]hat constitutes an offsetting benefit to competition" remains a "question left open")).

²¹² Newman, *supra* note 211, at 502–05.

²¹³ *Id.* at 504–05.

adequately considers the broad range of ways that digital platform defendants enable efficiencies in the markets where they compete. Thus, these approaches do not offer an improvement over the existing efficiencies-focused approach used in most circuit courts.

1. Market Failure Approach

One approach that antitrust scholars like John M. Newman have proposed is to credit a defendant's justification where it alleviates a market failure, i.e., improves some previously inefficient allocation of market resources.²¹⁴ A market failure might be the result of hold-ups to deal-making like high transaction costs, coordination challenges and information asymmetries.²¹⁵ It may also be the result of costs being borne by only a few market participants, as with free-riding.²¹⁶

Newman's market failure approach aligns best with Supreme Court decisions that have focused their analysis of procompetitive justifications on economic effects. Justice Brandeis's reasoning in *Chicago Board of Trade*, which permitted balancing a restraint's anticompetitive effect against evidence showing that the same restraint "helped to improve market conditions" through increasing the number of trading partners, reducing transaction costs, and lessening risk from failed transactions, could be considered as aligned with this approach.²¹⁷ In the vertical restraint context, the Supreme Court credits conduct designed to limit free-riding among retailers, a market failure, as procompetitive.²¹⁸ More recently, in *Ohio v. American Express*, the Supreme Court suggested openness to crediting justifications shown to reduce negative externalities like free-riding outside the vertical restraint context.²¹⁹ No Supreme Court decision has ever required a defendant, however, to go further than showing that an alleged procompetitive justification improved market conditions and show that it actually *alleviated* a market failure.

²¹⁴ *Id.* at 504, 509. See also Thomas L. Greaney, *Quality of Care and Market Failure Defenses in Antitrust Health Care Litigation*, 21 CONN. L. REV. 605 (1989) (arguing correcting market failures may justify some restraints in healthcare markets); Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849 (2000) (arguing that restraints may sometimes be justified where a market is not functioning optimally).

²¹⁵ Newman, *supra* note 211, at 510–12.

²¹⁶ *Id.*

²¹⁷ 246 U.S. 231, 240–41 (1918).

²¹⁸ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007).

²¹⁹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289–90 (2018).

Newman's approach is deficient for several reasons and would not work well to assess the conduct of digital platform defendants. First, Newman's definition of "market failure"—"the relevant market produces outcomes that are less efficient than they might be"—is broad and indeterminate, making application of the approach difficult in practice.²²⁰ The definition seems to encompass any market that falls short of perfect competition. In doing so, the approach provides no benefit or guide to practitioners regarding when a procompetitive justification should be credited. Second, Newman's approach does not fit well to a circumstance where a platform owner develops an entirely new way to match buyers and sellers or offer a product or service. Platform providers like Uber and Airbnb, which conceptualized novel ways to deliver traditional services like taxi and limousine rides and short-term apartment rentals, would be barred from seeking procompetitive justifications for restraints that flow out from making these platforms operational, like setting rules limiting direct negotiations between users on the platform over ride price (Uber) or limiting direct communication for booking and billing (Airbnb).²²¹ Failure to credit justifications from creating a new product or significantly improving how an existing service is offered would seem in derogation of the Supreme Court's holding in *BMI*.²²² Further, Newman's approach might not credit efficiencies from defendant conduct that merely improves competitive conditions without demonstrating a market failure, such as platform conduct to reduce search and contract formation costs or to set rules for online auctions.²²³ This is despite similar cost reduction and regulatory-type behavior being credited for improving efficiencies in *Chicago Board of Trade*.²²⁴ Newman's approach also does not appear to capture platform efficiencies from increased innovation and improved allocative efficiency, which platform businesses help to promote.²²⁵ This position stands in opposition to that of several circuit courts, which specifically require recognition of innovation improvements as a cognizable efficiency,²²⁶ or others that have suggested openness

²²⁰ Suggesting some market conditions that fall short of perfect competition, Newman identifies conditions likely to persist in most markets: imperfect information, lack of market power, transaction costs, externalities, irrational behavior by market participants. Newman, *supra* note 211, at 509, 512.

²²¹ See *supra* 3. Self-Regulation and Improved Information Sharing, (5); see also Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber*, 19 STAN. TECH. L. REV. 293, 298 (2016).

²²² 441 U.S. 1 (1979).

²²³ See *supra* 1. Reduced Search Costs.

²²⁴ 246 U.S. 231 (1918).

²²⁵ See *supra* 4. Increased Rate of Innovation.

²²⁶ *McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015) (permitting justifications that have the effect to "reduce cost, increase output or improve product quality, service, or innovation").

to recognizing innovation improvements.²²⁷ In sum, in attempting to streamline courts' approach to assessing procompetitive justifications, Newman removes too many categories of efficiencies that should be credited, especially for digital platform defendants.

2. *Competitive Process Approach*

A second approach that some antitrust scholars including Gregory J. Werden have argued for is a "competitive process" approach, whereby procompetitive justifications would be assessed holistically in conjunction with anticompetitive effects to determine whether conduct on net helps or harms competition.²²⁸ Werden cites to the decision of *Professional Engineers* to support his view, where Justice Stevens wrote about rule of reason analysis: "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint."²²⁹

Some Supreme Court cases have suggested that procompetitive justifications should be analyzed broadly in terms of their effects to competition. In *Chicago Board of Trade*, Justice Brandeis wrote that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."²³⁰ In *NCAA*, Justice Stevens wrote that the "ultimate focus of the inquiry," referring to rule of reason analysis, "is whether or not the challenged restraints enhance competition."²³¹ Further, the Court wrote that "the criterion to be used in judging the validity of a restraint on trade is its impact on competition."²³²

²²⁷ *United States v. Apple, Inc.*, 791 F.3d 290, 334 (2d Cir. 2015) (rejecting Apple's asserted procompetitive justification of improving innovation through collaboration with publishers only where it failed "to establish a connection between these benefits and the conspiracy among Apple and the Publisher Defendants").

²²⁸ Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 732–36 (2014); see also Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2256 (2013).

²²⁹ Notably, *Professional Engineers* was resolved under a "quick look" approach that did not look very far past the plain anticompetitive effects of the restraint at issue, thus was not a rule of reason analysis that actually considered procompetitive justifications in its analysis. 435 U.S. 679, 692–93 (1978) ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and "[o]n its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.").

²³⁰ 246 U.S. 231, 238 (1918).

²³¹ 468 U.S. 85, 86 (1984).

²³² *Id.* at 104.

However, the competitive process approach is deficient in several ways and would not work well to assess the conduct of digital platform defendants. First, the competitive process approach does not clearly delineate what conduct tends to help as opposed to harm competition. It speaks generally about harms to competition and the “competitive process,” but does not clearly delineate what conduct would be permissible.²³³ Were this approach adopted, digital platform defendants would have no greater clarity about whether their conduct conforms with the law and instead may be even more befuddled about what is required of them. Second, it is not obvious that the competitive process approach would permit platform owners that develop an entirely new way to match buyers and sellers or offer a product or service, as in the examples of Uber and Airbnb above, to claim a precompetitive justification.²³⁴ Scholars supporting this approach have not specified whether the improvement to competition must take place in an existing antitrust market or if creating a new market altogether, as in markets for app-based delivery of ride-sharing services or short-term rentals, could be credited. Yet, the Supreme Court’s holding in *BMI* strongly suggests that offering a new product or service to market or significantly reducing transaction costs should be credited as a procompetitive justification.²³⁵ Relatedly, it is not clear whether a single firm’s improvement of product and services delivery on its own platform through regulatory behavior could be credited if there is no showing that competition improved in the market more broadly.²³⁶ Third, it is not clear how this approach would view platform efficiencies like improving innovation and resource allocation.²³⁷ On one hand, these efficiencies reduce the costs of market entry and ensure that resources flow to their highest valued use. And yet, because these efficiencies pose a more indirect improvement to competition than effects to prices and output, it is not clear that the competitive process approach would permit crediting these efficiencies. Finally, the approach muddles rule of reason’s multi-pronged, burden-shifting framework. Instead of first asking whether a plaintiff met the requisite showing of anticompetitive harm and then determining if a defendant can show an offsetting procompetitive justification, the approach considers all the evidence together. In addition to being contrary to accepted antitrust practice, the approach would obscure whether a case is more

²³³ See, e.g., Werden, *supra* note 228, at 713–44 (describing restraints as anticompetitive for “suppression of competition” or corruption of the “competitive process”).

²³⁴ See *supra* note 221 and accompanying text.

²³⁵ 441 U.S. 1 (1979).

²³⁶ See *supra* 3. Self-Regulation and Improved Information Sharing. Regulatory-type behavior was credited for improving efficiencies in *Chicago Board of Trade*, but in that case, the defendant set rules for transacting “to arrive” grain after hours for the entire market, not just on one platform. 246 U.S. 231 (1918).

²³⁷ See *supra* 4. Increased Rate of Innovation.

properly resolved under a per se analysis, forestalling consideration of procompetitive justifications altogether.

3. *Categorical Approach*

Some scholars have argued for a categorical approach, where justifications would only be credited if they fall into certain predetermined categories.²³⁸ The Tenth and Eleventh Circuits have adopted this approach, permitting justifications that have led to “increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice”²³⁹ or that “reduce cost, increase output or improve product quality, service, or innovation,”²⁴⁰ respectively.

The categorical approach has several positive attributes. Practically, it is the easiest approach to apply and might help reduce the time and expense to litigate antitrust cases under rule of reason, which courts have noted to be considerable.²⁴¹ Further, the included categories are fairly broad, spanning economic effects like reduced cost and increased output as well as more abstract considerations like improvements to innovation and widening consumer choice.²⁴² The Supreme Court

²³⁸ Newman, *supra* note 211, at 516.

²³⁹ In so doing, the Tenth Circuit cited the American Bar Association’s American Law Developments publication, which suggested that a justification could be credited where it reflected “a legitimate business goal—e.g., maximizing short-run profits, preventing free riding, or aligning the incentives of distributors.” *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

²⁴⁰ The Eleventh Circuit adopted the lower court’s approach, which had constructed categories from reasoning in *Indiana Federation of Dentists*, *BMI*, and a First Circuit decision. The Eleventh Circuit also favorably cited to language in *Phillip Areeda and Herbert Hovenkamp’s* antitrust treatise. *McWane, Inc. v. FTC.*, 783 F.3d 814, 841 (11th Cir. 2015) (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)).

²⁴¹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (“[L]itigating a rule of reason case is ‘one of the most costly procedures in antitrust practice.’”) (Breyer, J., dissenting) (quoting HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 105 (2005)); *see also* *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 343 (1982) (“The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex.”).

²⁴² *McWane*, 783 F.3d at 841 (permitting a procompetitive justification where the conduct had the effect to “reduce cost, increase output or improve product quality, service, or innovation”); *Law*, 134 F.3d 1010, 1023 (10th Cir. 1998) (permitting “increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice” as justifications).

has not yet ruled on whether a categorical approach to assessing procompetitive justifications would be permitted or useful.

The categorical approach should, however, be rejected for several reasons. First, it is overly formulaic and likely to lead to errors where categories are construed too narrowly or too broadly.²⁴³ This is worrisome for digital platform defendants experimenting with new ways to transact and offer services to customers, as they may unexpectedly find themselves unable to assert a justification. Whereas some platform efficiencies like reduced search and contract formation costs are likely to be credited, it is not clear that self-regulatory conduct fits into a category used by the Tenth or Eleventh Circuit.²⁴⁴ This is despite a long history of similar cost reduction and regulatory-type behavior being credited for improving efficiencies dating back to *Chicago Board of Trade*.²⁴⁵ Further, the categories of justifications adopted in jurisdictions that apply this approach are not uniform and are likely to lead to confusion. Both the Tenth and Eleventh Circuit permit increasing output and improving product or services quality to be credited, but only the Tenth Circuit permits creating operating efficiencies and making a new product available, and only the Eleventh Circuit credits reducing cost and improving innovation.²⁴⁶ These types of incongruities are problematic for digital platform defendants that often serve a national market and thus face potentially conflicting legal treatment. Digital platform defendants would also be better served by an approach that consistently recognized improvements to innovation and allocative efficiency as cognizable procompetitive justifications.²⁴⁷ Finally, it is not clear that the Supreme Court would ever adopt a categorical approach for crediting procompetitive justifications. The Supreme Court has consistently used very broad language to describe what conduct can be recognized as a procompetitive justification.²⁴⁸

²⁴³ Newman, *supra* note 211, at 534–35 (noting that greater output of goods that consumers do not value, like low quality products or pollution, would be permitted under the categorical approach but not under the market failure approach).

²⁴⁴ See *supra* 1. Reduced Search Costs.

²⁴⁵ 246 U.S. 231 (1918).

²⁴⁶ *McWane*, 783 F.3d at 84; *Law*, 134 F.3d at 1023.

²⁴⁷ See *supra* 4. Increased Rate of Innovation.

²⁴⁸ In *Indiana Federation of Dentists*, the Supreme Court advised crediting the “creation of efficiencies in the operation of a market or the provision of goods and services.” 476 U.S. 447, 459 (1986) (citations omitted). In *BMI*, it suggested crediting restraints that “increase economic efficiency and render markets more, rather than less, competitive.” 441 U.S. 1, 20 (1979).

C. PROPOSAL: Broad consideration for the ways that platforms improve market efficiencies with some clarification but no explicit change to how procompetitive justifications are assessed within rule of reason

No radical departure from the existing efficiencies-focused approach for assessing procompetitive justifications within rule of reason analysis is necessary or helpful for antitrust cases involving digital platform defendants. The existing efficiencies-focused approach to review asserted procompetitive justifications is sufficiently broad and flexible to consider the range of ways that digital platform defendants enable efficiencies in the markets where they compete. As demonstrated below in recent cases implicating digital platforms, courts already consider a broad range of defendants' asserted efficiencies and appropriately consider whether the defendant has carried its burden to substantiate these efficiencies with record evidence. Further, existing rule of reason analysis is well-calibrated to permit only restraints well-tailored to achieving efficiencies by requiring that no less restrictive alternative to achieving that benefit exist. Finally, existing rule of reason analysis already contemplates net effects to competition by weighing the anticompetitive effects of a restraint against the procompetitive benefits in its final balancing requirement.

Although the Supreme Court's statement in *Indiana Federation of Dentists* regarding when courts should credit a procompetitive justification—when it is shown to benefit competition through “creation of efficiencies”—is vague, this remains the best approach to guide lower courts, because it is sufficiently broad and flexible to consider the range of efficiencies that a defendant may assert and support with record evidence.²⁴⁹ This approach also incorporates preexisting jurisprudence from *Chicago Board of Trade*, *BMI*, *NCAA*, and *Professional Engineers*, all of which lend further specification to which justifications might be credited. Conduct that “help[s] to improve market conditions” by increasing the number of trading partners and deals, reducing information asymmetries, removing risk, and improving allocation of resources may be permitted by analogizing to the facts of *Chicago Board of Trade*.²⁵⁰ Conduct that is necessary to overcome extreme transactional costs and to vindicate an intellectual property right may be permitted under *BMI*.²⁵¹ And, conduct that “increase[s] output and reduce[s] . . . price,” “mak[es] possible a new

²⁴⁹ *Indiana Fed'n of Dentists*, 476 U.S. at 459 (describing a procompetitive justification as “some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. . . .”) (citations omitted).

²⁵⁰ 246 U.S. 231, 240 (1918).

²⁵¹ 441 U.S. 1, 20 (1979).

product,” “widen[s] consumer choice,” or “enhance[s] public interest [in the relevant product]” may be compared to the categories of efficiencies that the Supreme Court considered in *NCAA*.²⁵² Conduct that represents a refusal to compete on price or that so disrupts “the ordinary give and take of the market place” to set prices cannot be considered procompetitive in the application of *Professional Engineers*.²⁵³ The majority of circuit courts are right to follow the approach of *Indiana Federation of Dentists* and apply a broad standard that considers a wide range of cognizable efficiencies instead of limiting review to a pre-set category of efficiencies, as the minority of circuit courts have tried to do.²⁵⁴

One improvement that reviewing courts can adopt is to take the definition for assessing procompetitive justifications provided in *Microsoft* (itself an outgrowth of *Indiana Federation of Dentists*) and try to operationalize it as a series of steps for review: (1) assess if a procompetitive justification is cognizable, i.e., if it implicates an efficiency improvement; (2) determine if it is substantiated in fact; and (3) assess whether there is a less restrictive alternative to achieving the same result, should the plaintiff so assert that there is one.²⁵⁵ As demonstrated in the cases below, most courts consider these three elements in some manner, but like the D.C. Circuit in *Microsoft*, they do not tend to clearly describe their process.²⁵⁶ More strictly following a series of steps like those outlined above would help businesses and legal practitioners to understand if an asserted justification failed for not being cognizable, not being supported by record evidence, or not being sought out through the least restrictive means to do so. Thus, cases could be more instructive to those in the field regarding what type of conduct will be recognized as efficiency improving and what evidence is helpful to substantiate a claim. Cases might also be more instructive for reflecting what types of alternatives a party may need to undertake before imposing a restraint with certain deleterious effects to competition. Finally, this approach might streamline review on appeal to the extent that parties can stipulate that only one aspect of the lower court’s decision is being contested.

One additional improvement in cases involving digital platform defendants is for practitioners, not courts, to more specifically enunciate the efficiency being asserted and to try to substantiate that efficiency with more fulsome record evidence.

²⁵² 468 U.S. 85, 102–03, 113–14, 117 (1984).

²⁵³ 435 U.S. 679, 692–93 (1978).

²⁵⁴ See *supra* 2. Treatment of Procompetitive Justifications in Recent Cases.

²⁵⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (defining “procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal”).

²⁵⁶ See *infra* D. Application to recent cases involving digital platform defendants.

As described above, the range of potential efficiencies that a platform defendant may assert is broad: improving market efficiencies through reducing costs, improving quality, facilitating information sharing, speeding innovation and improving allocative efficiency, among others.²⁵⁷ Yet, the defendant must show that a given restraint actually furthers an asserted efficiency—it is not sufficient to be granted a procompetitive justification that a platform’s ordinary business operations achieve this result without the restraint. The cases involving Apple and Sabre below contemplate this circumstance: in both cases, the court was right to reject outright or uphold the jury’s determination rejecting the defendant’s asserted justification for not providing record evidence that showed that the restraint itself furthered an efficiency.²⁵⁸ Otherwise, the restraint is merely anticompetitive conduct undertaken by an entity that would otherwise produce efficiencies in the market where it competes. The latter circumstances should not be afforded any special deference or consideration in antitrust review.

D. Application to recent cases involving digital platform defendants

From a review of recent antitrust cases involving digital platform businesses as defendants,²⁵⁹ courts have so far stepped up to the challenge of broadly considering possible efficiencies associated with the operation of these businesses, while also ensuring that a justification is only credited where it is supported by adequate evidence and no less restrictive alternative to achieving this benefit exists. This result supports this Note’s conclusion that no radical change to the existing approach for assessing procompetitive justifications is necessary but that some greater uniformity and precision in how the approach is applied would be helpful.

²⁵⁷ See *supra* C. Market Efficiencies Specific to Platform Businesses

²⁵⁸ *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 Civ. 2725 (LGS), slip op. at *1–2 (S.D.N.Y. Mar. 21, 2017), *vacated and remanded*, 938 F.3d 43 (2d Cir. 2019); *United States v. Apple, Inc.*, 791 F.3d 290, 296–98 (2d Cir. 2015).

²⁵⁹ Based on a combination of keyword, headnote, and citing reference searches conducted on the dominant legal search platform, there have only been a handful of antitrust cases involving these defendants that reached a final determination on the merits in the 20 years since the *Microsoft* decision. Searches were conducted in the timeframe July 2020 to October 2020. Representative Boolean searches included searches for “procompetitive justification” and antitrust and “network effect,” in the timeframe January 1, 2002 to present, to screen for cases decided after *Microsoft*. Headnote and citing reference searches originating from the *Microsoft* decision well overlapped with keyword and Boolean searches. In total, some 60 cases were reviewed with varying depth to determine whether a digital platform business was implicated in the case and if the reviewing court reached a final decision on the merits. Fewer than half a dozen cases were found to meet this description.

1. Realcomp II, Ltd. v. FTC

Realcomp, an association of approximately 14,000 real estate agents and brokers, provides two critical services to its members: access to its MLS database and advertising services.²⁶⁰ Realcomp maintains the largest MLS database in Michigan, with detailed information about available property listings and contact information for brokers representing home sellers.²⁶¹ The Realcomp database is only available to Realcomp association members.²⁶² Realcomp also provides an advertising service for members that allows them to share information about active listings on the MLS database to certain pre-approved public-facing websites.²⁶³ All brokers, whether full-service or limited service, pay the same fee to become Realcomp members and access its services.²⁶⁴

The FTC accused Realcomp of violating the FTC Act for two practices.²⁶⁵ First, the FTC challenged Realcomp's policy of refusing to share information about certain exclusive agency listings and other nontraditional listings in its MLS database to public-facing websites as part of advertising services that it offered to association members.²⁶⁶ Second, the FTC challenged Realcomp's practice of preventing exclusive agency and other non-traditional listings from being included in the default search settings for its MLS database.²⁶⁷ The FTC alleged that these practices were designed to insulate traditional, higher fee brokers from competition with new low-cost, limited-service brokers and individual buyers and sellers.²⁶⁸

Realcomp claimed two procompetitive justifications for its conduct. Realcomp claimed that its conduct reduced "free-riding" by non-traditional brokers and individuals, who allegedly did not pay full fare for the benefits of property

²⁶⁰ *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 819–20 (6th Cir. 2011).

²⁶¹ *Id.* at 820, 830 (noting that the factfinder determined that the Realcomp MLS reached about 80 percent of home buyers in the relevant antitrust market of real estate brokerage services in Southeastern Michigan, and that through re-postings on public-facing websites, brokers could reach about 90 percent of home buyers).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 820.

²⁶⁵ *Id.* at 824 ("Because '[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of § 1 of the Sherman Act . . . aimed at prohibiting restraint of trade,' we rely upon Sherman Act jurisprudence in determining whether the challenged policies violated Section 5 of the FTC Act.") (*quoting* *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n. 3 (1999)).

²⁶⁶ *Id.* at 822.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 820–22.

advertising, listing, and search services that they received from Realcomp.²⁶⁹ The defendant also claimed that its conduct helped to reduce a “bidding disadvantage” that buyers using traditional brokers faced when bidding against buyers with low-cost brokers.²⁷⁰

In the initial FTC Commission decision, the Commission succinctly but comprehensively reviewed and rejected both of the platform defendant’s procompetitive justifications and applied the right law to do so. Citing *Indiana Federation of Dentists*, the Commission stated that its review would look for “some countervailing procompetitive virtue - such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.”²⁷¹ Outlining its approach, the Commission wrote that it would assess: “whether those purported justifications are legitimate (i.e. ‘cognizable’ and ‘plausible’); whether they are supported by evidence in the record; and whether the restraints they impose are a reasonably necessary means to achieve a legitimate, procompetitive end.”²⁷² As such, the Commission’s approach was tightly aligned with the process for evaluating procompetitive justifications outlined in *Microsoft* and proposed by the Note as a best practice.²⁷³ Analyzing Realcomp’s first procompetitive justification of reducing free-riding, the Commission had no trouble analogizing to the vertical restraint context and determining that such an efficiency could be cognizable.²⁷⁴ The Commission then promptly rejected this claim on a finding that no record evidence showed that the restraint in fact improved market outcomes; instead, all users, traditional and low-cost brokers, had to pay the same access fees to use the Realcomp platform, so “there was no ‘free ride.’”²⁷⁵ The Commission also did not struggle to

²⁶⁹ *Id.* at 835.

²⁷⁰ *Id.* (claiming an intent to reduce “free rid[ing] on the Realcomp members who invest and participate in the MLS through the payment of dues and who otherwise undertake to support the cooperative endeavor of the MLS”).

²⁷¹ In the Matter of Realcomp II Ltd., A Corp., 2009-2 Trade Cas. *16 (CCH) ¶ 76784 (MSNET Oct. 30, 2009).

²⁷² *Id.* at *28.

²⁷³ *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

²⁷⁴ In the Matter of Realcomp II Ltd., A Corp., 2009-2 Trade Cas. *30 (CCH) ¶ 76784 (MSNET Oct. 30, 2009).

²⁷⁵ *Id.* at *30–31 (finding that because all brokers and sellers on the Realcomp platform had to pay directly for website access or gain access through assistance of a cooperating broker, “there was no ‘free ride’ at all here” and “[t]he courts are quite familiar with - and have consistently rejected - efforts to dress up as a “free-riding justification” what is in fact an effort to protect a less-demanded, higher-priced product from competition by a lower-priced product that consumers may prefer more strongly.”).

determine that Realcomp's second claim for solving a "bidding disadvantage" among types of brokers merely masked an attempt by traditional brokers to prevent low-cost brokers from passing on cost-savings to customers.²⁷⁶ Thus, this claim failed to demonstrate a cognizable efficiency improvement.²⁷⁷ The Sixth Circuit ultimately confirmed the Commission's reasoning and result.²⁷⁸

In sum, both the Commission and the Sixth Circuit demonstrated no difficulty in assessing procompetitive justifications asserted by a digital platform defendant under the broad efficiencies-focused approach outlined in *Indiana Federation of Dentists* and *Microsoft*. The Commission considered both whether the alleged justifications were cognizable efficiency improvements and if they were supported by record evidence. It also clearly outlined its reasoning to do so. The Sixth Circuit was right to confirm this reasoning and result.

2. *US Airways, Inc. v. Sabre Holdings Corp.*

In *Sabre*, an airline brought suit against the owner of a global distribution system ("GDS"), a computer reservation service that matches airlines and other travel providers with travel agents looking to book travel plans for mostly corporate clients.²⁷⁹ In its 2011 contract with Sabre, US Airways paid Sabre a booking fee of at least \$3.41 per US Airways flight segment booked on the Sabre platform.²⁸⁰ In the period 2006 to 2012, Sabre paid more than \$1.2 billion in incentive fees to travel agents to encourage them to use its platform.²⁸¹

US Airways claimed that Sabre had violated the Sherman Act through several contract provisions in the agreement between the companies.²⁸² The provisions

²⁷⁶ *See id.* at *32–34.

²⁷⁷ *Id.* at *33 (holding that as opposed to a policy designed to "increase output, or improve product quality, service or innovation," Realcomp's bidding policy made it easier for an incumbent class of brokers to avoid price competition for fees) (quoting *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)).

²⁷⁸ The Sixth Circuit confirmed the Commission's determination that free-riding could be a cognizable justification but was not supported by case evidence, whereas the "bidding disadvantage" claim was not a cognizable justification. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 834–36 (6th Cir. 2011).

²⁷⁹ *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 Civ. 2725 (LGS), slip op. at *1–2 (S.D.N.Y. Mar. 21, 2017) (reviewing Sabre's motion for a judgment as a matter of law under Federal Rule of Civil Procedure 50(b) or, in the alternative, a new trial under Rules 50 and 59), *vacated and remanded*, 938 F.3d 43 (2d Cir. 2019).

²⁸⁰ US Airways estimated that about 40% of its revenues were booked through Sabre and another 25% were booked through rival GDS services. *Id.* at *4–5.

²⁸¹ *Id.* at *5.

²⁸² *Id.* at *2.

prevented the plaintiff from offering discounts or better benefits on tickets booked through non-Sabre sales channels or imposing surcharges on any tickets booked through Sabre's platform.²⁸³ The provisions also prevented US Airways from inducing travel agents or customers to directly purchase tickets from the airline, i.e., to circumvent the Sabre system.²⁸⁴

Defendant's claimed procompetitive justifications for its conduct were twofold. First, Sabre claimed that certain contract provisions enabled customers to see the lowest-priced fares across all GDS networks.²⁸⁵ Thus, consumers could more easily comparison shop for flights across airlines using the Sabre platform.²⁸⁶ Sabre claimed that these contract provisions also encouraged efficient booking practices by travel agents, as they reduced the time to make and change reservations.²⁸⁷ Second, Sabre claimed that its contract provisions were necessary to prevent US Airways from undermining the agreement between the parties and offering a better deal to rivals, as well as to prevent travel agent customers from being induced to use another platform to book lower cost flights after having researched those flights on Sabre's platform.²⁸⁸ That is, certain provision were necessary to deter free-riding on the platform services.²⁸⁹

At the district court, a jury heard evidence from Sabre supporting its alleged procompetitive justifications as well as from the plaintiff regarding less restricting alternatives Sabre could have pursued.²⁹⁰ Sabre presented evidence that its contract provisions led to increased competition among airlines by enabling travel agents to shop more efficiently among multiple airlines and compare prices for fares.²⁹¹ US Airways presented evidence that Sabre could have separately charged for searching and booking flights, as well as permitted airlines to pass on a surcharge to customers booking through Sabre where other platforms charged lower fees to the airline.²⁹²

²⁸³ *Id.* at *5.

²⁸⁴ *Id.*

²⁸⁵ *US Airways, Inc. v. Sabre Holdings Corp.*, 105 F. Supp. 3d 265, 283 (S.D.N.Y. 2015) (reviewing Sabre's motion for summary judgment), *aff'd*, 938 F.3d 43 (2d Cir. 2019).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 Civ. 2725 (LGS), slip op. at *15–16 (S.D.N.Y. Mar. 21, 2017) (reviewing Sabre's motion for a judgment as a matter of law under Federal Rule of Civil Procedure 50(b) or, in the alternative, a new trial under Rules 50 and 59), *vacated and remanded*, 938 F.3d 43 (2d Cir. 2019).

²⁹¹ *Id.*

²⁹² *Id.*

US Airways argued that these alternatives would have adequately remedied Sabre's free-riding concerns arising from travel agent booking practices while also permitting greater competition among airlines by allowing them to pass along savings from lower booking fees to customers.²⁹³ The jury ultimately determined that Sabre unreasonably restrained trade through its contract provisions, demonstrating that the jury either was not convinced by Sabre's procompetitive justifications or was swayed by US Airways' presentation of less restrictive alternatives.²⁹⁴

While the district court played a more limited role in assessing the record evidence in *Sabre* than in *Realcomp* because there was a jury sitting as factfinder, where relevant, the court nonetheless demonstrated acuity in evaluating the platform defendant's asserted procompetitive justifications. Reviewing Sabre's motion for summary judgment, the district court found that Sabre's contract provisions could demonstrate benefits to competition from comparison shopping and more efficient booking methods, i.e., they were cognizable, and thus would be assessed by the jury.²⁹⁵ Analogizing to vertical restraint cases, the district court described that "[c]ontract provisions that result in a better or more efficient product to meet consumer demand are procompetitive."²⁹⁶ The court also found Sabre's free-riding claims to be cognizable.²⁹⁷ Although the district court did not give a clear statement as to what standard it was using to evaluate procompetitive justifications offered by the defendant, its reasoning reflected that it was looking for justifications that advanced a market efficiency and that were supported by record evidence, an approach aligned with *Indiana Federation of Dentists* and *Microsoft*.²⁹⁸

Later, when reviewing Sabre's motion for a judgment as a matter of law under Federal Rule of Civil Procedure Rule 50(b), the district court upheld the jury's determination that the defendant's justifications, while cognizable on their face, may not have been convincingly substantiated, failed on a showing of less restrictive alternatives, or else failed to balance strong anticompetitive effects from Sabre's conduct.²⁹⁹ The court described the process for evaluating procompetitive justifications as one that asks: "[W]hether 'there [is] strong evidence that the

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *US Airways, Inc. v. Sabre Holdings Corp.*, 105 F. Supp. 3d 265, 283 (S.D.N.Y. 2015), *aff'd*, 938 F.3d 43 (2d Cir. 2019).

²⁹⁶ *Id.* (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–55 (1977)).

²⁹⁷ *Id.*

²⁹⁸ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001).

²⁹⁹ *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 Civ. 2725 (LGS), slip op. at *15–16 (S.D.N.Y. Mar. 21, 2017), *vacated and remanded*, 938 F.3d 43 (2d Cir. 2019).

challenged practice creates substantial efficiencies by reducing participants' costs or improving product or service quality.'"³⁰⁰ Although the court cited Phillip Areeda and Herbert Hovenkamp's antitrust treatise for this standard instead of *Indiana Federation of Dentists* or *Microsoft*, this approach largely aligns with the broad efficiencies-focused approach promoted in those cases.³⁰¹ One distinguishable aspect is that neither *Indiana Federation of Dentists* nor *Microsoft* required a showing of "strong evidence" that a challenged practice creates "substantial" efficiencies, merely a showing of "some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services" or "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."³⁰² That said, the *Sabre* court did not appear to apply a heightened standard of review to assess the procompetitive justifications asserted by the defendant.³⁰³ Rather, it found that Sabre presented evidence sufficient for the defendant to carry its burden, but that the jury as factfinder was within its discretion not to credit Sabre's witnesses or arguments, to find that there were least restrictive means to achieve the same efficiencies, or to determine that on balancing, Sabre's conduct was anticompetitive.³⁰⁴ The district court's evaluation of procompetitive justifications was not challenged on appeal to the Second Circuit.³⁰⁵

In sum, the district court adequately assessed procompetitive justifications asserted by a digital platform defendant under a broad efficiencies-focused approach. The district court, where appropriate, considered whether the alleged justifications were cognizable efficiency improvements and if they were supported by record evidence. Although the clarity and precision of its reasoning could be improved, the district court's ultimate conclusions were appropriate.

³⁰⁰ *Id.* at *15 (citing 7 Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶ 1507a, at 426 (3rd ed. 2010) for the standard for what constitutes a procompetitive justification).

³⁰¹ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

³⁰² *Ind. Fed'n of Dentists*, 476 U.S. at 459; *Microsoft*, 253 F.3d at 58.

³⁰³ *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 Civ. 2725 (LGS), slip op. at *15–16 (S.D.N.Y. Mar. 21, 2017), *vacated and remanded*, 938 F.3d 43 (2d Cir. 2019).

³⁰⁴ *Id.*

³⁰⁵ On appeal to the Second Circuit, Sabre challenged the reliability of the district court's alternative verdict and urged a new determination of market definition in light of the Supreme Court's decision in *Ohio v. American Express*. The case was reversed and remanded for a new trial in light of the *American Express* decision. *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 60 (2d Cir. 2019).

3. Other relevant recent cases

As noted above, the courts have yet to fully resolve many cases involving digital platform businesses as defendants.³⁰⁶ Two further recent cases suggest, however, that existing rule of reason analysis and its efficiencies-focused standard for assessing procompetitive justifications is sufficient to meet the challenge of reviewing conduct undertaken by digital platform defendants.

In *United States v. Apple, Inc.*, the Second Circuit correctly determined that no procompetitive justifications applied to the conduct of a digital platform for e-book sales because the defendant, Apple, had participated in a horizontal price-fixing conspiracy with book publishers to try to gain market share in the e-books market.³⁰⁷ In dicta that briefly considered the merits of Apple's procompetitive justifications—to encourage market entry by publishers to challenge Amazon's market dominance and innovation benefits from collaboration with publishers to improve Apple's tablet products—the Second Circuit correctly recognized which of Apple's procompetitive justifications were not cognizable, and which were cognizable but not substantiated with record evidence. The Second Circuit did not give a clear statement as to what standard it was using to reject Apple's procompetitive justifications but it appeared to be looking for justifications that advanced a market efficiency and that were supported by record evidence, an approach aligned with *Indiana Federation of Dentists* and *Microsoft*.³⁰⁸

Regarding Apple's first justification, the use of anticompetitive conduct to disrupt an existing market cartel, the Second Circuit properly determined that the claim was not cognizable, as such conduct is never a permitted justification.³⁰⁹ The Second Circuit also correctly determined that Apple's second justification, improving innovation in tablet products, was cognizable but not supported by record evidence.³¹⁰ Apple did not provide any evidence to establish a connection between the conduct at issue and the benefit that it alleged—it could point to no new

³⁰⁶ See *supra* note 259.

³⁰⁷ 791 F.3d 290, 296–98, 325 (2d Cir. 2015).

³⁰⁸ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

³⁰⁹ *Apple*, 791 F.3d 330–34 (“[T]he dissent invites conduct that is strictly prohibited by the Sherman Act—horizontal collusion to fix prices—to cure a perceived abuse of market power. Whatever its merit in the abstract, that preference for collusion over dominance is wholly foreign to antitrust law Indeed, the attempt to justify a conspiracy to raise prices ‘on the basis of the potential threat that competition poses . . . is nothing less than a frontal assault on the basic policy of the Sherman Act.’” (citing *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 680 (1978))).

³¹⁰ *Id.* at 334–35.

innovation that it had undertaken with book publishers nor an explanation for why a price-fixing arrangement would be necessary to further this result.³¹¹ Thus, the court came to a sensible conclusion using a broad, efficiencies-focused approach for assessing the defendant's asserted procompetitive justifications that required justifications to be both cognizable and supported by record evidence. Whereas the clarity and precision for what standard was being applied and what steps were being taken to reach this result could be improved, the ultimate conclusion was appropriate.

In *Viamedia, Inc. v. Comcast Corp.*, the Seventh Circuit declined to resolve the merits of an antitrust case implicating the conduct of a high technology platform, Comcast, on a motion for summary judgment and reserved rule of reason analysis to be undertaken by the factfinder.³¹² In dicta that considered the merits of Comcast's procompetitive justifications for tying and refusing to deal with a rival in the market for spot cable television advertising placement, the Seventh Circuit cited to the *Microsoft* decision's definition for "procompetitive justification" to guide analysis upon remand to the court below.³¹³ Thus, the Seventh Circuit intended for review of procompetitive justifications to consider both whether a justification was cognizable and if it was supported with record evidence. The court further expounded on what justifications might be cognizable by citing to Phillip Areeda and Herbert Hovenkamp's antitrust treatise, which advises crediting procompetitive justifications where conduct results in "higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like."³¹⁴ This approach aligns well with the categories of justifications discussed in *NCAA*, and is also not intended to be exhaustive, in accord with the broad, efficiencies-focused approach of *Indiana Federation of Dentists*.³¹⁵ While not deciding the issue, the Seventh Circuit expressed skepticism that Comcast would be able to substantiate its alleged procompetitive justifications for tying and

³¹¹ *Id.*

³¹² 951 F.3d 429, 461, 478, 485 (7th Cir. 2020) ("Viamedia has alleged—and offered evidence of—enough harm to competition from Comcast's refusal-to-deal and tying conduct for its claim to go forward. Consideration of procompetitive justifications must wait for a comprehensive rule of reason analysis.").

³¹³ *Id.* at 463–64 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001)).

³¹⁴ *Id.* at 478 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 651d, at 119 (4th ed. 2015)).

³¹⁵ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 102–03, 113–14, 117 (1984).

refusing to deal with a rival with record evidence.³¹⁶ As such, the Seventh Circuit adopted a broad, efficiency-focused approach for reviewing the defendant's alleged procompetitive justifications that well encapsulated the leading cases for what justifications are cognizable as well as required that any justifications be substantiated in fact. Its analysis was clear and easy to follow upon remand to the court below.

Two other recent decisions at the Supreme Court and courts of appeals challenge whether courts are properly evaluating digital platform defendants' procompetitive justifications. These cases are, however, distinguishable for involving mixed cases of antitrust and intellectual property licensing or for not reaching the merits of a full rule of reason analysis.³¹⁷

In *Federal Trade Commission v. Qualcomm, Inc.*, the Ninth Circuit afforded significant and surprising weight to Qualcomm's explanation for tying intellectual property licensing agreements to chip supply agreements to reduce transaction costs from multi-level licensing agreements.³¹⁸ The Ninth Circuit's reasoning suggested a single firm's cost reduction alone might be sufficient to rebut an allegation of anticompetitive harm or that it might be recognized as a procompetitive efficiency despite no improvement to market competition.³¹⁹ Yet, the Ninth Circuit's reasoning reflected special deference to Qualcomm's licensing preferences given the particular facts of the case—a mixed case of antitrust and intellectual property rights.³²⁰ The court wrote that “the rules of contract and patent law are better equipped to handle commercial disputes” between technologically advanced companies party to these

³¹⁶ *Viamedia*, 951 F.3d at 479–80 (“If Comcast has evidence of truly procompetitive benefits, it should submit that evidence to the trier of fact. But the hypotheses it has offered thus far do not entitle it to summary judgment.”).

³¹⁷ Neither of the two cases that follow specifically addresses a *digital* platform defendant. Yet, the defendants in these cases either offered products for distribution in a highly technologically advanced market (*Qualcomm*) or the reviewing court considered the relevance and impact of network effects to its inquiry (*American Express*).

³¹⁸ The Ninth Circuit's determination overturned the district court's findings that these cost savings were not supported by record evidence: “Qualcomm's own recorded statements . . . show that Qualcomm used to license rival modem chip suppliers, and that Qualcomm stopped licensing rivals because it is more lucrative to license only OEMs. Nowhere . . . [did Qualcomm] executive[s] raise concerns about multi-level licensing.” *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 756 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

³¹⁹ *Qualcomm Inc.*, 969 F.3d at 996–97.

³²⁰ *Id.*

licensing agreements, suggesting that the latter concern, not antitrust reasoning, was motivating its result.³²¹

In *Ohio v. American Express*, the Supreme Court suggested openness to crediting American Express's asserted procompetitive justifications for preventing merchants from steering customers toward lower cost payment options at the customer's point of purchase: improving interbrand competition among credit card providers and reducing free-riding among merchants that hold themselves out as accepting American Express.³²² This was despite the fact that American Express's anti-steering provisions reflected a direct restraint to negotiations over price, presumably foreclosed by *Professional Engineers*, and evidence presented in the district court and not reversed on appeal that American Express had raised prices to merchants 20 times during the relevant five-year period.³²³ The Supreme Court did not reach the merits of this determination, finding instead that the plaintiff's failure to show harm in a single market containing merchants and cardholders resolved the case.³²⁴ Four justices joined Justice Breyer's dissenting opinion, which favored finding anticompetitive harm at the first step of rule of reason analysis and remanding the case to the Second Circuit for a determination of offsetting procompetitive benefits.³²⁵ The dissent also expressed strong resistance to crediting American Express's asserted procompetitive justifications.³²⁶

CONCLUSION

In sum, the Supreme Court's statement in *Indiana Federation of Dentists* as to when to credit a defendant's asserted procompetitive justification—where it is shown to benefit competition through “creation of efficiencies”—remains the best

³²¹ *Id.* (quoting as well former FTC Commissioner Joshua D. Wright, “the antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law” and “imposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard-setting bodies and to commercialize innovation.” *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 GEO. MASON L. REV. 791, 808-09 (2014)).

³²² *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289–90 (2018).

³²³ *Id.* at 2293–94 (J. Breyer, dissenting) (“Among other things, the district court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions The court of appeals did not reject any fact found by the district court as ‘clearly erroneous.’”).

³²⁴ *Id.* at 2287–89.

³²⁵ *Id.* at 2302–04 (J. Breyer, dissenting).

³²⁶ *Id.*

path forward for lower courts.³²⁷ This approach permits defendants, including digital platform defendants, to assert a wide variety of justifications for their conduct, which they must then substantiate with evidence demonstrating that an improvement to market efficiencies has actually taken place. While somewhat vague, this approach means that platform defendants have a chance to assert efficiency improvements from reduced time and effort to find desired goods and services, reduced contracting costs, increased product and services quality, increased rate of innovation, and improved allocative efficiency as procompetitive justifications. In addition, earlier Supreme Court decisions including *Chicago Board of Trade*, *BMI*, *NCAA*, and *Professional Engineers* have helped to delineate what types of justifications may be credited, including conduct that: increases output, reduces price, makes possible a new product, expands consumer choice, or enhances consumer interest in the relevant product.³²⁸

Further, existing rule of reason analysis is well designed to permit only justifications well-tailored to achieving an asserted benefit to competition to meaningfully affect the outcome of a case. The factfinder is within its discretion to reject a justification where a defendant does not carry its burden of proof, a plaintiff shows a less restrictive means to achieve the same benefit, or balancing shows that the harm from the conduct's anticompetitive effect outweighs its procompetitive effect. Thus, whereas the body of efficiencies that might be credited as a procompetitive justification is broad, very few will be determinative of an antitrust claim.

Finally, the existing approach appears to be working well as it is applied to cases involving digital platform defendants. A review of recent cases implicating these defendants confirms that lower courts have sufficient guidance for how to apply the broad, efficiency-focused standard for assessing procompetitive justifications from *Indiana Federation of Dentists* and *Microsoft* as well as how to integrate these results into fuller rule of reason analysis. And, the current approach is superior to other ways forward suggested in legal scholarship and experimented with in a minority of circuit courts, which are poorly calibrated to considering the range of ways that platforms enable efficiencies in the markets where they compete.

³²⁷ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (describing a procompetitive justification as “some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. . . .”) (citations omitted).

³²⁸ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 102–03, 113–14, 117 (1984).

One improvement suggested by this Note is for courts to provide greater clarity when assessing procompetitive justifications regarding what criteria they are using to determine whether to credit a given efficiency. Courts can do so through applying the definition for “procompetitive justification” developed in *Microsoft* as a series of steps for review: (1) assess if a procompetitive justification is cognizable, i.e., if it implicates an efficiency improvement; (2) determine if it is substantiated in fact; and (3) assess whether there is a less restrictive alternative to achieving the same result, should the plaintiff assert that there is one.³²⁹ Courts that more strictly follow a series of steps like those above would help businesses and legal practitioners to understand if an asserted justification failed for not being cognizable, not being supported by record evidence, or not being sought out through the least restrictive means. Thus, cases could be more instructive to those in the field regarding what type of conduct will be recognized as efficiency improving and what evidence is helpful to substantiate a claim. Cases might also be more instructive for reflecting what types of alternatives a party might need to undertake before imposing a restraint with certain deleterious effects to competition.

³²⁹ United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).