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## Jon Snow Lives! Glenn Dies! When Revealing Plot Twists Constitutes Copyright Infringement

Joel Timmer

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# Jon Snow Lives! Glenn Dies! When Revealing Plot Twists Constitutes Copyright Infringement

Joel Timmer\*

## ABSTRACT

*TV shows frequently rely on plot twists and cliff-hangers to keep viewers engaged and tuned-in for the next episode. To try to keep these plot twists secret, networks and program producers take steps to prevent people from revealing them before the episodes air. Recently, HBO and AMC, the networks that air Game of Thrones and The Walking Dead, respectively, have alleged that these so-called spoilers constitute copyright infringement. However, it does not appear that courts have considered whether posting such spoilers does, in fact, constitute infringement. This Article thus examines that question, which requires considering whether such spoilers constitute fair use of the copyrighted works, a defense to copyright infringement. This Article concludes that the revelation of plot twists before an episode airs by one with advance knowledge of the episode's event likely constitutes copyright infringement. Significant here is the fact that the copyrighted works are not yet published, which weighs in the copyright holder's favor when analyzing whether the spoilers constitute fair use. This provides copyright holders with a potential weapon to use against people who publish spoilers.*

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#### I. INTRODUCTION: PLOT TWISTS AND SPOILERS

TV show writers and producers frequently rely on plot twists and cliff-hangers to keep viewers engaged and tuned-in to the next episode.<sup>1</sup> These plot points can produce significant public discussion and speculation about the TV shows, with some viewers seeking to find out these plot twists in advance of a show's release in order

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1. See, e.g., Kristy Pirone, *18 Most Shocking TV Plot Twists Ever*, WHISP (Dec. 3, 2018), <https://thewhispmommyish.com/entertainment/tv/shocking-tv-plot-twists/1/> [https://perma.cc/LQ5L-3WRH].

to share them with the public.<sup>2</sup> These revelations are commonly, and appropriately, called “spoilers.” A “spoiler” is defined by Merriam-Webster as “information about the plot of a motion picture or TV program that can spoil a viewer’s sense of surprise or suspense,” as well as “a person who discloses such information.”<sup>3</sup> For purposes of this Article, spoilers are distinguished from guesses or predictions about upcoming details of a TV show’s plot, in that a spoiler is based on accurate knowledge of upcoming plot details. Such knowledge might be obtained from a leaked script or screener or from a third party with such knowledge.<sup>4</sup> Also, for the sake of clarity, the term “spoilers” is used to refer to those who reveal information about plot twists and story developments in upcoming episodes of TV programs, not to the actual plot twists themselves.

With the rise of the internet and social media, it has become increasingly difficult to keep plot twists from being made public, as anyone can share information with the world instantly with the press of a button.<sup>5</sup> Notably, TV viewers feel differently about learning about plot twists in advance of a show’s airing. Some relish finding out this information in advance, while others will go to great lengths to avoid it.<sup>6</sup> Furthermore, since audience interest in a program can be dependent on learning the next big plot twist, the revelation of this information can hurt program ratings.<sup>7</sup>

TV networks and producers go to great lengths to keep plot twists from being made public.<sup>8</sup> The first major television cliff-hanger, from the TV series *Dallas*, involved the character J.R. Ewing, an unscrupulous oilman who would cross family or foe if necessary for him

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2. See, e.g., *infra* notes 29 and accompanying text.

3. *Spoiler*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/spoiler> [<https://perma.cc/SQ2D-LSV5>] (last visited Feb. 2, 2020).

4. See, e.g., Aja Romano, *Walking Dead and Game of Thrones Fans Say Networks Are Threatening to Sue Because They’re Too Good at Predicting the Show*, VOX (June 17, 2016, 12:00 PM), <https://www.vox.com/2016/6/17/11934146/amc-bans-spoilers-walking-dead-game-of-thrones> [<https://perma.cc/Q252-87HL>]. In a student-written Note, Aislinn M. Koch labels these “predictive spoilers.” Aislinn M. Koch, Note, *Spoiler Alert!: How Posting Predictive Spoilers About Television Shows on the Internet Is Copyright Infringement*, 42 SETON HALL LEGIS. J. 457, 460 (2018).

5. See, e.g., Doug Gross, *Spoiler Alert! Negotiating Social Media in the DVR Age*, CNN BUS. (Feb. 25, 2014, 5:43 PM), <https://www.cnn.com/2014/02/25/tech/social-media/spoilers-social-media/index.html> [<https://perma.cc/K4DV-FBVT>].

6. See, e.g., Romano, *supra* note 4.

7. See, e.g., Matthew Belloni, *‘The Bachelor’ Lawsuit Challenges the Legality of Spoilers*, HOLLYWOOD REP. (Dec. 16, 2011, 4:21 PM), <https://www.hollywoodreporter.com/thr-esq/bachelor-lawsuit-reality-steve-274788> [<https://perma.cc/AG6R-CZ4A>].

8. See, e.g., Chris Mandle, *Spoiler Alert! How TV and Film Are Trying to Protect Their Blockbusters*, GUARDIAN (Apr. 9, 2019, 12:41 PM), <https://www.theguardian.com/tv-and-radio/2019/apr/09/spoiler-alert-tv-and-film-protect-their-blockbusters> [<https://perma.cc/8ENS-SLJY>].

to get his way.<sup>9</sup> In the 1980 season 3 finale, he was shot by an unknown assailant. With no shortage of suspects—six characters threatened J.R.'s life in the episode<sup>10</sup>—speculation about who shot J.R. grew into a media frenzy.<sup>11</sup> To help keep the shooter's identity secret, the show's producers shot multiple endings, each featuring a different character pulling the trigger.<sup>12</sup> Even the cast had to wait until the episode aired to learn who had pulled the trigger,<sup>13</sup> including the actress who played the shooter.<sup>14</sup> When the episode that revealed the shooter aired, it set records, drawing the largest audience ever to that point for a television show.<sup>15</sup> Today, it remains the second-most watched TV series episode in the United States.<sup>16</sup>

More recently, HBO went to great lengths to keep major plot points from its hit series *Game of Thrones* from being made public. The fantasy series, set in a quasi-medieval world, features sprawling storylines and a large cast of characters, with political power ploys, backstabbing, magic, murder, and even dragons.<sup>17</sup> To help keep plot twists from becoming public, the network discontinued its previous practice of providing preview screeners to TV critics and others. Producers also tried to conceal the resurrection of popular character Jon Snow in season 6, who had been killed at the end of season 5, by forbidding anyone from saying the character's name on set and using a

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9. See Jaime J. Weinman, *Why We Still Care Who Shot J.R.*, MACLEAN'S, Dec. 15, 2008, at 35.

10. See Richard Corliss, *Commentary: The 'Dallas' Shot that Was Heard Round the World*, L.A. TIMES (Nov. 23, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-11-23-ca-5345-story.html> [<https://perma.cc/4HEA-ZBMY>].

11. See Katie Couric, *'Who Shot J.R.?' - 30 Years Later*, CBS NEWS (Nov. 19, 2010, 7:05 PM), <https://www.cbsnews.com/news/who-shot-jr-30-years-later/> [<https://perma.cc/5H87-SLKM>]; David Sims, *From Dallas to Spoiler Alerts, the Rise and Fall of the Cliffhanger*, ATLANTIC (Mar. 20, 2015), <https://www.theatlantic.com/entertainment/archive/2015/03/the-decline-of-the-cliffhanger/388255/> [<https://perma.cc/5JSR-URZC>].

12. Lynette Rice, *A Look Back at Dallas and TV's Most Memorable Cliffhanger*, ENT. WKLY. (May 31, 2019, 6:06 PM), <https://ew.com/tv/2019/05/31/dallas-who-shot-jr-cliffhanger/> [<https://perma.cc/YUR4-BQE9>].

13. MeTV Staff, *'Who Shot J.R.?' by the Numbers*, METV (Nov. 21, 2016, 4:18 PM), <https://www.metv.com/lists/who-shot-jr-by-the-numbers> [<https://perma.cc/U9VJ-6CLF>].

14. *Who Shot J.R.? She Did. On 'Dallas.' 35 Years Ago*, L.A. DAILY NEWS (Aug. 28, 2017, 6:35 AM), <https://www.dailynews.com/2015/11/18/who-shot-jr-she-did-on-dallas-35-years-ago/> [<https://perma.cc/QV2Y-BFK6>].

15. See Couric, *supra* note 11.

16. Ed Martin, *Who Shot J.R.? Remains the Best TV Cliffhanger Ever*, HUFFPOST (May 25, 2011), [https://www.huffpost.com/entry/who-shot-jr-remains-the-b\\_b\\_786843](https://www.huffpost.com/entry/who-shot-jr-remains-the-b_b_786843) [<https://perma.cc/WU78-HTQW>].

17. Sarah Hughes, *'Sopranos Meets Middle-Earth': How Game of Thrones Took Over Our World*, GUARDIAN (Mar. 22, 2014, 11:45 AM), <https://www.theguardian.com/tv-and-radio/2014/mar/22/game-of-thrones-whats-not-to-love> [<https://perma.cc/7SJ3-V6H8>].

code to refer to the character in scripts.<sup>18</sup> Efforts were ramped up even more for *Game of Thrones*' final season:

The scripts were all double-password protected on iPads and other electronic devices rather than printed on paper. Scene breakdowns used code names for each character. Every member of the cast and crew was strictly prohibited from taking photos on the set (aside from official photographers). Whenever possible, the show filmed in government-protected airspace behind a distant, closely guarded perimeter, and tracked down, then blocked, any vantage points used by photographers to get a glimpse of filming.<sup>19</sup>

As an additional method of ensuring that those involved in the production of shows do not post plot points in advance of a show's airing, many shows, particularly reality shows, include confidentiality provisions in their contracts, which often provide for large financial penalties should a person reveal details about a show before it airs.<sup>20</sup> The provisions can apply to contestants, crew members, and others who are involved with a show.<sup>21</sup> For example, confidentiality provisions in contracts for *Survivor*, *The Bachelor*, and *The Bachelorette* all provide for a \$5 million fine, while those for *The Amazing Race* impose a \$10 million penalty.<sup>22</sup> These large financial penalties can deter those involved with a TV series from revealing plot twists and provide networks with a remedy against anyone involved with a show who does so, assuming the source of the leak can be identified. But what about those people who are not involved in a show's production, those with whom producers have no contractual relationship? What can networks do to prevent those third parties from posting upcoming plot twists? And what remedies do networks and producers have against those who make a show's secret plot twists public?

In recent years, some networks have turned to copyright law, threatening spoilers with actions for copyright infringement. This Article examines whether a spoiler—here defined as an individual with advance knowledge of a show's plot who makes an episode's plot twists public before the episode airs—has violated copyright law. If so, the threat of litigation could provide networks with an additional means to

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18. Michelle Jaworski, *Do These 'Game of Thrones' Spoiler Videos Violate DMCA?*, DAILY DOT (Feb. 24, 2017, 7:39 PM), <https://www.dailydot.com/parsec/game-of-thrones-spoilers-jose-senaris-frikidoctor-hbo-dmca-youtube/> [<https://perma.cc/WH29-2RP7>].

19. James Hibberd, *The Spoils of Thrones*, ENT. WKLY., May 31, 2019, at 28 ("And yet, as season 8 began to air, accurate spoilers popped up online.").

20. Katie Hopkins, *Unique Legal Considerations in Reality Television*, 13 PITT. J. TECH. L. & POL'Y 1, 15 (2012).

21. Andy Dehnart, *How Do Reality Shows protect [sic] Their Secrets?*, TODAY (Feb. 28, 2005, 2:11 PM), <https://www.today.com/popculture/how-do-reality-showsprotect-their-secrets-wbna7046582> [<https://perma.cc/S9PZ-H2ZH>].

22. *Id.*; Hopkins, *supra* note 20.

deter spoilers from revealing plot twists, as well as the ability to recoup lost revenue in the form of damages from these spoilers.<sup>23</sup>

A spoiler sued for copyright infringement in these circumstances would likely try to defend itself by claiming fair use, which allows for limited use of copyrighted works without the copyright holder's authorization. To analyze a claim of fair use, courts typically consider and analyze four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>24</sup>

A number of commentators have observed that networks suing spoilers for copyright infringement have some likelihood of success because the plot twists they make public often involve “the heart of the work,”<sup>25</sup> which is part of the analysis under the “substantiality” component of the third fair use factor. It refers to the most important or significant portion of a copyrighted work.<sup>26</sup> While it is true that this fair use component weighs strongly against the revelation of such plot twists being considered fair uses,<sup>27</sup> the fact that the works are unpublished is particularly significant here since this generally leads to a weighing of all four of the fair use factors more favorable to the copyright holder.<sup>28</sup>

Part II of this Article describes instances in which HBO and AMC threatened copyright infringement actions against spoilers who, based on accurate information, made, or threatened to make, revelations of upcoming events in *Game of Thrones* and *The Walking Dead*. Part III examines whether the networks in cases like these could make a prima facie case of copyright infringement. As this seems likely, Part IV examines whether the revelations could qualify as fair uses by analyzing the likely application of the fair use factors. Part V applies the prima facie case requirements and fair use factors to the *Game of*

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23. 17 U.S.C. § 504 (2018).

24. 17 U.S.C. § 107 (2018).

25. See, e.g., Jennifer Williams-Alvarez, *Is HBO Censoring 'Game of Thrones' Spoiler?*, CORP. COUNS. (May 10, 2016), <https://www.law.com/corpcounsel/almID/1202757342443/is-hbo-censoring-game-of-thrones-spoiler/> [<https://perma.cc/ZWH8-LSDX>]; Dustin Rowles, *Is It Illegal to Post 'The Walking Dead' Spoilers on the Internet?*, UPROXX (June 17, 2016), <https://uproxx.com/tv/amc-walking-dead-spoilers-lawsuit/> [<https://perma.cc/TPBN-6XL6>].

26. Harper & Row Publishers, Inc. v. Nation Enter.'s, 471 U.S. 539, 565 (1985).

27. See *infra* notes 257–64 and accompanying text.

28. See *infra* notes 276 and accompanying text.

*Thrones* and *The Walking Dead* spoilers. Part VI concludes that posting these plot twists is not likely to be considered a fair use and could thus constitute copyright infringement, providing networks with a legal means to deter and potentially recover damages from spoilers.

## II. THE *GAME OF THRONES* AND *THE WALKING DEAD* SPOILERS

Dr. Jose Senaris, also known as the “Spanish Spoiler,” began posting YouTube videos in early 2016 in which he revealed plot points for upcoming episodes of season 6 of the HBO show *Game of Thrones*.<sup>29</sup> *Game of Thrones* was a hit series for HBO, becoming its most watched series<sup>30</sup> and setting the record for most Emmy wins for a fictional series.<sup>31</sup> Season 5 of the series ended with the death of popular character Jon Snow,<sup>32</sup> in an episode viewed live by over eight million viewers, the show’s largest audience to date.<sup>33</sup> There was a great deal of discussion by fans leading up to the start of season 6 over the possibility of Jon Snow being brought back to life,<sup>34</sup> a topic Senaris addressed in his videos.

Although Senaris initially claimed only to be guessing at upcoming events, it became clear that he had an inside source, as his “guesses” suspiciously contained several details of the events of upcoming episodes that turned out to be correct.<sup>35</sup> Senaris correctly revealed that Jon Snow would be brought back to life in “Home,” the second episode of season 6, as well as other crucial events from that episode.<sup>36</sup> In May of 2016, Senaris admitted to receiving these details

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29. Romano, *supra* note 4.

30. See Tony Maglio & Jennifer Maas, *Inside the Mountain-Size ‘Game of Thrones’ Ratings Growth from Seasons 1-7*, WRAP (Apr. 12, 2019, 6:53 PM), <https://www.thewrap.com/game-of-thrones-ratings-viewers-growth-hbo-got-season-8/> [https://perma.cc/38AV-W6HJ].

31. See Chelsey Sanchez, *Every Emmy Award Game of Thrones Has Ever Won*, HARPER’S BAZAAR (Sept. 22, 2019), <https://www.harpersbazaar.com/culture/film-tv/a29068578/game-of-thrones-emmys-total-wins/> [https://perma.cc/73G4-BB4F].

32. Rebecca Hawkes, *It’s Official: Jon Snow Is Definitely Alive in Game of Thrones Season 6*, TELEGRAPH (Nov. 23, 2015, 4:55 PM), <https://www.telegraph.co.uk/culture/tvandradio/game-of-thrones/12012456/jon-snow-season-6.html> [https://perma.cc/XZ5B-AUQC].

33. Dan Selcke, *“Mother’s Mercy” Was the Highest Rated Game of Thrones Episode of All Time*, FANSIDED (2015), <https://winteriscoming.net/2015/06/16/mothers-mercy-was-the-highest-rated-game-of-thrones-episode-of-all-time/> [https://perma.cc/BFV2-JEWC].

34. See Kim Renfro, *Why ‘Game of Thrones’ Viewers Shouldn’t Be Bummed About the Big Jon Snow Reveal*, BUS. INSIDER (Apr. 25, 2016, 8:37 AM), <https://www.businessinsider.com/game-of-thrones-jon-snow-resurrection-theory-2016-4> [https://perma.cc/N4AY-H22U].

35. Romano, *supra* note 4.

36. Jaworski, *supra* note 18 (those events were “the Stark introduction in Bran’s vision, Ramsay’s cruel murders, and [that] Tyrion wouldn’t have anything to worry about from Rhaegal and Viserion”).



by email from an unidentified source.<sup>37</sup> Two days later, using the notice-and-takedown provision of the Digital Millennium Copyright Act (DCMA),<sup>38</sup> HBO sent YouTube a notice that Senaris's videos were infringing on HBO's copyright by providing the unreleased plot twists, even though his videos did not include any footage from the show. The videos merely depicted Senaris in costume discussing spoilers from an upcoming episode of the show.<sup>39</sup> YouTube removed the videos but reposted them a few days later after Senaris provided YouTube with a counternotice claiming the videos had been wrongly removed.<sup>40</sup> Nevertheless, since that time, Senaris has insisted that he would only use publicly available information to make his predictions.<sup>41</sup>

Similarly, The Spoiling Dead Fans, a website for fans of *The Walking Dead*, faced similar action from AMC, the network that airs that show. *The Walking Dead* takes place during a zombie apocalypse, in which a handful of survivors struggle to find food and shelter while avoiding hordes of zombies who seek to kill them and turn them into zombies as well.<sup>42</sup> The show has been immensely popular with viewers. In season 3, the show drew more viewers in the 18–49 demographic than any other on television that season, beating other hit shows such as *The Voice*, *Modern Family*, and *The Big Bang Theory*.<sup>43</sup> Its season 5 premiere drew over seventeen million viewers, making it the most watched show in cable television history.<sup>44</sup>

In 2016, prior to the start of season 7, AMC issued a cease-and-desist order to the Spoiling Dead Fans site, threatening legal action should the site reveal the so-called “Lucille Victim.”<sup>45</sup> “Lucille” is a wooden baseball bat wrapped in barbed wire owned by Negan, one of the show's villains. In the season 6 finale, Negan and his followers, the “Saviors,” capture series hero Rick Grimes and a group of his fellow

37. Romano, *supra* note 4.

38. *Id.*; see 17 U.S.C. § 512(c) (2018) (outlining basic requirements for takedown notice).

39. Romano, *supra* note 4.

40. Williams-Alvarez, *supra* note 25.

41. Romano, *supra* note 4.

42. *The Walking Dead: Plot*, IMDB, [https://www.imdb.com/title/tt1520211/plotsummary?ref\\_=tt\\_stryp\\_synopsis](https://www.imdb.com/title/tt1520211/plotsummary?ref_=tt_stryp_synopsis) [https://perma.cc/VMN2-UW6H] (last visited Feb. 2, 2020).

43. *The Walking Dead Is First Cable Series to Beat Every Show of Fall Broadcast Season in Adult 18-49 Rating*, AMC (2012), <https://www.amc.com/shows/the-walking-dead/talk/2012/12/the-walking-dead-season-3-ratings> [https://perma.cc/MU8Z-4CQ5].

44. Allen St. John, ‘*The Walking Dead*’ Season 5 Premiere Breaks Ratings Record as the Most Watched Cable Show of All Time, FORBES (Oct. 13, 2014, 05:09 PM), <https://www.forbes.com/sites/allenstjohn/2014/10/13/the-walking-dead-season-5-premiere-breaks-ratings-record-as-the-most-watched-cable-show-of-all-time/#452142386472> [https://perma.cc/LAJ4-M8KF].

45. Romano, *supra* note 4.

survivors, who have killed several of Negan's Savivors. Negan forces the group to kneel in a circle before him to face his wrath, then points Lucille at several members of Rick's group, before picking a victim and smashing Lucille down onto his or her head several times.<sup>46</sup> Watched by over fourteen million viewers,<sup>47</sup> the episode—and season 6—ends without revealing Lucille's victim. Viewers would have to wait until the subsequent season's premiere to learn the victim's identity.<sup>48</sup> The victim turned out to be the longtime character Glenn.<sup>49</sup>

In its cease-and-desist letter, AMC asserted that The Spoiling Dead made a post on its site claiming to have confidential information about the identity of the Lucille victim, which the site allegedly promised to reveal publicly prior to the airing of season 7's premiere.<sup>50</sup> In arguing that this information was protected by copyright, AMC characterized it as "the most critical plot information in the unreleased next season of *The Walking Dead*," and claimed that its revelation would "greatly damage" the network.<sup>51</sup> AMC also claimed that the release of "crucial plot elements" such as this have been found to constitute copyright infringement.<sup>52</sup> The network threatened to file a lawsuit against the site to obtain damages and injunctive relief if the website did not comply with its demands.<sup>53</sup> In a subsequent post on The Spoiling Dead Fan's Facebook page, the site backed down, stating that it would not be posting the identity of Lucille's victim on any of its outlets.<sup>54</sup>

Both HBO and AMC seem to have succeeded in preventing any further upcoming plot twists from being revealed by those they threatened with legal action. However, what if those threats had not been successful, and Senaris and The Spoiling Dead Fans continued to

46. *Lucille (Weapon)*, FANDOM, [https://walkingdead.fandom.com/wiki/Lucille\\_\(Weapon\)](https://walkingdead.fandom.com/wiki/Lucille_(Weapon)) [<https://perma.cc/2RXC-9S5P>] (last visited July 21, 2019).

47. See Dominic Patten, *'The Walking Dead' Ratings Down from 2015 Finale*, DEADLINE (Apr. 5, 2016 7:26 AM), <https://deadline.com/2016/04/the-walking-dead-ratings-season-6-finale-down-amc-1201732195/> [<https://perma.cc/5FB6-WLT6>].

48. See Romano, *supra* note 4.

49. See *Lucille (Weapon)*, *supra* note 46.

50. The Spoiling Dead Fans, FACEBOOK (June 12, 2016), <https://www.facebook.com/SpoilingDeadFans/posts/657869551034853> [<https://perma.cc/R8EF-V2GG>].

51. Andy, *AMC Threatens Copyright Lawsuit over Walking Dead Spoiler*, TORRENTFREAK (June 14, 2016), <https://torrentfreak.com/amc-threatens-copyright-lawsuit-over-walking-dead-spoiler-160614/> [<https://perma.cc/BMS2-PWPP>]; see Letter from Dennis L. Wilson, Attorney, Kilpatrick Townsend & Stockton LLP, to The Spoiling Dead Fans site (June 7, 2016), available at <https://www.documentcloud.org/documents/2860902-SpoilingDeadDemandLetter.html> [<https://perma.cc/5HRK-CZ79>].

52. Andy, *supra* note 51.

53. *Id.*

54. The Spoiling Dead Fans, *supra* note 50.

post story details from upcoming *Game of Thrones* and *The Walking Dead* episodes? Could the networks have succeeded if they pursued copyright infringement actions against the spoilers making these details public? That is the focus of the remainder of this Article.

### III. PRIMA FACIE CASE OF COPYRIGHT INFRINGEMENT

The US Constitution gives authors copyright protection,<sup>55</sup> in part to incentivize them to create expressive works by allowing them to profit from what they have created.<sup>56</sup> Copyright gives the author or creator of an expressive work exclusive rights in the work, including the right to copy, distribute, adapt, and perform the work.<sup>57</sup> In essence, the copyright holder is given the right to control the work the rights holder created. However, copyright protection is not unlimited. Copyright protection does not extend to the facts or ideas contained in a work but only to an author's original expression of those facts or ideas.<sup>58</sup> The Copyright Act also authorizes others to make "fair use" of a copyrighted work without the copyright holder's authorization,<sup>59</sup> and the duration of copyright protection is also limited.<sup>60</sup>

To make a prima facie case of copyright infringement, the plaintiff–copyright holder must prove (A) it owns a valid copyright in the work, and (B) the defendant copied original elements of the work.<sup>61</sup> Copying by the defendant may be shown by direct evidence or, alternatively, by showing (1) that the defendant had access to the plaintiff's work, and (2) substantial similarity between the two works.<sup>62</sup> The substantial similarity requirement is to determine whether the defendant's copying of the plaintiff's work is sufficient to be legally actionable.<sup>63</sup>

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55. U.S. CONST. art. I, § 8.

56. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward.").

57. 17 U.S.C. § 106 (2018).

58. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (citing 17 U.S.C. § 102 (2018)).

59. *Id.* (citing 17 U.S.C. § 107).

60. See, e.g., 17 U.S.C. § 302 (2018).

61. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361–62 (1991).

62. *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993) (citing *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977)).

63. *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 370 (5th Cir. 2004) (citing *Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340 n.4 (5th Cir. 1994); 4 NIMMER ON COPYRIGHT § 13.01(B) (2004)).

*A. First Element of a Prima Facie Case:  
Ownership of a Valid Copyright*

Because an author has copyright protection in a work from the time of its creation,<sup>64</sup> registration of a work with the government is not necessary for a work to be protected. Nevertheless, there are benefits associated with registering a work, particularly if the copyright holder intends to pursue an action for infringement.<sup>65</sup> For example, registering a work with the US Copyright Office and obtaining a certificate of registration<sup>66</sup> constitutes a prima facie claim of a valid copyright.<sup>67</sup> For an episode of a TV series, either the script for the episode, the episode itself, or both may be registered.<sup>68</sup> Registering a work with the US Copyright Office is neither difficult nor expensive, so it should not present an obstacle for copyright holders.<sup>69</sup> Having established ownership of a valid copyright in the work, the plaintiff must next establish that the alleged infringer copied original elements of that work such that the two works are substantially similar, considered next.

*B. Second Element of a Prima Facie Case:  
Actionable Copying of the Work*

Once a plaintiff establishes ownership of a valid copyright, the plaintiff must then establish that the alleged infringer copied original

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64. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546–47 (1985) (citing 17 U.S.C. § 106).

65. See U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS 1, 4–5 (2017), <https://www.copyright.gov/circs/circ01.pdf> [<https://perma.cc/8JF7-6AXQ>].

66. 17 U.S.C. §§ 408–10 (2018).

67. 17 U.S.C. § 410(c) (2018).

68. See U.S. COPYRIGHT OFFICE, PERFORMING ARTS, <https://www.copyright.gov/registration/performing-arts/index.html> [<https://perma.cc/Y474-C4K5>]. As long as there aren't more than slight variations in the protected expression between the script and episode, the two may be treated as the functional equivalent of each other where only one is registered. See *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1371 (2d Cir. 1993) (holding the “disposition of the copyright issues is ultimately unaffected whether [plaintiffs] registrations apply to the teleplays, to the televised episodes, or, as alleged for the first episode, to both the teleplay and the televised episode”).

69. See U.S. COPYRIGHT OFFICE, CIRCULAR 2: REGISTRATION OF COPYRIGHT 1–3 (2017), <https://www.copyright.gov/circs/circ02.pdf> [<https://perma.cc/5QR4-V9N3>]; see U.S. COPYRIGHT OFFICE, CIRCULAR 2: COPYRIGHT OFFICE FEES 7–8 (2017), <https://www.copyright.gov/circs/circ04.pdf> [<https://perma.cc/UR7L-JYDH>]; U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS 5 (2017), <https://www.copyright.gov/circs/circ01.pdf> [<https://perma.cc/8JF7-6AXQ>].

expression in that work.<sup>70</sup> If direct evidence of copying is unavailable, copying may be inferred if the plaintiff can show that (1) the defendant had “access to the copyrighted work prior to creation of the infringing work,” and (2) the works have “substantial similarity.”<sup>71</sup> “Access” requires that the defendant had “an opportunity to view or copy the plaintiff’s work.”<sup>72</sup> Significantly, evidence that both the plaintiff and defendant were dealing with a third party that had access to the plaintiff’s work can be used to establish that the defendant had access to the work as well.<sup>73</sup> Copying may also be established without proving access if the plaintiff’s and defendant’s works are “so strikingly similar” as to preclude the possibility that the defendant’s work was independently created.<sup>74</sup> Once the copyright holder establishes a presumption of copying circumstantially, the defendant may rebut that presumption by proving that he did, in fact, independently create the work.<sup>75</sup>

Direct evidence of copying or access to inside information is crucial when litigating the propriety of spoilers. If someone figures out a significant plot point by examining clues from previous episodes of a series or accurately guesses a major plot point, there is no infringement because there has been no copying. This is a mere “prediction,” not a spoiler. A prediction is independently created, so the one making the prediction is not liable for infringement. However, one who gains access to a script or a copy of an episode, or obtains inside information about a script or an episode from a third party and reveals a significant plot point about that episode prior to its release has copied.<sup>76</sup> Establishing access is particularly important when only a single plot detail was made public. The fewer details that are posted, the more conceivable that the plot twist was not copied but predicted. The more of the episode’s events that are revealed, however, the less crucial it is to establish access, as it is much less likely that the person posting was so lucky.<sup>77</sup>

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70. *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 367 (5th Cir. 2004).

71. *Id.*

72. *Sid & Marty Krofft Television Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977).

73. *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981) (citing 3 NIMMER ON COPYRIGHT § 13.02(A) (1981)).

74. *Gen. Universal Sys. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004) (citing *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001)).

75. *Positive Black Talk*, 394 F.3d at 368 (citing *Peel & Co.*, 238 F.3d at 398; *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1375 (5th Cir. 1981)).

76. *See supra* notes 70–74 and accompanying text.

77. *See Gen. Universal Sys.*, 379 F.3d at 142 (citing *Peel & Co.*, 238 F.3d at 394).

Having shown that the defendant had access to the copyrighted work, the plaintiff then must prove that the two works are “substantially similar.”<sup>78</sup> This requires the copyright holder to show that the “copying amounts to an improper or unlawful appropriation”<sup>79</sup> by showing that the two works are quantitatively and qualitatively similar enough to support a finding that infringement has occurred.<sup>80</sup> The qualitative component focuses on the similarity of the expression, rather than the ideas or facts contained in a work, which are not protected by copyright.<sup>81</sup> The quantitative component focuses on the amount of the copyrighted work that was copied.<sup>82</sup> The purpose of the substantial similarity requirement is to determine whether this copying rises to the level of being legally actionable.<sup>83</sup> An example of this determination is provided by *Paramount Pictures v. Carol Publishing*.<sup>84</sup> At issue was the book *The Joy of Trek*, published by the defendants without authorization by *Star Trek* copyright holder, Paramount. Intended to explain *Star Trek* and its popularity to the “non-Trekker,” part of the book contained a guide to the various *Star Trek* TV series and movies (the “*Star Trek* Properties”), with brief descriptions of the plots and storylines from several of the *Star Trek* Properties.<sup>85</sup> The court found that the book took these plot lines “directly from the *Star Trek* Properties, and that ‘[a] reasonable person would easily recognize these aspects of the book as having been appropriated from the copyrighted properties.’”<sup>86</sup> Finding substantial similarity between the two,<sup>87</sup> the court observed that the defendant had simply described “the fictitious history of *Star Trek*.” This led the court to conclude that “a

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78. *Positive Black Talk*, 394 F.3d at 367–68 (citing *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 577 (5th Cir. 2003)).

79. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (citing *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992) (quotation marks and citations omitted)).

80. *Positive Black Talk*, 394 F.3d at 370 (citing *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340 n.4 (5th Cir. 1994); 4 NIMMER ON COPYRIGHT § 13.01(B) (2004)).

81. *Castle Rock*, 150 F.3d at 138 (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997)).

82. *Id.* (citing *Ringgold*, 126 F.3d at 75). Similar findings of substantial similarity were made in an infringement action against an unauthorized reference guide to the *Harry Potter* book series, which presented entries describing “the persons, places, spells, and creatures from the *Harry Potter* works” organized in an A-to-Z format. See *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 522 (S.D.N.Y. 2008).

83. *Positive Black Talk*, 394 F.3d at 370 (citing *Eng’g Dynamics*, 26 F.3d at 1340 n.4).

84. *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 11 F. Supp. 2d 329, 333 (S.D.N.Y. 1998).

85. *Id.* at 332. Devoted *Star Trek* fans are referred to as “Trekkers.” *Id.* at 331.

86. *Id.* at 333.

87. *Id.*

book which tells the story of a copyrighted television series infringes on its copyright.”<sup>88</sup>

Substantial similarity was also found in a case involving a book that tested the reader’s knowledge of details about a TV series but did not summarize episodes of the series. That case, *Castle Rock Entertainment v. Carol Publishing Group*,<sup>89</sup> dealt with *The Seinfeld Aptitude Test* (“*The SAT*”), a trivia quiz book devoted to testing the reader’s knowledge of scenes and events from the TV series *Seinfeld*.<sup>90</sup> Because “every question and correct answer has as its source a fictional moment in a *Seinfeld* episode,”<sup>91</sup> the court concluded:

Unlike the facts in a phone book, which “do not owe their origin to an act of authorship,” each “fact” tested by *The SAT* is in reality fictitious expression created by *Seinfeld*’s authors. *The SAT* does not quiz such true facts as the identity of the actors in *Seinfeld*, the number of days it takes to shoot an episode, the biographies of the actors, the location of the *Seinfeld* set, etc. Rather, *The SAT* tests whether the reader knows that the character Jerry places a Pez dispenser on Elaine’s leg during a piano recital, that Kramer enjoys going to the airport because he’s hypnotized by the baggage carousels, and that Jerry, opining on how to identify a virgin, said “It’s not like spotting a toupee.” Because these characters and events spring from the imagination of *Seinfeld*’s authors, *The SAT* plainly copies copyrightable, creative expression.<sup>92</sup>

Determinations of substantial similarity involve both a qualitative and quantitative component. The qualitative standard was satisfied by *The SAT*, as all of the “facts” tested by the book’s trivia questions consisted of “fictitious expression created by *Seinfeld*’s authors.”<sup>93</sup> The quantitative standard was easily satisfied in this case, as all of the book’s questions were based on fictional details from the series.<sup>94</sup>

After the plaintiff has established a prima facie case of copyright infringement, the defendant has the opportunity to defend its use of the copyrighted work by establishing that the use qualifies as a fair use.

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88. *Id.* at 334. A similar case involved a book about the *Twin Peaks* television series. In that case, the court found that “[c]hapter 3 of the Book is essentially a detailed recounting of the first eight episodes of the series. Every intricate plot twist and element of character development appear in the Book in the same sequence as in the teleplays,” leading the court to find the two substantially similar. *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1372–73 (2d Cir. 1993).

89. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 132 (2d Cir. 1998).

90. *Id.* at 135.

91. *Id.* at 136.

92. *Id.* at 139 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991)) (discussing the distinction between discovered facts, which do not “owe their origin to an act of authorship” and therefore are not protected by copyright, and created facts, which constitute original, protected expression).

93. *Castle Rock*, 150 F.3d at 138.

94. *Id.* at 138–39.

Fair use, and the factors used to determine whether the unauthorized use of a copyrighted work qualifies as a fair use, is considered next.

#### IV. POTENTIAL DEFENSE TO COPYRIGHT INFRINGEMENT: FAIR USE

Fair use allows individuals to make limited use of copyrighted works without permission from the copyright holder.<sup>95</sup> Typical purposes of fair uses include “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>96</sup> These examples are meant to provide a guide to the types of uses of copyrighted works generally considered to be fair uses, rather than an exhaustive list of such uses.<sup>97</sup>

Courts consider four factors when determining whether a particular use of a copyrighted work constitutes a fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>98</sup>

These factors are to be analyzed on a case-by-case basis, with all factors to be considered and weighed together before coming to a fair use determination.<sup>99</sup> Each of these factors and their application to spoilers revealing upcoming plot twists are considered below.

##### *A. First Factor: Purpose and Character*

Courts examine three indicia under the first factor, “the purpose and character of the use.” One is whether the use is “transformative.” A transformative use is one that adds something new to the original to make a new work, rather than simply copying it.<sup>100</sup> Second, courts

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95. See 17 U.S.C. § 107.

96. *Id.*

97. *Castle Rock*, 150 F.3d at 141 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1985)).

98. 17 U.S.C. § 107.

99. *Campbell*, 510 U.S. at 577–78 (citing Pierre N. Leval, *Commentaries: Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110–11 (1990); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L. J. 667, 685–87 (1992)).

100. *Id.* at 579 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (Cir. Ct. D. Mass. 1841); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); Leval, *supra* note 99, at 1111).



consider the good faith, or lack thereof, of the one claiming fair use.<sup>101</sup> Third, courts consider whether the allegedly infringing use is commercial or nonprofit in nature.<sup>102</sup> Each of these indicia is considered in more detail below.

### 1. Transformative Uses

Courts are more likely to find fair use when a use “produces a value that benefits the broader public interest.”<sup>103</sup> Thus, oftentimes analysis of the first factor focuses on whether the new work is “transformative” and, if so, to what extent. A transformative use is one that adds something new to the original, “with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>104</sup> The significance of this factor stems from the fact that transformative works help further a goal of copyright, “to promote science and the arts.”<sup>105</sup> As a result, the more transformative a new work, the less significant other factors will be, such as the commercial nature of that use, which might weigh against a determination of fair use.<sup>106</sup>

A transformative use of the *Harry Potter* book series was found with regard to *The Lexicon*,<sup>107</sup> an encyclopedia that described people, creatures, places, and spells from the *Harry Potter* book series, arranged in alphabetical entries to allow users to quickly find information about the series.<sup>108</sup> In so holding, the court noted that that the likely purpose of *Harry Potter* author, J.K. Rowling, was to tell an entertaining story focusing on the character Harry Potter and the magical world he inhabited.<sup>109</sup> On the other hand, *The Lexicon* contained more than 2,400 entries, with fictional facts on those topics drawn from the seven books in the series.<sup>110</sup> Thus, *The Lexicon* gave “readers a complete picture of each item that cannot be gleaned by reading the voluminous series, since the material related to each item

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101. See *Harper & Row*, 471 U.S. at 562–63.

102. *Campbell*, 510 U.S. at 578 (citing 47 U.S.C. § 107(1)).

103. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008) (citing *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)).

104. *Campbell*, 510 U.S. at 579 (citing *Folsom*, 9 F. Cas. at 348; *Harper & Row*, 471 U.S. at 562; Leval, *supra* note 99, at 1111).

105. *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40, 478–80 (1994) (Blackmun, J., dissenting)).

106. *Id.* (Blackmun, J., dissenting)).

107. *Warner Bros.*, 575 F. Supp. 2d at 541.

108. *Id.* at 522.

109. *Id.* at 541.

110. *Id.*

is scattered over thousands of pages of complex narrative and plot.”<sup>111</sup> Since *The Lexicon* served as a reference, rather than for entertainment purposes, its use of the *Harry Potter* books was found to be transformative.<sup>112</sup>

On the other hand, the *Seinfeld* trivia book, *The SAT*, was found to have only a “slight to non-existent” transformative purpose.<sup>113</sup> The court acknowledged there was a “minimal” amount of creative work in creating trivia questions.<sup>114</sup> However, the book did not comment on or otherwise analyze *Seinfeld* but simply asked trivia questions instead.<sup>115</sup> Furthermore, the book used material from *Seinfeld* episodes “without substantial alteration.”<sup>116</sup> As such, the book’s purpose was “to repackage *Seinfeld* to entertain *Seinfeld* viewers,” which was not considered transformative.<sup>117</sup>

Transformative use was also lacking in *Twin Peaks Productions v. Publications International*,<sup>118</sup> which involved a book that provided detailed descriptions of the first eight episodes of the *Twin Peaks* TV series, including “[e]very intricate plot twist and element of character development” of those episodes.<sup>119</sup> The court noted that in order to provide useful commentary on a work, it must first be identified, and that works with a fair use purpose such as criticism, teaching, or news reporting typically give “a brief indication of the plot.”<sup>120</sup> Such a use may be transformative “if a plot was briefly described for purposes of adding significant criticism or comment about the author’s plotting technique.”<sup>121</sup> In this case, however, the defendant’s detailed plot summaries told readers the precise plot details of each *Twin Peaks* episode, going “far beyond merely identifying their basic outline for the transformative purposes of comment or criticism.”<sup>122</sup>

A use of a copyrighted work that serves a different purpose than the original work, such as *The Lexicon* acting as a reference guide to the

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111. *Id.* at 542.

112. *Id.* at 541 (citing *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003)) (stating that new works are described as transformative “when the works use copyrighted materials for purposes distinct from the purpose of the original material”).

113. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

114. *Id.* at 143.

115. *Id.*

116. *Id.*

117. *Id.* at 142.

118. *Twins Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

119. *Id.* at 1372–73.

120. *Id.* at 1375.

121. *Id.*

122. *Id.*

*Harry Potter* series, can be considered transformative.<sup>123</sup> Simply recounting story details of the original work, as with *The SAT* and the *Twin Peaks* book, which does not add anything to the original nor serve a different purpose than the original, is not a transformative use.<sup>124</sup> Based on the above, then, simply revealing details about the events of an upcoming episode of a TV series lacks a transformative purpose, weighing against a determination of fair use.

## 2. Good Faith

One aspect of the “purpose and character” factor that is less frequently considered by courts is whether the party claiming fair use acted in good faith. The US Supreme Court stressed the significance of good faith in *Harper & Row Publishers v. Nation Enterprises*.<sup>125</sup> That case involved a memoir written by former president Gerald Ford, which contained previously unpublished material about the Watergate crisis, Ford’s pardon of former president Richard Nixon, and Ford’s reflections on these historical events and the personalities and morality of those involved in them.<sup>126</sup> Before the book’s publication, Ford’s publisher, Harper & Row, contracted with *Time Magazine* to allow *Time* to excerpt up to 7,500 words from the book on Ford’s account of Nixon’s pardon, for an article to be released just prior to the book’s publication. In exchange, *Time* agreed to pay Harper & Row \$25,000, half in advance and half at publication.<sup>127</sup> As the exclusive right to be the first to publish excerpts of Ford’s memoirs prior to the book’s publication was important to *Time*, it retained the right to cancel or renegotiate the second payment should material from Ford’s memoirs be published by another outlet before *Time* published its excerpts from the book.<sup>128</sup>

Shortly before *Time* was to release the issue featuring the article about Ford’s memoirs, an unidentified person secretly provided Victor Navasky, editor of political commentary magazine *The Nation*, a copy of the Ford manuscript. Navasky “hastily put together what he believed was ‘a real hot news story’ composed of quotes, paraphrases, and facts drawn exclusively from the manuscript.”<sup>129</sup> *The Nation* article on the Ford memoirs was released prior to *Time*’s release of its own article, leading *Time* to cancel its article, along with its remaining \$12,500

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123. Warner Bros. Entm’t, Inc. v. RDR Books, 575 F. Supp. 2d 513, 541 (S.D.N.Y. 2008).

124. Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998); *Twin Peaks*, 996 F.2d at 1375–76.

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

126. *Id.* at 542 (citations omitted).

127. *Id.* at 542–43.

128. *Id.* at 543.

129. *Id.*

payment to Harper & Row. Harper & Row then filed suit against *The Nation*, alleging, *inter alia*, that its unauthorized use of portions of the Ford manuscript in its article constituted copyright infringement.<sup>130</sup>

The Court held that *The Nation's* use of the Ford manuscript constituted infringement and was not a fair use, writing that “*The Nation's* stated purpose of scooping the forthcoming hardcover and *Time* abstracts . . . had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder’s commercially valuable right of first publication.”<sup>131</sup> Stating that “fair use presupposes good faith and fair dealing,” the Court examined the propriety of *The Nation's* action as part of its consideration of the character of the use.<sup>132</sup> The Court noted that *The Nation*, like *Time*, could have bid for the right to publish excerpts from Ford’s memoir, but it instead “knowingly exploited a purloined manuscript.”<sup>133</sup> Nevertheless, *The Nation's* lack of good faith was not dispositive in the fair use determination, as the Court continued on to analyze the remaining factors,<sup>134</sup> after which it concluded that *The Nation's* use of Ford’s memoirs did not qualify as a fair use.<sup>135</sup>

Later, in a footnote in another fair use decision, *Campbell v. Acuff-Rose Music*,<sup>136</sup> the Court cast some doubt on the importance of good faith in fair use analysis with comments such as “regardless of the weight one might place on the alleged infringer’s state of mind” and “[e]ven if good faith were central to fair use.”<sup>137</sup> In any event, as one judge later observed, “[*Harper & Row*] undoubtedly said that ‘fair use presupposes good faith and fair dealing,’ an observation that the Supreme Court has never expressly disavowed. Nonetheless, the

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130. *Id.*

131. *Id.* at 562 (citing *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F. Supp. 686, 690 (S.D.N.Y. 1974) (noting that the purpose of the text was to compete with the original), *aff'd*, *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974)).

132. *Harper & Row*, 471 U.S. at 562 (citing *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968); 4 NIMMER ON COPYRIGHT § 13.05(A)(1)(d)).

133. *Harper & Row*, 471 U.S. at 563.

134. *Id.* at 563–69; see *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 (2d Cir. 2004) (citing *Harper & Row*, 471 U.S. at 543) (“Ultimately, the Court rejected the fair use defense in *Harper & Row*, not just because of the defendants’ bad faith, but also because the defendants had failed to make any substantial transformative use of the copyrighted work.”).

135. *Harper & Row*, 471 U.S. at 569.

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

137. *Id.* at 585 n.18. The Court also characterized *Harper & Row* as standing for the proposition that “fair use presupposes good faith and fair dealing.” *Id.* The Court contrasted that with *Folsom v. Marsh* as standing for the proposition that “good faith does not bar a finding of infringement” and Justice Leval’s position that “good faith [is] irrelevant to fair use analysis.” *Id.* (citing *Harper & Row*, 471 U.S. at 562; *Folsom v. Marsh*, 9 F. Cas. 342, 349 (Cir. Ct. D. Mass. 1841); Leval, *supra* note 99, at 1126–27).

*Campbell* footnote invites and provokes discussion of the issue as an open question where it may arise.”<sup>138</sup>

Based on the Court’s comments in *Harper & Row*, and despite the *Campbell* footnote, at least one court, the US Court of Appeals for the Federal Circuit, has held that good faith is a prerequisite for a finding of fair use. In *Atari Games Corp. v. Nintendo of America, Inc.*, Atari made misrepresentations to the US Copyright Office to obtain for itself an unauthorized copy of Nintendo’s 10NES security system, used in Nintendo’s NES videogame system.<sup>139</sup> Atari was able to use this unauthorized copy to help it copy the 10NES program. This was significant to the court, which held that to qualify as a fair use, “an individual must possess an authorized copy of a literary work.”<sup>140</sup> Accordingly, Atari’s use did not qualify as a fair use.<sup>141</sup>

Most courts, however, have not applied this factor so stringently, instead considering the absence of good faith as merely a factor to be considered along with the other fair use factors. For example, in *NXIVM Corp. v. Ross Institute*,<sup>142</sup> plaintiff NXIVM provided a manual for its “Executive Success” training program, which contained a copyright notice on nearly every page. Further, seminar participants were required to sign nondisclosure agreements that prohibited them from releasing the manual to others.<sup>143</sup> Defendant Rick Ross obtained a copy of the manual from a onetime participant in the seminar, then commissioned two other defendants to write reports analyzing and critiquing the manual. In doing so, the reports quoted sections of the manual. The reports were then made available to the public through Ross’s website.<sup>144</sup>

As a result, the court determined that the defendants must have known that the manual quoted in the reports published online was acquired in an unauthorized manner.<sup>145</sup> This led the court to assume that the defendants acted in bad faith and resulted in this subfactor weighing against a finding of fair use.<sup>146</sup> The court then questioned how much weight to give this bad faith, observing that the holding in *Atari* would cause the defendants’ fair use claim to fail based solely on their

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138. *NXIVM Corp.*, 364 F.3d at 486 (Jacobs, J., concurring).

139. *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 835–36 (Fed. Cir. 1992).

140. *Id.* at 843.

141. *Id.* (citing *Harper & Row*, 471 U.S. at 562–63).

142. *NXIVM Corp.*, 364 F.3d at 471.

143. *Id.* at 475.

144. *Id.*

145. *Id.* at 477.

146. *Id.* at 478.

bad faith.<sup>147</sup> Noting the Supreme Court's statement in *Campbell* that no single fair use factor is dispositive,<sup>148</sup> the Second Circuit found that criticism was transformative and held for the defendants. In doing so, the court observed, "Even a finding of bad faith by defendants would not automatically preclude finding that their use was fair use."<sup>149</sup>

Other courts have followed this approach. In considering whether *The Lexicon* was a fair use of the *Harry Potter* book series, the US District Court for the Southern District of New York noted that "a finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis."<sup>150</sup> Another court has noted that "the fact that [the defendant] may have obtained his copies in an unauthorized manner tends to weigh in plaintiffs' favor. This finding, however, will not bar [the defendant's] fair use defense, but will merely be considered with the other factors."<sup>151</sup>

To learn about events from an upcoming TV episode, a spoiler would likely need to have unauthorized access to a script or similar material, meaning the spoiler lacked good faith in obtaining that information. In the Federal Circuit, based on the court's holding in *Atari*, this would be enough to defeat a fair use defense.<sup>152</sup> Other courts, however, simply weigh this lack of good faith against a finding of fair use.<sup>153</sup>

### 3. Commercial Uses

Finally, the first factor also includes a consideration of whether the use of another's copyrighted work is for commercial or nonprofit purposes.<sup>154</sup> A commercial use weighs against a finding of fair use.<sup>155</sup> However, a determination that a use is commercial does not disqualify a use of a copyrighted work from being a fair use.<sup>156</sup> Otherwise,

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147. *Id.*

148. *Id.* at 479 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1985)).

149. *NXIVM Corp.*, 364 F.3d at 482.

150. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008) (citing *NXIVM Corp.*, 364 F.3d at 479 n.2).

151. *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 923 F. Supp. 1231, 1245 (N.D. Cal. 1995).

152. *See Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992).

153. *See, e.g., NXIVM Corp.*, 364 F.3d at 478–79; *Warner Bros. Entm't, Inc.*, 575 F. Supp. 2d at 545.

154. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1985) (citing 17 U.S.C. § 107(1)).

155. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

156. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 585 (quotation marks omitted); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1995)).

nearly all of the examples listed in the statute as examples of fair use—news reporting, comment, criticism, teaching, scholarship, and research—would be disqualified as fair uses, since these activities are generally done for profit in the United States.<sup>157</sup> Therefore, courts give only minimal weight to the fact that a use was commercial.<sup>158</sup>

Simply revealing an upcoming plot twist is not inherently commercial. To be commercial, a spoiler would need to be accompanied by some effort to profit or benefit financially. For example, courts have relied on the sale of advertising or solicitation of donations in coming to a conclusion that a use was commercial.<sup>159</sup> It seems that networks would most likely pursue spoilers who were able to reach a large audience, as those would be the ones likely to cause the most harm. Those who did reach a large audience could have the opportunity to earn money from that audience through the sale of advertising.<sup>160</sup> In addition, being able to learn a significant plot twist before an episode airs could help drive traffic to the site where the upcoming plot twist is published. Although it would depend on the particular circumstances in each case, it seems likely that there would be a commercial component associated with the revelation of plot twists in a number of cases. When that is so, all three components of the first factor would favor the copyright holder. Regardless, however, courts must also consider the remaining three fair use factors before coming to a conclusion.

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157. *Campbell*, 510 U.S. at 584 (citing *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting)).

158. *Castle Rock*, 150 F.3d at 141.

159. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939–40 (2005) (“StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software’s use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.”); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1159 (C.D. Cal 2010) (accompanying the use of copyrighted material with a request for donations was a factor leading one court to conclude that the use was commercial under the first factor of the fair use test); see also Keiyana Fordham, *Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 939, 969–70 (2010) (“[I]t may be implied that the court considered advertising displayed next to search results to be a commercial use.”) (discussing *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1120 (D. Nev. 2006)).

160. See, e.g., Jeff Rose, *12 Ways You Can Absolutely Make Money Online*, FORBES (Apr. 24, 2018, 3:27 PM), <https://www.forbes.com/sites/jrose/2018/04/24/make-money-online/#1525c75f4954> [<https://perma.cc/H3TX-VX4A>].

### B. Second Factor: Nature of the Copyrighted Work

The second fair use factor, “the nature of the copyrighted work,”<sup>161</sup> focuses on the copyrighted work that the defendant copied. There are two aspects of the copyrighted works to consider with spoilers making upcoming plot twists from these works public. One is that the copyrighted works are fictional in nature. The other is that the works are yet unpublished when the spoiler reveals the plot twist. Each of these aspects of the nature of the copyrighted work is considered below.

#### 1. Nature of the Work: Fictional Works

Works of fiction or fantasy “are closer to the core of intended copyright protection” than factual works.<sup>162</sup> As the “law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy,”<sup>163</sup> the scope of fair use for fictional works is narrower than for factual works and consequently more difficult to establish.<sup>164</sup> As a result, this factor, “if it favors anything, must favor a creative and fictional work.”<sup>165</sup> This factor favored the plaintiff in the *Harry Potter* case, in which the court observed that *Harry Potter* author, J.K. Rowling, had “given life to a wholly original universe of people, creatures, places, and things. Such highly imaginative and creative fictional works are close to the core of copyright protection.”<sup>166</sup> The fictional nature of *Seinfeld* was also significant to the *Seinfeld* court’s determination that *The SAT* was not a fair use.<sup>167</sup> This aspect of the second factor, then, will seemingly always favor copyright holders seeking to stop spoilers, as it will be the revelation of a creative decision about fictional details and events that will be at issue.

#### 2. Nature of the Work: Unpublished Works

An additional issue under the second factor, one that is particularly relevant here, is the unpublished nature of the work.

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161. 17 U.S.C. § 107(2).

162. *Castle Rock*, 150 F.3d at 143 (citing *Campbell*, 510 U.S. at 586).

163. *Harper & Row, Publishers., Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (citation omitted).

164. *Castle Rock*, 150 F.3d at 143 (citing *Stewart v. Abend*, 495 U.S. 207, 237 (1990)).

165. *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993) (citing *Stewart*, 495 U.S. at 237–38; *Harper & Row*, 471 U.S. at 563).

166. *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008) (citing *Castle Rock*, 150 F.3d at 144; *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998); *Twin Peaks Prods.*, 996 F.2d at 1376).

167. *Castle Rock*, 150 F.3d at 144.



Publication of a work requires that the owner consent to making the work available to the public.<sup>168</sup> Historically, fair use was not available as a defense to those who copied from an unpublished work.<sup>169</sup> However, Congress changed this in 1992, amending the law to state that the unpublished nature of a work alone did not prevent a finding of fair use.<sup>170</sup> Nevertheless, the scope of fair use in and the amount of permissible copying of unpublished works is smaller than that for published works.<sup>171</sup> As a result of this, one court has observed, “Unpublished works are the favorite sons of factor two.”<sup>172</sup>

In *Harper & Row*, the Court found that “[i]n using generous verbatim excerpts of Mr. Ford’s unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, *The Nation* effectively arrogated to itself the right of first publication, an important marketable subsidiary right.”<sup>173</sup> This right of first publication includes “not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”<sup>174</sup> Thus, making public all or part of an unpublished work contains an aspect not present with the use of published works, in that it “seriously infringes the author’s right to decide when and whether it will be made public.”<sup>175</sup> As a result, the Court characterized the unpublished nature of a work as a “key, though not necessarily determinative, factor’ tending to negate a defense of fair use.”<sup>176</sup> Accordingly, “[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.”<sup>177</sup>

Communicating the contents of the work to a large number of staff does not constitute publication of that work, particularly where its owners have taken steps to keep details of its contents from being made public prior to the work’s release to the public. “Even though a work is read by a large group of people, it is still unpublished where it is held confidential and the authors do not relinquish control over their copies

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168. See *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 923 F. Supp. 1231, 1242 n.9 (N.D. Cal. 1995).

169. *Harper & Row*, 471 U.S. at 550–51.

170. *Religious Tech. Ctr.*, 923 F. Supp. at 1245 (citing H.R. REP. NO. 102-286, 102d Cong., 2d Sess. 8 (1992)); see also 17 U.S.C. § 107 (2018) (“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.”).

171. *Harper & Row*, 471 U.S. at 564; *Religious Tech. Ctr.*, 923 F. Supp. at 1245.

172. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991).

173. *Harper & Row*, 471 U.S. at 548–49.

174. *Id.* at 564.

175. *Id.* at 551 (citing *Wheaton v. Peters*, 8 Pet. 591, 657 (1834)).

176. *Harper & Row*, 471 U.S. at 554 (citations omitted).

177. *Id.* at 555.

of the work.”<sup>178</sup> Thus, works have been considered unpublished where plaintiffs kept them “confidential using tight security measures,” even though there may have been “unauthorized public disclosures of some of these works.”<sup>179</sup> Thus, the unpublished and fictional nature of the copyrighted work weighs in favor of the copyright holder.

*C. Third Factor: Amount and Substantiality of the Portion Used*

The third fair use factor examines whether “the amount and substantiality” of the portion of the copyrighted work used by the defendant “are reasonable in light of the purpose of the copying.”<sup>180</sup> This factor requires consideration not only of the amount of the copyrighted work that was copied but of the importance or significance of the copied portions to the original work.<sup>181</sup> In the case of upcoming plot twists, the amount of the copyrighted work used may be quite small—perhaps a single fictional detail. However, as the Supreme Court has observed, “the scope of fair use is narrower with respect to unpublished works.”<sup>182</sup> This means less copying is allowed of unpublished works,<sup>183</sup> so using only a small amount of a copyrighted work may be sufficient for this factor to weigh in the copyright holder’s favor. Furthermore, the fact that only a very small amount of a work is used can be significant when that small amount is one of the most defining parts of the work, otherwise known as the “heart of the work.”<sup>184</sup>

In *Harper & Row*, the article published in *The Nation* used only a small portion of the Ford manuscript.<sup>185</sup> However, “[a] *Time* editor described the chapters on the pardon as ‘the most interesting and moving parts of the entire manuscript.’ The portions actually quoted were selected by Mr. Navasky as among the most powerful passages in those chapters.” Furthermore, “*The Nation* article [was] structured around the quoted excerpts which serve as its dramatic focal points.”<sup>186</sup> This led the Court to determine that although “[*T*]he *Nation* had taken only some 300 words out of President Ford’s memoirs,” these portions constituted “the heart of the book,” or the most newsworthy portions of

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178. *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 923 F. Supp. 1231, 1245 (N.D. Cal. 1995) (citing *College Entrance Examination Bd. v. Cuomo*, 788 F. Supp. 134, 139–41 (N.D.N.Y. 1992)).

179. *Id.* (citations omitted).

180. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (citing § 107(3)).

181. *Id.* at 587.

182. *Harper & Row*, 471 U.S. at 564–65.

183. *Religious Tech Ctr.*, 923 F. Supp. at 1245.

184. *Harper & Row*, 471 U.S. at 564.

185. *See id.* at 600 (Brennan, J., dissenting).

186. *Id.* at 565 (citations omitted).

the book.<sup>187</sup> The Court thus found that the third factor favored plaintiffs.<sup>188</sup>

A similar situation was presented in *Los Angeles News Service v. KCAL-TV Channel 9*.<sup>189</sup> The Los Angeles News Service (LANS) filmed the riots following the Rodney King verdict in Los Angeles on April 29, 1992, capturing footage from its helicopter of Reginald Denny being beaten by rioters. LANS copyrighted the video and licensed it to media outlets. When TV station KCAL showed thirty seconds of the nearly five-minute video on its newscast without acquiring a license from LANS, LANS sued KCAL for copyright infringement.<sup>190</sup>

The court observed that only a small portion of the video was used, but that “it was all that mattered” and “the most valuable part of that footage.”<sup>191</sup> The court observed that, “[i]n preparing a newscast, a television station selects the most effective and illustrative shots from the raw footage available,” calling these shots “the best of the LANS footage—its ‘heart.’”<sup>192</sup> The court found this factor favored the plaintiffs, as the fact that the heart of the work “was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”<sup>193</sup>

The revelation of a single plot point from an upcoming episode of a TV show may be small in quantitative terms, but if that plot point is a key development in the episode, that single detail could be considered the heart of the work. In both *Harper & Row* and *Los Angeles News Service*, the portions of the copyrighted works used were small, but they were the portions of those works likely to be of the greatest interest to the audience, causing this factor to favor the copyright holders in those cases.<sup>194</sup> The same can be said of plot twists posted by spoilers, which may only reveal a single detail—albeit the one of greatest interest to the audience. Given that the scope of permissible copying of unpublished works is smaller,<sup>195</sup> the third fair use factor likely weighs in favor of the copyright holder.

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187. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (citing *Harper & Row*, 471 U.S. at 564–66, 568 (internal quotation marks omitted)).

188. *Harper & Row*, 471 U.S. at 564–66 (citations omitted).

189. *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

190. *Id.* at 1120.

191. *Id.* at 1122.

192. *Id.* (citing *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992)).

193. *KCAL-TV*, 108 F.3d at 1122 (citing *Harper & Row*, 471 U.S. at 565).

194. *See supra* notes 185–93 and accompanying text.

195. *See supra* notes 171–77 and accompanying text.

*D. Fourth Factor: Effect on the Market*

The fourth fair use factor considers “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>196</sup> Not only does this factor require a consideration of the extent of market harm caused by the alleged infringer, it also requires consideration of “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”<sup>197</sup> The Supreme Court has observed, however, that “[m]arket harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”<sup>198</sup>

The focus of this factor is whether the defendant’s use of the copyrighted work “usurps or substitutes for the market of the original work.”<sup>199</sup> Whether the use is transformative is significant to this analysis, as the more transformative the use, the less likely it is that the use would be a substitute for the original.<sup>200</sup> For example, the *Twin Peaks* book was found to lack transformative purpose in recounting in detail the events of the series’ first eight episodes.<sup>201</sup> The court found it “possible that a person who had missed an episode of ‘Twin Peaks’ would find reading the book an adequate substitute, and would not need to rent the videotape of that episode in order to enjoy the next one.”<sup>202</sup> As a result, this factor favored the plaintiffs in that case.<sup>203</sup> On the other hand, in the case involving the highly transformative reference guide to the *Harry Potter* book series, the court found “no plausible basis to conclude that publication of the *Lexicon* would impair sales of the *Harry Potter* novels.”<sup>204</sup> As a result, the court found that *The Lexicon* did not harm the market for the *Harry Potter* books.<sup>205</sup>

In making this determination, courts also consider whether “unrestricted and widespread conduct” of the same type as that of the

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196. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing 17 U.S.C. § 107(4)).

197. *Id.* (citations omitted).

198. *Id.* at 591 n.21.

199. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998).

200. *Id.* (citing *Campbell*, 510 U.S. at 591–92).

201. *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1372–73 (2d Cir. 1993).

202. *Id.* at 1377 (citing *Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977) (the defendant’s abstracts filled demand for the plaintiff’s financial reports), *cert. denied*, 434 U.S. 1014 (1978)).

203. *Twin Peaks Prods.*, 996 F.2d at 1377.

204. *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008).

205. *Id.*

defendant “would result in a substantially adverse impact on the potential market for the original.”<sup>206</sup> Accordingly, “to negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’”<sup>207</sup> If advance revelation of important plot points in upcoming episodes were to become widespread, it seems logical to believe that some viewers would not feel the need, or not have the desire, to watch those episodes. At the same time, it seems logical to believe that becoming aware of a spoiler before an episode airs would not deter every viewer from watching the episode, as some people prefer to know in advance what happens.<sup>208</sup> Others may not know whether the spoiler can be trusted or not, so might go ahead and watch regardless. Or some, knowing what happens, may still be curious to find out *how* it happens.

As the Supreme Court has observed, “a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.”<sup>209</sup> Further, fair use “is limited to copying by others which does not materially impair the marketability of the work which is copied.”<sup>210</sup> Moreover, greater use of a copyrighted work is allowed where that use has minimal effect on the market. Conversely, less of the copyrighted work may be used when that use causes substantial harm to the market.<sup>211</sup> It does seem logical that, at least for some, knowing the most significant events that will occur in a particular episode is an adequate substitute for viewing that episode; a spoiler’s revelation of an upcoming plot twist consequently risks harm to the market for that copyrighted work.<sup>212</sup> As a result, the fourth factor should favor plaintiffs as well.

Based on the four factors, a strong case can be made that spoilers posting upcoming plot twists do not constitute a fair use. Next, this

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206. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing 3 NIMMER ON COPYRIGHT § 13.05(A)(4) (1993) (internal quotations omitted)).

207. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)) (emphasis added); *id.*, at 484, 484 n. 36 (Blackmun, J., dissenting) (collecting cases).

208. Romano, *supra* note 4. (“Some are drumming up elaborate fan theories to try to explain what we saw, while others are trying to avoid potential spoilers at all costs—even if they’re currently just unproven predictions. This dichotomy is common. All TV fans must decide for themselves whether they want to read spoilers for what’s coming up on their favorite show and, if not, how far they’re willing to go to avoid them.”).

209. *Campbell*, 510 U.S. at 587–88 (citing *Harper & Row*, 471 U.S. at 565).

210. *Harper & Row*, 471 U.S. at 566–67 (citing 1 NIMMER ON COPYRIGHT § 1.10(D) (1984)).

211. *Meeropol v. Louis Nizer, Doubleday & Co.*, 560 F.2d 1061, 1069–70 (2d Cir. 1977) (“If the effect on the market by an infringing work is minimal, for example, far greater use may be privileged than where the market value of the copyrighted material is substantially decreased.”).

212. *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

Article considers the application of the fair use factors to the *Game of Thrones* and *The Walking Dead* spoilers discussed above.

#### V. PRIMA FACIE CASE AND FAIR USE ANALYSIS OF THE *GAME OF THRONES* AND *THE WALKING DEAD* SPOILERS

The discussion above demonstrates that copyright holders can make a case that posting spoilers constitutes copyright infringement and is not a fair use. Next, the principles gleaned from that discussion are applied to the advance revelation that Jon Snow would be resurrected on *Game of Thrones* and that Glenn would be Lucille's victim on *The Walking Dead*.

##### A. Copyright Holders Have a Prima Facie Case of Copyright Infringement Against Spoilers

A prima facie case of copyright infringement first requires that the copyright holder establish that it owns a valid copyright in the work.<sup>213</sup> The relevant episode of *Game of Thrones*, "Home," is registered with the US Copyright Office,<sup>214</sup> as is *The Walking Dead* episode, "The Day Will Come When You Won't Be."<sup>215</sup> Having established ownership of a valid copyright, it is next necessary to show that the spoilers copied expression from the copyrighted works in an actionable manner.<sup>216</sup>

Copying may be established circumstantially by showing (1) the spoiler had access to the work prior to the revelation of the upcoming plot twist, and (2) substantial similarity of the works.<sup>217</sup> Evidence that both the plaintiff and defendant were dealing with a third party that had access to the plaintiff's work can be used to establish that the defendant had access to the work.<sup>218</sup> With the *Game of Thrones* and *The Walking Dead* spoilers, there is evidence of such access to inside information. For *Game of Thrones*, Senaris admitted to receiving

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213. *Id.* at 1372 (2d Cir. 1993) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361–62 (1991)).

214. *Game of Thrones*: 604 (54) Book of the Stranger, U.S. Copyright No. PA0001998091.

215. *The Walking Dead*, U.S. Copyright No. V2195P096.

216. *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993).

217. *Id.* (citing *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977)).

218. *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981) (quoting 3 NIMMER ON COPYRIGHT § 13.02(A) (1981)). Senaris admitted to having an inside source who provided him with details about upcoming episodes. Romano, *supra* note 4. AMC alleged that *The Spoiling Dead* Fans claimed to have received confidential information from a source. Andy, *supra* note 51.

spoilers from an unknown source.<sup>219</sup> For *The Walking Dead*, AMC alleged that the Spoiling Dead website had in its possession “copyright protected” information about the identity of the Lucille victim.<sup>220</sup> If true, this could mean that the defendant had an opportunity to copy the plaintiff’s work, satisfying the access requirement.<sup>221</sup>

Having established access, the plaintiff must then show that there has been sufficient copying such that the two works are “substantially similar.” This analysis examines the quantitative and qualitative similarities between the two works to determine whether the defendant’s copying of the work rises to the level of copyright infringement.<sup>222</sup> With the *Game of Thrones* and *The Walking Dead* spoilers, the fact that significant events or details from the episodes were accurately revealed, or threatened to be revealed, prior to the airing of the episodes provides evidence of substantial similarity. Further, with Senaris and *Game of Thrones*, it appears that so many details were provided about the episode’s events such “as to preclude the possibility of independent creation.”<sup>223</sup> The fact that those details are fictional satisfies the qualitative aspect of the substantial similarity analysis.<sup>224</sup>

What may present copyright holders with the largest challenge in cases like these is to establish substantial similarity when only a single story detail or plot twist is revealed, because the quantitative aspect of the similarity is small in such a case. Nevertheless, this can still support a finding of substantial similarity. “Even if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity.”<sup>225</sup> The single detail that was revealed here, whether that be that Jon Snow would be brought back to life or that Glenn was killed by Lucille, is one of the most significant details of each episode’s story, meaning its qualitative aspect is very significant and therefore supports a finding of substantial similarity. Of course, the more details that are provided about the

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219. Romano, *supra* note 4.

220. See Andy, *supra* note 51.

221. Sid & Marty Krofft Television v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir. 1977) (citations omitted).

222. Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 370 (5th Cir. 2004) (citing Eng’g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1340, 1340 n.4 (5th Cir. 1994); 4 NIMMER ON COPYRIGHT § 13.01(B) (2004)).

223. Gen. Universal Sys. v. Lee, 379 F.3d 131, 142 (5th Cir. 2004) (citing Peel & Co. v. Rug Mkt., 238 F.3d 391, 394 (5th Cir. 2001)).

224. See *supra* notes 89–93 and accompanying text.

225. Positive Black Talk, 394 F.3d at 373 n.12 (citing 4 NIMMER ON COPYRIGHT § 13.03(A)(2) (2004)).

episode's event, the greater the level of substantial similarity.<sup>226</sup> Further, the fact that each work was unpublished is significant here, as the amount of permissible copying of unpublished works is smaller than that for published works,<sup>227</sup> making it more likely that the copying of a single detail of such importance would support a finding of substantial similarity.

### *B. Spoilers Are Not a Fair Use of Copyrighted Works*

Once the copyright holder has made a *prima facie* case of copyright infringement, the defendant has the opportunity to defend its use of a copyrighted work by demonstrating that it qualifies as a fair use.<sup>228</sup> The application of the four fair use factors, discussed above, to the *Game of Thrones* and *The Walking Dead* spoilers is considered next.

#### 1. Purpose and Character of the Use:

##### Transformativeness, Good Faith, and Commerciality

Again, the first fair use factor focuses on the purpose and character of the use of the copyrighted work, considering whether that use is transformative, whether the one claiming fair use acted in good faith, and whether the use is commercial in nature.<sup>229</sup> Spoilers about upcoming episodes from *Game of Thrones* and *The Walking Dead* lack a transformative purpose, similar to the secondary works at issue in the *Twin Peaks* and *Star Trek* cases, where the revelations were made to *inform* readers of an episode's events, rather than to comment on or critique the episodes. Although the video in which he made the revelations is no longer available, Senaris revealed several significant details about the *Game of Thrones* episode's events, making it sound like a plot summary with little or no additional commentary or analysis. At issue for *The Spoiling Dead Fans* was its alleged claim that it would reveal Lucille's victim. As the *Twin Peaks* court observed, a transformative purpose can be found "if a plot was briefly described for purposes of adding significant criticism or comment about the author's plotting technique."<sup>230</sup> Simply revealing a spoiler, however, lacks

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226. It does appear that additional details about the *Game of Thrones* episode's events were revealed in the spoilers. For *Game of Thrones*, "[Senaris] revealed in his video for 'Home' that Jon would be resurrected, the Stark introduction in Bran's vision, Ramsay's cruel murders, and Tyrion wouldn't have anything to worry about from Rhaegal and Viserion." Jaworski, *supra* note 18.

227. See *supra* notes 171–77 and accompanying text.

228. See 17 U.S.C. § 107 (2018).

229. See *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 540–42 (S.D.N.Y. 2008).

230. *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993).



transformative purpose, making this a significant factor in the copyright holders' favor.<sup>231</sup>

Accompanying the revelation of a plot twist with some commentary or analysis, however, could be considered transformative. Take this Article, for example, which includes the plot twists "Jon Snow Lives" and "Glenn Dies" in its title, as well as discussions of the TV series and episodes from which those plot twists come. The plot twists are discussed in the context of whether their revelation could constitute copyright infringement. This Article, then, uses these plot twists as "raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—[and] is [thus] the very type of activity that the fair use doctrine intends to protect for the enrichment of society."<sup>232</sup> The revelation of such plot twists, on its own, however, fails to do this.

Furthermore, the fact that the relevant episodes of *Game of Thrones* and *The Walking Dead* had yet to air means that the copyrighted works being used were unpublished.<sup>233</sup> Both HBO and AMC went to great lengths to keep each episode's events from being made public,<sup>234</sup> meaning that both Senaris and The Spoiling Dead Fans would know, or likely knew, that their obtaining this confidential information was unauthorized. The bad faith of the spoilers weighs against a finding of fair use.<sup>235</sup> As with *The Nation* and the Ford manuscript, the spoilers' purpose would be to "scoop" the forthcoming episodes by reporting on their events prior to their release, which would be "not merely the incidental effect but the *intended purpose*" of the spoilers' revelations.<sup>236</sup> Like *The Nation* in *Harper & Row*, the spoilers would have "knowingly exploited a purloined manuscript [or its equivalent]."<sup>237</sup>

231. *Id.* at 1374.

232. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (citing *Leval*, *supra* note 99, at 1111).

233. Publication of a work "requires that the owner *consent* to selling, leasing, loaning, giving away, or otherwise making available to the general public, the original or copies of the work." *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1242 n.9 (N.D. Cal. 1995) (citing 17 U.S.C. § 101).

234. Shaanee Flowers, *'The Walking Dead' Spoilers: AMC Issues More DMCA Take-Down Notices to Stop Spoilers – Here's What We Know About Season 6 Finale So Far*, INQUISITR, (Jan. 24, 2020, 3:04 PM), <https://www.inquisitr.com/2956885/the-walking-dead-spoilers-amc-issues-more-dmca-take-down-notices-to-stop-spoilers-heres-what-we-know-about-season-6-finale-so-far/> [<https://perma.cc/5WCM-LPAD>]; Mike Sanders, *HBO Is Going All Out to Stop Game of Thrones Spoilers*, ETEKNIX (Jan. 24, 2020, 3:00PM), <https://www.eteknix.com/hbo-stop-game-of-thrones-spoilers/> [<https://perma.cc/ERA5-7Z9N>].

235. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 545–46 (S.D.N.Y. 2008).

236. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542, 562 (1985).

237. *Id.* at 563 (citation omitted).

It also could be argued that the *Game of Thrones* and *The Walking Dead* spoilers both have a commercial aspect. Senaris posts his videos on YouTube, going under the name Frikidoctor, with ads airing before at least some of his videos,<sup>238</sup> while the Spoiling Dead Fans website solicits donations.<sup>239</sup> Courts have relied on the sale of advertising or solicitation of donations in coming to a conclusion that a use was commercial under the first fair use factor.<sup>240</sup> Whether a use is “commercial” is not, however, an all-or-nothing choice; there can be varying degrees of commerciality.<sup>241</sup> For example, a stronger case might be made for the commercial nature of the secondary works in the *Star Trek* and *Seinfeld* cases discussed above.<sup>242</sup> In the *Star Trek* case, the court observed that defendants were “undoubtedly” hoping to make a profit, but the court nevertheless turned to an examination of the transformative nature of the work as being much more important to the weighting of the first factor.<sup>243</sup> The *Seinfeld* court also found a purpose of the use to be for commercial gain but did not give much weight to that fact.<sup>244</sup>

The first fair use factor, then, would favor the plaintiffs, particularly because the posting of the plot twists lacked a transformative purpose by parties who lacked good faith. While the court would consider whether the revelation of the plot twists was commercial in nature, it would not be of much significance, even if this aspect of the first factor favored the copyright holders. Next, the application of the second factor is considered.

## 2. Nature of the Work: Works of Fiction and Unpublished Works

The second factor focuses on the nature of the copyrighted work being used, whether that work is factual or fictional, and whether it is

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238. As of February 17, 2020, Frikidoctor's YouTube channel has 225,000 subscribers. Frikidoctor, YOUTUBE, [https://www.youtube.com/channel/UCmQkOxn7\\_tEkvOwTxBJRKUQ](https://www.youtube.com/channel/UCmQkOxn7_tEkvOwTxBJRKUQ) [<https://perma.cc/7CZU-XGZX>] (last visited Feb. 17, 2020).

239. *Trophies*, SPOILING DEAD FANS <http://www.thespoilingdeadfans.com/help/trophies> [<https://perma.cc/JH5H-G527>] (last visited Mar. 8, 2020).

240. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939–40 (2005); see also *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1159 (C.D. Cal. 2010); Fordham, *supra* note 159, at 969–70 (discussing *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1120 (D. Nev. 2006)).

241. See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986) (“We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, ‘commercial’ and ‘non-profit.’ . . . The commercial nature of a use is a matter of degree, not an absolute.”) (citations omitted).

242. See *supra* notes 84–94 and accompanying text.

243. *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 11 F. Supp. 2d 329, 334–35 (S.D.N.Y. 1998).

244. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

published or unpublished.<sup>245</sup> With *Game of Thrones* and *The Walking Dead*, it seems clear that both aspects of the second factor will favor the plaintiffs. Both are “works of fiction or fantasy,”<sup>246</sup> rather than factual works, and thus are “closer to the core of intended copyright protection.”<sup>247</sup> Like J.K. Rowling with *Harry Potter*, the creators of *Game of Thrones* and *The Walking Dead* have “given life to a wholly original universe of people, creatures, places, and things.”<sup>248</sup> As a result, both “are close to the core of copyright protection, particularly where the character of the secondary work is not entirely transformative.”<sup>249</sup>

The unpublished nature of the works at issue also favors the plaintiffs. As the Supreme Court observed, “it has never been seriously disputed that ‘the fact that the plaintiff’s work is unpublished . . . is a factor tending to negate the defense of fair use.’”<sup>250</sup> Both works were unpublished when the plot twists were revealed, as the episodes had not yet aired.<sup>251</sup> The fact that producers of both shows went to great lengths to keep the plot points from being made public further reinforces the unpublished nature of the works. To help keep Jon Snow’s return secret, HBO discontinued its previous practice of providing preview screeners.<sup>252</sup> In addition, during production of the episodes leading up to and containing Jon Snow’s resurrection, producers prohibited anyone from saying the character’s name on set, and a code was used to refer to him in scripts and call sheets.<sup>253</sup> Similar steps were taken with regard to *The Walking Dead* and the identity of Lucille’s victim. For example, producers filmed a death scene for each of the eleven characters that were potentially Lucille’s victim.<sup>254</sup>

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245. See *supra* notes 161–65, 168–72 and accompanying text.

246. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (citing Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC’Y 560, 561 (1982)).

247. *Castle Rock*, 150 F.3d at 143 (citing 17 U.S.C. § 107(2); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

248. Warner Bros. Entm’t, Inc. v. RDR Books, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008).

249. *Id.* (citing *Castle Rock*, 150 F.3d at 144); see *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993); *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 11 F. Supp. 2d 329, 335 (S.D.N.Y. 1998).

250. *Harper & Row*, 471 U.S. at 551 (quoting 3 NIMMER ON COPYRIGHT § 13.05 n.2 (1984)).

251. Publication of a work “requires that the owner consent to selling, leasing, loaning, giving away, or otherwise making available to the general public, the original or copies of the work.” *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 923 F. Supp. 1231, 1242 n.9 (N.D. Cal. 1995) (citations omitted).

252. Jaworski, *supra* note 18.

253. *Id.*

254. See, e.g., Taylor Rios, ‘*The Walking Dead*’ Casting Call: Doubles Hired to Hide Negan’s Real Victims After Leaked Spoilers?, INQUISITR (July 15, 2016), <https://www.inquisitr.com/3310001/the-walking-dead-casting-call-doubles-hired-to-hide-negans-real-victims-after-leaked-spoilers/> [https://perma.cc/YZR6-ET7X]; Don Kaye, *Here’s How the Walking Dead Is Keeping That Season-Ending Death a Secret*, SYFY WIRE (June 17, 2016),

Further evidence still are the letters sent to the Spoiling Dead Fans website and the actions of AMC's lawyers to try to keep the site from making the revelation.<sup>255</sup> Both aspects of the second factor, then, favor the plaintiffs in these cases. Again, the unpublished nature of both works is significant, as an author's right to determine the first public appearance of his work normally outweighs a claim of fair use while the work is still unpublished.<sup>256</sup> The application of the third factor is considered next.

### 3. Amount and Substantiality of the Portion Used: The Heart of the Work

The third factor focuses on the amount and substantiality of the portion of the copyrighted work used.<sup>257</sup> This includes quantitative and qualitative analysis, with it possible that using only a small portion of the work will not protect the defendant if that portion is the "heart of the work."<sup>258</sup> With the *Game of Thrones* and *The Walking Dead* spoilers, assume that they each revealed only a single event from the upcoming episodes, but that they were each the most important detail. That detail for *Game of Thrones* was that Jon Snow would be resurrected, and for *The Walking Dead*, it was that Glenn would be Lucille's victim. Quantitatively, these are only small portions of either episode in which the event occurs, but a strong case can be made that these were each "the heart of the work." Both were the topic of much discussion and speculation leading up to each episode's airing.<sup>259</sup> Both could be described as "the most interesting and moving parts of the entire [episode]," as well as "the most powerful passages in those [episodes]."<sup>260</sup> The events might further be described as both their

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<https://www.syfy.com/syfywire/heres-how-walking-dead-keeping-season-ending-death-secret> [https://perma.cc/54BE-84S9].

255. See *supra* notes 45–53 and accompanying text.

256. *Harper & Row*, 471 U.S. at 540.

257. See 17 U.S.C. § 107(3).

258. See *supra* notes 180–84 and accompanying text.

259. See, e.g., Lorraine Caballero, 'Game of Thrones' Season 6: Jon Snow to Return from the Dead?, CHRISTIAN POST (Nov. 25, 2015), <https://www.christianpost.com/trends/game-of-thrones-season-6-jon-snow-to-return-from-the-dead.html> [https://perma.cc/UHE4-8JBV]; Christopher Hooten, Jon Snow: Alive or Dead? Game of Thrones Season 6 Episode 2 Finally Had the Answer, INDEPENDENT (May 2, 2016), <https://www.independent.co.uk/arts-entertainment/tv/news/jon-snow-alive-or-dead-game-of-thrones-season-6-episode-2-finally-had-the-answer-a7009541.html> [https://perma.cc/K6JU-ZBVN] ("After months of speculation, we can stop bloody speculating."); Rios, *supra* note 254 ("Fans are going crazy trying to figure out who Negan killed in the season finale."); Kaye, *supra* note 254 ("Fans have been going crazy speculating over who the victim could be."); Romano, *supra* note 4 ("The only problem is that we don't know *who* suffered that terrible fate, a topic that has inspired intense discussion among *The Walking Dead*'s most devoted fans.").

260. *Harper & Row*, 471 U.S. at 565 (citations omitted).

episode's and the spoilers' "dramatic focal points,"<sup>261</sup> as well as "the part[s] most likely to be news-worthy."<sup>262</sup> Given that these fictional details played a "key role in the infringing work,"<sup>263</sup> then this factor also favors the plaintiffs. The fact that the work that was copied was unpublished only strengthens this conclusion, as a smaller amount of copying is allowed from unpublished works than published works.<sup>264</sup> Like the first and second factors, the third factor also favors the plaintiffs. Last to be considered is the effect of these revelations on the market for the episodes of the shows themselves.

#### 4. Effect on the Market for the Copyrighted Work

The fourth factor focuses on the effect of the use of the copyrighted work on the market for the copyrighted work itself.<sup>265</sup> It is difficult to determine what impact the revelation of the plot twists might have had on the markets for the relevant *Game of Thrones* and *The Walking Dead* episodes, and a detailed analysis of that is beyond the scope of this Article. However, there are many ways to measure the market for an episode of a TV show. Nielsen ratings estimate a TV show's audience size and composition,<sup>266</sup> although Nielsen provides multiple measures of a show's audience, many including various forms of delayed viewing.<sup>267</sup> There is also a show's performance in aftermarkets, such as DVD sales and rentals or digital downloads.<sup>268</sup> With these spoilers' revelations, it would seem most relevant to look at each episode's audience on the night the episode initially aired to determine any potential harm to the market for the shows. That is because once the show has aired, the plot twists become public

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261. *Id.* (citations omitted).

262. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (citing *Harper & Row*, 471 U.S. at 568 (internal quotation marks omitted)).

263. *Harper & Row*, 471 U.S. at 565 (citations omitted).

264. *See supra* notes 171–77 and accompanying text.

265. *Campbell*, 510 U.S. at 590 (citing 17 U.S.C. § 107(4)).

266. *See, e.g.*, Seamus Kirst, *What Are Nielsen Ratings and How Are They Calculated?*, FORBES (Dec. 18, 2015, 1:37 AM), <https://www.forbes.com/sites/seamuskirst/2015/12/18/what-are-nielsen-ratings-and-how-are-they-calculated/#17f14e5956e0> [<https://perma.cc/9DF8-RBF8>].

267. *See, e.g.*, Stephen Battaglio, *Facing Pressure from Clients, Nielsen Says It Is Changing How It Measures Television Ratings*, L.A. TIMES (Aug. 5, 2017, 3:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-nielsen-ratings-tea-20170805-story.html> [<https://perma.cc/NA5U-QAZG>].

268. *See, e.g.*, Ricardo Lopez, *Disc Sales Decline Deepens in Annual Home Entertainment Spending Report*, VARIETY (Jan. 9, 2018 12:49 PM), <https://variety.com/2018/digital/news/home-entertainment-spending-2017-1202658638/> [<https://perma.cc/YN84-M6K8>].

knowledge, or at least easily discoverable,<sup>269</sup> so it is hard to attribute any harm to the market from that point on to a plot twist revealed by a spoiler prior to the episode's airing. Again, as with the first three fair use factors, the fact that the copyrighted works here are unpublished contributes to a more favorable weighing of this factor. All of this may be difficult to quantify, however.

The ratings for both episodes were generally strong. The *Game of Thrones* episode "Home" (season 6, episode 2) was watched by 7.29 million US viewers in its initial airing on HBO, which made it the fourth-highest rated episode of the series to that point.<sup>270</sup> *The Walking Dead* episode "The Day Will Come When You Won't Be," the first episode of season 7, delivered the show's second-highest ratings to date and more viewers than anything else on TV that night, including an NFL game.<sup>271</sup> This led one observer to state, "The cliffhanger at the end of Season 6 of 'The Walking Dead' worked really well—at least in terms of ratings."<sup>272</sup>

There are a lot of questions that would seemingly need to be answered to determine whether the spoilers did reduce, or would have reduced, the initial viewership of either episode. First, the number of people exposed to the plot twists prior to the episodes' airings would be relevant. In addition, as the plot twists were posted online, their reach was not limited to the United States, so international viewership data could also be relevant. Other questions may need answering as well, but these questions are beyond the scope of this Article. The primary question for present purposes is whether the plaintiffs likely could

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269. Presumably, once the work has been published, the public would be able to view the episodes and thus learn about the episodes' events that way. In addition, significant plot points are frequently discussed publicly once the episodes containing them have aired. See, e.g., Erik Kain, 'Game of Thrones' Season 6, Episode 2 Review: Home, FORBES (May 1, 2016, 10:51 PM), <https://www.forbes.com/sites/erikkain/2016/05/01/game-of-thrones-season-6-episode-2-review-home/#22d3ae4163f4> [<https://perma.cc/K7ZK-P9ZV>]; Nick Romano, *The Walking Dead Premiere Recap: Season 7, Episode 1*, ENT. WKLY. (Oct. 24, 2016, 04:12 PM), <https://ew.com/recap/the-walking-dead-season-7-premiere/> [<https://perma.cc/TD78-GCXX>].

270. *Home (Game of Thrones)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Home\\_\(Game\\_of\\_Thrones\)](https://en.wikipedia.org/wiki/Home_(Game_of_Thrones)) [<https://perma.cc/4TF8-URCF>] (last visited Feb. 17, 2020). In fact, season 6 was the series' highest-rated season to that point, with some of the potential credit for that being attributed to "word of mouth about season six. The network and fans kept the discussion of Jon Snow's (Kit Harington) death going throughout the months between seasons five and six." Jethro Nededog, 'Game of Thrones' Is Having Its Highest-Rated Season — Here's How Many People Are Watching, BUS. INSIDER (May 26, 2016, 3:13 PM), <https://www.businessinsider.com/game-of-thrones-season-6-ratings-2016-5> [<https://perma.cc/2BB2-AFH2>].

271. Rick Porter, *Sunday Cable Ratings: 'The Walking Dead' Premiere Kills It with Second-Highest Ratings Ever*, TV BY NUMBERS (Oct. 25, 2016), <https://tvbythenumbers.zap2it.com/daily-ratings/sunday-cable-ratings-oct-23-2016-walking-dead-premiere/> [<https://perma.cc/MM82-MBYU>].

272. *Id.*

make a sufficient showing of market harm resulting from the revelation of the plot twists to help defeat a fair use defense.

Again, the fourth factor considers whether the use of the copyrighted work can serve as a substitute for the original work.<sup>273</sup> Learning in advance that Jon Snow would be resurrected or that Glenn was Lucille's victim may result in some viewers, but certainly not all viewers, no longer feeling the need to watch those episodes and thus, for them, serve as a substitute. Furthermore, in determining market harm, courts consider whether "unrestricted and widespread conduct" of the same type as that of the defendant "would result in a substantially adverse impact on the potential market for the original."<sup>274</sup> If plot twists such as these became widespread, becoming known to many more potential viewers before the episodes air, that would seem to compound the potential harm these specific revelations might have caused. As the Supreme Court stated, "[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'"<sup>275</sup> The effect of spoilers' revelations of plot twists on the market, then, like the previous three factors, favors copyright holders as well.

## VI. CONCLUSION

The revelation of important and significant plot twists from upcoming episodes of television series is likely a copyright infringement that does not qualify as fair use. A number of factors support this conclusion. The spoilers in these cases used copyrighted expression in the form of fictional details and events from the series. The details and events were not guessed or deduced but rather obtained from access to information about those episodes. Furthermore, all four of the fair use factors weigh against considering the spoilers' fair uses. The revelation of key events from upcoming episodes lacks a transformative purpose, which is a strong factor weighing against fair use. Although it depends on the specific circumstances, it seems that in many cases the revelations of plot twists that the networks would be most interested in stopping would be accompanied by a commercial purpose, at least to some extent. Both series are works of fiction, meaning there is less

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273. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998).

274. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing 3 NIMMER ON COPYRIGHT § 13.05(A)(4) (internal quotations omitted)).

275. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *id.*, at 484, 484 n.36 (Blackmun, J., dissenting)).

justification for using significant portions of these works than for factual works. Only a small portion of the copyrighted works are revealed by the spoilers, but those portions contain the “heart” of each work. Finally, it seems likely that revealing key plot points in advance of the episodes’ airing would serve as substitutes and deter at least some viewers from watching the episodes, establishing a likelihood of harm to the market for the shows.

This analysis is further bolstered by the fact that the copyrighted works were unpublished. Since the copyright holder had not yet released the work to the public, the spoiler was not authorized to access the work, resulting in a lack of good faith on the part of the spoiler. This weighs against a finding of fair use under the first factor, character of the use. The unpublished nature of the work also weighs in the copyright holder’s favor under the second factor, nature of the work. Further, since “the amount of permissible copying [is] less in the case of an unpublished work,”<sup>276</sup> the third factor, amount used, also weighs in the copyright holder’s favor. Finally, the fact that the works were unpublished makes it more likely that revelation of the plot twists resulted in some harm to the markets for the copyrighted works, particularly when compared to any harm that could be attributed to the spoilers had the works already been made public. As a result, a spoiler’s revelation of upcoming plot twists does not constitute a fair use—but, rather, copyright infringement.

Going forward, copyright holders could seek to prevent spoilers from posting upcoming plot twists with a compelling threat of litigation or, at the very least, recoup some damages from the spoilers after they have revealed those plot twists. Copyright infringement actions could help the networks spoil things for the spoilers.

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276. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp. 1231, 1245 (N.D. Cal. 1995).



