Friend or Fiend? A "Fair Use" Analysis of Audioblogs

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Friend or Fiend?
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INTRODUCTION

Audioblogs are a new and distinct breed of website emerging from a passionate community of music lovers, all connected by the internet and their interest in rare and forgotten recordings. As the mainstream media is beginning to recognize, “audioblogs (a.k.a. MP3 blogs) have become a kind of collective road map to a music subculture built around non-mainstream artists and self-made tastemakers.” Like any website that involves downloading digital audio recordings, audioblogs raise concerns over copyright infringement and music piracy. This Note aims to establish the common characteristics of audioblogs and then determine whether or not these websites operate in violation of copyright law. Specifically, I will focus on the potential success a “fair use” defense raised by audiobloggers would have against a charge of copyright infringement under the Copyright Act of 1976. Upon completing this “fair use” analysis of audioblogs in their common form, I will conclude by examining possible alternative formats, including “sampling” and “streaming,” that audiobloggers may employ in order to strengthen their claims to legal legitimacy under the Copyright Act.

I. WHAT IS AN AUDIOBLOG?

In its most basic form, an audioblog is a website featuring music reviews with accompanying audio available for download. Invariably, an audioblog will focus on its creator’s particular musical obsessions and feature obscure, often

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1 B.A. 2001, George Washington University; J.D. Expected 2008, University of Kentucky College of Law. The author would like to thank Suzann Vogel, whose passion for music was the inspiration for this article, and for her patience, love and support. Also, the author would like to thank Professor Jonathan Cardi for reading an earlier draft of this Note and providing much-needed and valuable feedback.


out-of-print songs and recordings by forgotten artists. Mainstream, "top 100" albums are not the subject of these websites; rather, the focus is on the other end of the musical spectrum. Unearthing previously neglected tracks is a "point of pride" among audiobloggers, with these websites serving as a medium through which such like-minded musical connoisseurs can share, show-off, and cultivate their common appreciation for music. The posted tracks are accompanied by information about the artist and the music, as well as commentary from the blogger involving anything from their take on the content of the post, how they came across the recording, or any other personal input they may be compelled to include. As such, audioblogs serve as musical diaries. There is an inherently personal touch to them, but there is also an inherently public aspect to these websites in which diligent musical research is informally catalogued and made available to the public. As a prominent audioblogger aptly states: "[t]he point of an audioblog is to provide edutainment," to expose people to music and artists that they would in all likelihood have never had the opportunity to enjoy.

As a practical matter, creating an audioblog is a relatively simple endeavor. There are websites that take prospective audiobloggers through the necessary steps, some free and some that charge a small fee. The simplest and most common way to create digital sound files is through a process called "ripping," in which software is employed to convert audio recordings from a CD, or other source, into a compressed MP3 format on a computer's hard drive.


6 Pasick, supra note 5.

7 See id.


9 For a free service, see Blogger, http://www.blogger.com. For a fee service, see Audioblog.com, http://www.audioblog.com, which charges $4.95 for the basic service of creating the webpage. Id.

quantity, songs are limited to a few per post and usually left up for just a few weeks. This approach rewards those who visit the site and helps minimize storage. Once the site is operational, creating links with other related audioblogs is the key to integrating into the desired on-line music community. Audioblogs will almost always post links to one another, thus creating the integrated digital community that is at the core of audioblogs. When available, links also will be posted for websites where the featured artist’s music can be purchased, should the listener’s interests be piqued by an on-line track. It is important to note that these links are not part of a money-making scheme, but are a natural part of trying to expose visitors to music and lead them to where more of the same can be acquired.

II. COPYRIGHT LAW AND AUDIOBLOGS

A. Exclusive Rights of Copyright Holders as Applicable to Audioblogs

For purposes of determining whether audioblogs violate copyright law, the most crucial characteristic of these websites is that they enable visitors to download complete, permanent copies of digital music files. This aspect of audioblogs potentially violates three separate provisions under the Copyright Act of 1976—Section 106 of the Act affords copyright owners the exclusive right to authorize and do the following: (1) “to reproduce the copyrighted work,” (2) “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership,” and (3) “to perform the copyrighted work publicly by means of a digital audio transmission.” Each of these rights has a distinct licensing structure that any person must comply with should they choose to engage in any of the activities protected under the Act. However, this Note assumes that an audioblogger makes no effort to comply with these requirements

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11 See Wang, supra note 8.
12 See, e.g., id.
13 See, e.g., id.; Pasick, supra note 5.
14 See, e.g., Werde, supra note 5; Stone, supra note 5.
15 Whether or not audioblogs will be nevertheless treated as “commercial” for the purposes of copyright infringement will be addressed later in this Note.
16 17 U.S.C. § 106(1), (3), (6) (2000). The right to perform “by means of digital audio transmission” was added to the Copyright Act by the Digital Performance Right in Sound Recording Act of 1995, the others above were included in the original Act in 1976. Benjamin Aitken, Download, Stream, or Somewhere In Between: The Potential for Legal Music Use in Podcasting, 2006 DUKE L. & TECH. REV. 12 (2006). There are three other subsections under Section 106 of the Copyright Act that are inapplicable to posting digital files on-line: involving preparing “derivative works” based on the copyrighted material and traditional (non-digital audio) public performances of the work. 17 U.S.C. § 106(2), (4), (5).
17 For a concise and informative discussion of the licensing structures applicable to each protected right under the Copyright Act, see Aitken, supra note 14, ¶ 13-22.
and that by reproducing, distributing, and digitally performing copyrighted music without obtaining the necessary licensing or the permission of the copyright owner, an audioblog is in violation of the exclusive rights of the copyright holder.

B. The "Fair Use" Doctrine

The exclusive rights a copyright holder has under Section 106 of the Copyright Act are subject to the "fair use" defense of Section 107. The "fair use" doctrine exempts activity that would otherwise violate the exclusive rights of a copyright holder granted under Section 106 when these acts are for such purposes as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." These examples are not an exhaustive list of what is to be considered fair use, rather, "[t]he statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine." It was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." Fair use of copyrighted material has been well-recognized by the courts as "necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . ." The four factors given in Section 107 to guide courts in their application of the doctrine are:

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.

These factors are not meant to be exclusive, rather, since the doctrine is an "equitable rule of reason, no generally applicable definition is possible" and each case must be decided on its facts. Thus, the statute is seen to require a tailored, case-by-case application of any fair use defense, an application this article will apply to the case of an audioblog.

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19 Id. § 107.
21 Id.
25 Id. at 552.
III. FAIR USE DEFENSE AS APPLICABLE TO AUDIOBLOGS

In applying these factors, the United States Supreme Court has called for a “sensitive balancing of interests” in which no one factor will be conclusive as to a fair use defense. Each factor is weighed for or against the user or the copyright owner resulting in an overall assessment of the fair use claimed.

A. Purpose and Character of the Use

There are two primary considerations in determining the purpose and character of how copyrighted material is used: (1) whether the use is commercial or nonprofit and (2) whether the nature of the use is transformative.

1. Commercial or Nonprofit.—“[E]very commercial use of a copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” Although this statement seems to place almost dispositive weight on the matter of whether the use is commercial or nonprofit, the Supreme Court in Campbell v. Acuff-Rose Music, Inc. was careful to emphasize that commerciality is just one aspect amongst others to consider, and that it was erroneous for courts to place excess emphasis on this one factor. However, as much as the Court may wish to mitigate the importance of commerciality, a showing that copyrighted material is being used for commercial purposes creates a substantial burden for a user to overcome.


27 See the specific language of 17 U.S.C. § 107 indicating the relevance of whether the use is commercial: “including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). For discussions recognizing and applying both of these factors in determining purpose and character, see, e.g., Campbell, 510 U.S. at 578–85; A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001); Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 198–200 (3d Cir. 2003); Kelly v. Arriba Soft Corp., 280 F.3d 934, 940–42 (9th Cir. 2002); Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 845–49 (C.D. Cal. 2006).


29 Campbell, 510 U.S. 569.

30 Id. at 583–84 (The Court notes that since most of the exemplified communications listed in the introductory paragraph of § 107 are generally profit driven, to make commerciality dispositive would be to virtually eliminate fair use from copyright law).

31 This is partly a result of the consequences commerciality has on the fourth and most important factor, the effect the potential use has on the potential market or value of the copyrighted work, which will be discussed later in this Note.
Whether or not an activity is "commercial" within the meaning of the Act is not simply a matter of looking to see whether the user is motivated by monetary gain, but rather it depends on "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."\(^3\) Although this attempt at clarification by the Court is not especially illuminating, it is sufficient to say that "[c]ourts have defined 'commercial uses' extremely broadly."\(^3\) While a business that uses copyrighted material for profit is clearly putting it to commercial use,\(^3\) the incidental economic consequences of not-for-profit use can suffice to establish commerciality. So, even if the use can be deemed noncommercial, if the challenging party can demonstrate "that if it [the particular use] should become widespread, it would adversely affect the potential market for the copyrighted work," then the activity will be considered "commercial."\(^3\) In other words, "[i]f the intended use is for commercial gain, that likelihood of market harm may be presumed. But if it is a noncommercial purpose, the likelihood must be demonstrated."\(^3\) Thus, although the purpose of the activity may be not-for-profit, if the consequences of multiple people engaging in the activity would be harmful to potential markets of the copyrighted work, then this activity will weigh against the user.

Audioblogs are not operated for commercial gain, and therefore will not be subject to a presumption of commerciality. Finding rare, forgotten music by obscure artists and sharing these recordings with a small community of like-minded enthusiasts\(^3\) seems to fit more into the mold of the examples given in the text of Section 107: "criticism, comment, . . . teaching, . . . scholarship, or research."\(^3\) As such, it would fall on a copyright owner to demonstrate the likelihood of commercial harm that would result from widespread audioblogging. The strongest fact in support of a copyright owner's argument against fair use is that people who visit audioblogs receive permanent, complete copies of songs and that, inevitably, some of the people who download these songs will not go out and buy the originals.\(^3\) The activity can serve as a substitute for purchasing a song, as a market replacement, which if multiplied by numerous users could have a

\(^3\) Perfect 10, 416 F. Supp. 2d at 846.
\(^3\) See Video Pipeline, 342 F.3d at 198 (stating the charging of a fee to be commercial).
\(^3\) A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001).
\(^3\) Id. (emphasis added by the Court).
\(^3\) The most popular audioblogs appear to have, at most 2,500 to 3,000 visitors per day. See, e.g., Werde, supra note 5; Stone, supra note 5; Pasick, supra note 5.
\(^3\) See BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005). This was a decisive factor in the court's conclusion that the activity was commercial.
deleterious impact on the potential market for the posted music and thus result in audioblogs being considered "commercial."\(^4\)

Although audioblogs may not be able to avoid being labeled "commercial" under the courts' broad interpretation of this concept, the fact-specific, narrowly tailored approach of the courts to fair use may yet afford some favorable treatment to audioblogs. Prior cases involving the downloading of permanent, complete song recordings have involved peer-to-peer network websites where users could search out any particular track or album they desired and download them for free, by the thousands if they were so inclined.\(^4\) File sharing services function through software programs that allow users to access MP3 recordings stored on other users' computers, creating a vast network that enable the masses to engage in widespread copyright infringement.\(^4\) If a file-sharer wanted a particular album or recording, he or she could simply go on the network, search for the tracks and download them for free, sparing themselves the expense of purchasing the album through legitimate means.

The courts have been harsh on file-sharing systems, in that their only purpose and "principal object is the dissemination of copyrighted material."\(^4\) Audioblogs are not file-sharing systems, they do not incorporate software specially tailored to facilitate mass copyright infringement. A limited number of songs are selected by the audioblogger and made available to the public along with commentary, insight, and scholarship devoted to the genre and specific recordings posted. Thus, an audioblog's sole purpose is not to engage in copyright infringement; rather, any copyright infringement is a secondary consequence of the music cultivation, scholarship, and criticism that is their primary purpose.\(^4\) The absence of an actual recording would severely compromise the ability of the audioblogger to accomplish any meaningful cultural engagement—even the most flourished and profound prose fails to capture the experience of listening to a recording—in-itself. Unlike file-sharing networks, audioblogs do not function as a free on-line

\(^4\) See Napster, 239 F.3d at 1011 (explaining how Napster's MusicShare software functioned).
\(^4\) BMG Music, 430 F.3d at 889 (citing Grokster, 545 U.S. 913).
\(^4\) Audiobloggers appear openly mindful of artists' rights and will remove any material that they are instructed to by the copyright owner, no doubt partly out of fear of legal action but also since the point is to share music, not to get music for free that you would otherwise have to pay for. Many include a disclaimer welcoming anyone with a copyright complaint to let them know immediately of it so that the track(s) can be taken down from the sight. Also, on occasion, audiobloggers will include links to postings where visitors can find related recordings by the artist for purchase. See, e.g., Werde, supra note 5; Stone, supra note 5; Pasick, supra note 5.
store where visitors can go and download whatever song they may desire. In all likelihood, the visitor will never have heard of the songs being posted on an audioblog. While this distinction may not be sufficient to overcome the fact that audioblogs make available permanent, complete recordings for no cost, it is a factor that the courts will have to address in a fact-specific fair use examination.

Regardless of the arguments that an audioblogger could make in regard to commerciality, it will be difficult to overcome such assertions by the courts as: "downloading full copies of copyrighted material without compensation to authors cannot be deemed 'fair use.'"45 The best that an audioblogger can likely hope for is some sort of sympathetic treatment based on the fact that the commercial aspect of their use is ""more incidental and less exploitative in nature than more traditional types of commercial use.""46 Under such treatment, commerciality would weigh only slightly against them and not present the substantial burden against a fair use defense imposed by for-profit, more traditionally commercial websites.

2. Whether the Use is Transformative.—The use of copyrighted material is transformative when it does more than simply supersede the original, but "instead adds something new, with a further purpose or different character, altering the first with the new expression, meaning or message."47 The more transformative a work is the stronger the fair use argument, since when a work is transformed into something else, "market substitution is at least less certain, and market harm may not be so readily inferred."48 The potential that someone will acquire this new work instead of the original copyrighted material diminishes; thus, it is less likely to serve as a market replacement for the original.49 Activity that courts have found "transformative" include an artist incorporating another's music into a new song, such as a parody,50 which provides a good example to illustrate this point. One would not purchase the parody of a copyrighted song as a substitute for the original. They are two separate creative works with their own appeal and identity, like any two other songs created by separate artists.

Converting recordings into MP3 files is not transformative.51 By posting digital recordings of copyrighted music, audiobloggers do not provide

45 BMG Music v. Gonzalez, 430 F.3d 888, 891 (7th Cir. 2005).
48 Id. at 591.
49 Id.
50 See, e.g., id. at 579.
“something new.”52 Were a visitor to download a copy of a recording on an audioblog, they would have a near-identical copy of the original work,53 and thus would not have to go out and purchase a copy of the recording. There is the real danger that they will operate as a market replacement for the original and accordingly, this factor will weigh against a finding of fair use.54

3. The Role of “Good Faith” in Determining Purpose and Character.—In Harper & Row, Publishers, Inc. v. Nation Enterprises, the Supreme Court sparked the debate over the relevance of “good faith” and “bad faith” in determining the fair use of copyrighted material, asserting that “[f]air use presupposes ‘good faith’ and ‘fair dealing’.”55 This language was later interpreted to mean that “bad faith” on behalf of the user foreclosed any fair use defense.56 In response to this, the Supreme Court in Campbell deemphasized the relevance of good faith to fair use, stating that “[e]ven if” it were relevant, bad faith would not foreclose a defendant from succeeding with a fair use defense.57 The meaning of this holding is that even if a party using copyrighted material knew that they were using it without seeking permission, or even after having been expressly denied permission, this would “not weigh against a finding of fair use.”58 Subsequent circuit court decisions have interpreted this statement as either mitigating the importance of good faith as simply one aspect of the purpose and character of the use and not dispositive,59 giving very little weight as a factor,60 or no weight at all.61 Thus, good or bad faith as a factor in determining the purpose and character of the use of copyrighted material appears to have been significantly minimized, if not eliminated from consideration.

As a result of this treatment of good and bad faith, audiobloggers, although they may know that they would be using copyrighted materials without the permission of the owner, would not be precluded from asserting a fair use defense based on any bad faith the court may infer from this aspect of their

52 Campbell, 510 U.S. at 579.
53 MP3s are not quite “CD quality” in terms of the clarity of the recording that they convert, but the discrepancy is minimal. Wang, supra note 8.
54 This does not seem to matter whether there is an actual market for the recording.
57 Campbell 510 U.S. at 585 n.18.
58 Id.
59 See Falkenberg, supra note 56, at 8 (citing Religious Tech. Ctr. v. Netcom On-Line Commc’n Srvs., Inc., 923 F. Supp. 1231 (N.D. Cal. 1995); Los Angeles News Serv. v. KCAL–TV Channel 9, 108 F.3d 1119 (9th Cir. 1997)).
60 Id. at 9 (citing NXIVM Corp. v. Ross Inst., 364 F.3d 471, 479 (2d Cir. 2004)).
61 Id. (citing NXIVM, 364 F.3d at 483 (Jacobs, J., concurring)).
use. It is possible that audiobloggers' non-exploitive use of copyrighted materials, in which artists' work is reintroduced, discussed, praised and appreciated, would lead a court to find that they are not acting in bad faith. This ambiguity reflects the notion that bad faith is a "slippery concept" that could lead to unmanageable uncertainty on behalf of possible users of copyrighted materials who may be reluctant to act when "(unknown or unsuspected) tactics and morals" may be determinative as to the legality of their actions. So, any emphasis that a court may put on the good or bad faith of an audioblogger's use will be limited and likely weigh only slightly, if at all, in favor or against their fair use defense.

B. Nature of the Copyrighted Work

1. Whether the Work is Creative or Factual in Nature.—Certain works enjoy more protection under the Copyright Act than others, in that "[w]orks that are creative in nature are 'closer to the core of intended copyright protection' than are more fact-based works." "[C]opyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use under the second factor." Audioblogs post copyrighted musical compositions and sound recordings; thus, this factor weighs against their fair use defense.

2. Whether the Work is Published or Unpublished.—"The fact that a work is unpublished is a critical element of its 'nature.'" The right to release one's creative works is highly protected, and encompasses not only whether to release the expression, but when, where and how this will be done. However, once an artist's expression occurs and is made available to the public, using these works is more likely to be seen as fair use since the expression of the artist has already occurred. Thus, the effect of a copyrighted work's published or unpublished status in a fair use analysis is a matter or degree, in that if the work is unpublished it will weigh heavily against fair use while if it is published this will weigh only slightly against fair use.

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62 Id. (citing NXIVM, 364 F.3d at 486 (Jacobs, J., concurring)).
64 Id. (citing Napster, 114 F. Supp. 2d at 913).
66 See id.
The works posted on audioblogs are almost exclusively previously released recordings, however rare or forgotten they may be. Thus, audioblogs would be spared from the heavy condemnation imposed on users of unpublished works. Any unreleased recordings that may be posted would, of course, be subject to harsher treatment. Ultimately, the creative or factual aspect of the copyrighted material will have priority in the analysis concerning its nature.69 Since the nature of the copyrighted material used by audioblogs is creative in nature, whether released or unreleased recordings, this factor weighs against a fair use defense.

C. Amount and Substantiality of the WorkCopied

“As a general matter, as the amount of the copyrighted material used increases, the likelihood that the use will constitute ‘fair use’ decreases.”70 Consequently, when a user copies an entire copyrighted work this typically weighs against a finding of fair use.71 The courts have qualified this general rule, however, in that “the extent of permissible copying varies with the purpose and character of the use.”72 For example, in Harper & Row, Publishers, Inc. v. Nation Enterprises, a mere 300 words taken from President Gerald Ford’s unpublished manuscript was found to be substantial in amount since the portion was found to be so valuable to the work.73 This example illustrates how consideration of this third factor “calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”74 Meanwhile, identical thumbnail versions of copyrighted photographs have been found not to weigh against fair use,75 with the Ninth Circuit applying the rule that “[i]f the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.”76 So, although it most often will, using
a copyrighted work in its entirety does not necessarily weigh against a fair use defense, depending on the purpose and character of the use.

Complete recordings are made available for downloading on audioblogs, thus the entire amount of the copyrighted work is used. The only argument an audioblogger could make in defense of this fact is that posting the entire song is necessary in order to express the commentary and content of the posting as related to the artist, genre and music involved. However, there is precedent against such an argument, as the Napster court considered the above mentioned exceptions in regard to using an entire copyrighted work and found that downloading entire digital recordings of copyrighted music did not qualify under these exceptions, but rather weighed against a fair use defense. Thus, it is unlikely that audiobloggers will be able to claim an exception to the rule that using the entirety of a copyrighted work will weigh against a finding of fair use.

D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The final factor listed in Section 107 of the Copyright Act, "the effect of the use upon the potential market for or value of the copyrighted work," is undoubtedly the single most important element of fair use. "This is so because it touches most closely upon the author's ability to capture the fruits of his labor and hence his incentive to create." So, if the use of copyrighted works materially impairs the marketability of these works, this will weigh heavily against a fair use defense. Similarly, in establishing whether the purpose and character of the use is "commercial," the court must not only consider the harm caused by the specific use of the case at hand, but whether if the use "should become widespread, it would adversely effect the potential market for the copyrighted work." Also, like in proving commerciality, "[i]f the intended use is for commercial gain,

77 This argument would be similar to the one the court discusses in Kelly and Perfect 10, in which words would be an inadequate substitute for the work itself (here music, in these others, photographs) and thus posting the recording would be necessary to accomplish the audioblogger's intended use.
81 Bond v. Blum, 317 F.3d 385, 396 (4th Cir. 2003).
83 Id. at 568 (citing Sony, 464 U.S. at 451).
84 There is some overlap in the courts' analysis of "commerciality" and "market harm." This is understandable, in that commercial aspects of a use will necessarily occur within the market for a product. For example, the copyright holder can prove "commerciality" by showing that similar widespread use would have an adverse effect on the market for the work. See
that likelihood [of unfair exploitation of the copyrighted work's potential market] may be presumed. But if it is for a noncommercial purpose, the likelihood [of unfair exploitation of the copyrighted work's potential market] must be demonstrated.5

Market harm not only applies to markets for the works themselves, but to markets for any derivative works, meaning “only those that creators of original works would in general develop or license others to develop.”6 The essential concern of the courts seems to be whether the use is superseding the copyrighted work and serving as a market replacement for the original, in which case parties would be obtaining the same asset from a source other than the copyright owner.7 An important aspect of this concern is that works that are “transformative” in nature under Subsection (2) of Section 107 are less likely to serve as market replacements than non–transformative works.8 Thus, commercial, non–transformative works are most likely to have an adverse effect on the potential markets and value of copyrighted work.

As discussed earlier in this Note with regard to whether audioblogs are “commercial,” although audioblogs are not operated for commercial gain, the possible wide–spread downloading of permanent copies of copyrighted music could have a negative impact on potential markets for the music. Also, since audioblog recordings are non–transformative (they do not alter the recording itself), the danger of market replacement is more pressing. Were the owner of a song made available for free on an audioblog later to decide to market or re–release the recording, potential buyers would possibly be lost as a result of already having obtained a copy of the recording for free from an audioblog. Thus, under the courts’ broad understanding of commerciality, it is likely that an audioblog would be seen as posing a threat to the potential market for or value of copyrighted music.

This likelihood of market harm exists despite an argument audiobloggers frequently make: that they are, in fact, assisting the commercial concerns of the artists whose music they post. The basis of this argument is that audiobloggers provide these artists with notoriety and recognition they would not otherwise receive, as well as posting links to the recording where visitors can purchase the posted recording or similar works by the artist.9

Napster, 239 F.3d at 1016–17 (noting that a use must be “harmful . . . or . . . adversely affect the potential market for the copyrighted work”). This also appears in the courts’ discussion of the market replacement effect. See BMG Music v. Gonzalez, 430 F.3d 888, 890–92 (7th Cir. 2005) (discussing the manner in which infringer supplanted the copyright owner’s market for introducing consumers to their music).

85 Sony, 464 U.S. at 451.
87 Id. at 591.
88 Id.
89 See Werde, supra note 5; Stone, supra note 5; Pasick, supra note 5.
In a sense, there is no established market for some of these recordings, so arguably no market harm can occur. However, the courts have held that “lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works.” Thus, the audioblogger’s argument falls flat, since “[a]ny allegedly positive impact of defendant’s activities on plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs’ copyrighted works.” Thus, even though audioblogs most often involve music for which there is little or no market, either based on the obscurity of the music posted or the fact that the songs are out of print, any boost in sales resulting in their use of copyrighted material would not protect bloggers from a copyright infringement charge. As the Seventh Circuit resoundingly proclaims in BMG Music v. Gonzalez, “downloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for.” Accordingly, the potential market damage posed by audioblogs would almost certainly weigh against a fair use defense.

E. Audioblogs Would Likely Not Succeed With a “Fair Use” Defense

Applying the reasoning set forth in the preceding paragraphs, most notably taking into consideration courts’ broad interpretations of what constitutes “commercial use” and the non–transformative nature of the copyrighted work’s use, an audioblogger who posts copyrighted works would likely not succeed in claiming a fair use defense. Any positive treatment audioblogs may receive as a result of the scholarly and educational aspects of these websites or the more limited and obscure scope of the recordings they post would not be able to overcome the fact that they make available complete

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90 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001).
92 See Caramanica, supra note 4, ¶ 2, at 29 (stating a prominent audioblogger says that “90 percent of the songs he posts are out-of-print”).
93 BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005) (citing Napster, 239 F.3d at 1014-19; UMG Recordings, 92 F.Supp.2d at 349). The court in Gonzalez compares downloading recordings to radio broadcasting of copyrighted recordings, which may boost record sales but still require royalties to be paid to the artist. Id. at 891.
94 It should be noted that the two cases cited in regard to boosting sales and the lack of a viable market both involved file-sharing networks, which are created solely for the purpose of infringing copyrights and pose a far greater threat to infringement. It is possible that audioblogs would receive more sympathetic treatment by the courts since the scope of infringement involved is far less broad, and thus the potential market impact is less pressing. A file-sharing network is not limited to obscure and out-of-print recordings like audioblogs; thus, the analysis of these cases would not mirror that of an audioblog. However, I am skeptical of whether audioblogs could overcome the notion that “downloading full copies of copyrighted material without compensation to authors cannot be deemed ‘fair use.’” BMG Music, 430 F.3d at 891.
recordings of copyrighted works for free without compensation to the copyright holder of these works, thereby supplanting the potential markets for or value of the underlying work.

IV. POSSIBLE WAYS AUDIOBLOGGERS MIGHT CHANGE THEIR SITES TO MAKE THEM MORE LIKELY TO CONSTITUTE FAIR USE

The central weakness to an audioblogger's argument that they are operating under a fair use exception is that they make available complete, permanent copies of copyrighted music. Thus, it is important to identify and consider any alternative ways that audiobloggers may make available the music on their websites in order to avoid this fatal weakness and possibly present a stronger fair use argument.

A. "Sampling"

One such alternative is posting only a small portion of a recording as opposed to the complete version. Arguably, by doing so bloggers could still present the more esoteric aspects of music that can not be captured and conveyed with mere literary description while still expressing the full meaning of what they are trying to share. This alternative would not leave the visitor with a permanent, complete copy of the recording, and the danger that it would function as a "market substitute" for the original is diminished. Accordingly, the visitors would then be required to seek out and purchase a complete copy of the underlying work if they so desire.

Unfortunately, this practice, known as "sampling," has been rejected as a "noncommercial" activity and has not succeeded as a fair use argument. Sampling on the internet is "highly regulated" by record companies, who collect royalties for the brief portions posted. Even if there may be economic benefits to the record companies from the posting of small portions of songs on-line, sampling is not seen to excuse the infringement. The proscription of "sampling" underscores not only the emphasis the courts place on the commercial sales consequences of copyright infringement but also to the copyright holder's "right to license the material" and "right to develop identified alternative markets." Thus, copyright holders are seen to have the right to control how their music is marketed and made available on-line. In other words, by posting even snippets of the underlying work, audiobloggers are usurping the copyright holders' rights in the material. As

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95 *Napster*, 239 F.3d at 1018.

96 *Id.* See also *BMG Music*, 430 F.3d at 890–91 (stating various ways in which copyright holders license and profit from the residual use of their work).

97 "The extent of the recordings addressed by the court in *Napster* were "thirty–to–sixty second samples." *Id.* at 1018.

98 *Id.*
a consequence of the courts' treatment of "sampling," audiobloggers who post incomplete versions of recordings would gain no real advantage under a fair use analysis.

B. Streaming

Another option audiobloggers have is to provide recordings through a "streaming" format. "Streaming" employs software that enables "on-demand music performances" in which "the user is not provided with a permanent digital copy of the streamed music," but "instead accesses copies residing on the provider's server computers." A visitor would simply access a recording made available on the audioblog and stream it to his or her computer through an active internet connection. The court in RealNetworks, Inc. v. Streambox, Inc. recognized that "the difference between streaming and downloading is of critical importance," in that "[a] user who obtains a digital copy may supplant the market for the original by distributing copies of his or her own." Were an audioblogger to employ streaming technology as opposed to downloading technology, he or she could share recordings with visitors and convey the same information without having to provide a complete, permanent copy of the work. By doing so, the audioblogger could avoid the aspect of use that seems fatal under a fair use analysis.

Although seemingly less threatening to the financial interests of copyright holders than downloading, streaming copyrighted music over the internet unquestionably has copyright infringement implications. Although there is significant debate over what specific licensing regime streaming falls under, the details of this debate are beyond the scope of this Note. This is so because fair use places one's activities outside the reach of copyright law, whatever particular statutory provisions may be applicable. The question is whether by providing music through streaming instead of downloading audioblogs would be able to establish a successful fair use defense.

101 Grokster, 454 F. Supp. 2d at 998 (acknowledging the debate over whether streaming requires only a public performance license or both a public performance license and mechanical license).
102 For excellent discussions on the applicability of the licensing schemes to music downloading, webcasting and podcasting, see Grokster, 454 F. Supp. 2d at 998; Aitken, supra note 16; Edward L. Carter & Scott Lunt, Podcasting and Copyright: The Impact of Regulation on New Communication Technologies, 22 Santa Clara Computer & High Tech. L.J. 187 (2006).
103 See Aitken, supra note 16.
This alteration would certainly cut into a copyright holder’s commerciality and market harm arguments. By operating as nonprofit websites that do not provide permanent copies of recordings, audioblogs would force copyright owners to make an all-the-more-tenuous claim to the financial damages they would incur on behalf of the use. As the court points out in *RealNetworks*, streaming does not “supplant the market for the original,” since there is no permanent, complete copy left on the visitor’s computer.\(^{104}\) Thus, by seriously mitigating the market effect the commerciality of the use is diminished as well. This, in turn, adds validity to the argument that by posting these copyrighted recordings, along with links to websites where they can be purchased, audiobloggers are actually profiting the copyright owner. It is also important to reemphasize that audioblogs do not operate for-profit, unlike radio stations. Thus, an argument that radio stations, although they boost record sales, still have to pay royalties—\(^{105}\) and so should audioblogs—has less punch, since radio stations are profiting as a consequence of utilizing copyrighted works while audioblogs are not.

In a strange conceptual twist, if visitors to audioblogs are not deemed to be “sampling” the music for the purpose of considering whether to purchase the recording, but merely experiencing the music with no intention of purchasing it at all, the likelihood that this activity would be deemed “commercial” diminishes. This is based on the reasoning of the Ninth Circuit in *Napster* in which the temporary, impermanent downloading of music for sampling purposes was deemed commercial.\(^{106}\) If a visitor is listening to a recording to see whether he or she wants to buy it, this seems like a commercial endeavor similar to marketing or advertising. Thus, by emphasizing the effects that their posts have, or may have, on the sales performances of the recordings they post, audiobloggers are integrating themselves into the commercial realm of these works. By doing so they may play into the importance courts place on an owner’s right to “make [his or her] own decisions about how best to promote [his or her] works.”\(^{107}\)

The courts do not want to be asked to “second-guess the market” just because a user “think[s] that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute.”\(^{108}\) By avoiding this argument, audiobloggers who utilize streaming technology instead of downloads may be able to dissociate themselves with the financial interests of copyright owners and align themselves more with the activities Congress had in mind in creating

\(^{104}\) *RealNetworks*, 2000 WL 127311, at *2.
\(^{105}\) BMG Music v. Gonzalez, 430 F.3d 888, 891 (7th Cir. 2005).
\(^{106}\) A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1018 (9th Cir. 2001).
\(^{107}\) BMG Music, 430 F.3d at 891.
\(^{108}\) Id.
the fair use doctrine: "criticism, comment, news reporting, teaching . . . ,
 scholarship, or research."109

By utilizing streaming instead of downloading technology to provide
recordings on their websites, audiobloggers would have a stronger fair use
defense to put forth. Any negative "commerciality" and "market effect"
analysis would be weakened, and greater emphasis would likely be placed
on the academic aspects of these sites. Most importantly, streaming would
allow them to eliminate the characteristic of their use that seems to pose
an insurmountable obstacle to a successful fair use defense—that they
provide complete, permanent versions of copyrighted material.110

V. The Future of Audioblogs
and Likelihood of Infringement Liability

The failure of audioblogs to qualify for a fair use defense under modern
copyright jurisprudence, despite the not-for-profit, academic bent of
these websites, can be seen as a reflection of what some legal scholars have
detected as a movement "away from the Framers' vision of promoting
artistic expression and toward a materialistic concern with compensating
corporations that produce and distribute authors' works."111 Regardless of
whether this perceived trend would have any effect on the fair use potential
of audioblogs, the fact that audioblogs have largely escaped suits brought
by the record industry is quite extraordinary in the aggressive "permission
culture" that permeates the legal landscape of copyright law today.112 With
so-called "copyright bullies" liberally distributing cease and desist letters
and threatening legal action against perceived copyright infringers for the
use, in any fashion, of their copyrighted works,113 why is it that audiobloggers
have generally not felt the wrath of the recording industry?114


110 Some websites already employ such a streaming-only format. See, e.g., Posting
com/2005/02/all-songs-that-are-fit-to-play.html (Feb. 1, 2005, 01:00 A.M.).

111 Carter & Lunt, supra note 102, at 191. Carter and Lunt cite the example of Congress
increasing the term of copyrights over time from 14 to 70 years as an example of the trend
toward increased copyright protection. Id.

112 Victoria Smith Ekstrand, Protecting the Public Policy Rationale of Copyright: Reconsidering
Copyright Misuse, 11 COMM. L. & POL'y 565, 567 (2006). Overly aggressive legal action by copy-
right holders who attempt to exert more authority over their copyrighted material than they
are entitled to is seen as pervasive in our current culture. These activities have lead to efforts
advocating courts to more willingly employ the legal doctrine of "copyright misuse" which
punishes overaggressive copyright holders for their unauthorized and overbearing attempts to
stifle the fair use of their copyrighted materials. See id. at 587–88.

113 Id. at 565–67.

114 It is generally recognized that audioblogs have not been subject to copyright in-
fringement lawsuits, only occasionally receiving "cease-and-desist" letters, which are im-
mediately complied with, even when posting works by modern artists whose work is in circula-
One likely factor in this phenomenon is that record companies and copyright owners have found audioblogs to be a valuable marketing tool for artists they themselves have difficulty promoting due to their anonymity or niche market appeal.\(^\text{115}\) Since audioblogs will typically include links to websites where the posted recordings (when available) or similar music by the artist can be purchased, this provides copyright holders with direct access to customers for the sort of lesser-known artists primarily promoted by audioblogs. It is no surprise that record labels have actually attempted to persuade audiobloggers to post songs in an effort to promote their artists, although the independent nature of these bloggers has generally met such efforts with resistance.\(^\text{116}\)

By operating out of the mainstream and in a limited capacity in terms of the amount of music made available, audioblogs simply do not appear to pose the same substantial threat to record sales as file sharing networks such as KaZaA and Napster, which have been aggressively attacked through lawsuits.\(^\text{117}\) For the moment, the position of the music industry appears to be one of passive observation, as a representative of the Recording Industry Association of America has stated: audioblogs are "an issue we’re monitoring" and that the RIAA "could decide at any time to make this an enforcement priority."\(^\text{118}\) For now, it appears audiobloggers will have to continue on in a legal netherworld where their illegality will be tolerated so long as copyright holders see them as helping rather than hindering their interests.

\(^\text{115}\) See Werde, supra note 5; Stone, supra note 5; Pasick, supra note 5.
\(^\text{116}\) See Stone, supra note 5.
\(^\text{117}\) See, e.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001); BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005) (lawsuit against KaZaA).
\(^\text{118}\) Werde, supra note 5.