

# NOTES

## AGGREGATION ANALYSIS IN COPYRIGHT INFRINGEMENT CLAIMS: THE FATE OF FICTIONAL FACTS

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*In a copyright infringement dispute, when assessing whether a defendant's work is substantially similar to, and therefore infringing, a plaintiff's, a court must first determine which works to compare. A unique issue arises when a defendant has appropriated material from multiple works in a series or collection by a plaintiff. A court must decide whether to examine material taken from each of a plaintiff's individual works (such as the individual episodes of a television show or each book in a series) or to analyze the body of works collectively. The latter approach has been referred to as "aggregation" analysis, approach, or theory. This Note highlights the unpredictable application of aggregation analysis in copyright infringement disputes, examines how the analysis defies the language of the Copyright Act, and argues the unsettling discord that the analysis creates undermines the fundamental goals of copyright law. It cites prominent cases involving fictional-fact reference works as examples that illuminate the risks of aggregation and discusses the issues that arise when a plaintiff elects to receive statutory damages. Ultimately, this Note offers alternatives to aggregation that aim to promote consistent interpretation of the Copyright Act and avoid a windfall for copyright owners when courts find infringement.*

### INTRODUCTION

No one likes a copycat, particularly not the law. Legally actionable copying—copyright infringement—holds the prospect of injunction against the distribution of infringing work<sup>1</sup> and payment of damages and profits,<sup>2</sup> in addition to reputational harm for the infringer. Because an author's misappropriation of the work of another carries severe consequences, the questions of *what* and *how much* material was taken are

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1. 17 U.S.C. § 502 (2012) (authorizing injunctions).

2. *Id.* § 504 (authorizing recovery of damages and profits gained from infringing work). Additional remedies available to successful plaintiffs include impoundment and disposition, costs and attorney's fees, and even criminal sanctions. *Id.* §§ 503, 505–506.

critical and delicate issues for a court to determine in adjudicating a copyright claim.

In 1995, the producer and copyright owner of the television series *Seinfeld* filed an infringement suit against the author and publisher of *The Seinfeld Aptitude Test*, a trivia book testing knowledge of characters and events from the series.<sup>3</sup> The plaintiffs claimed that the book had appropriated copyrightable material from eighty-four episodes of the show.<sup>4</sup> Twelve years later, J.K. Rowling and Warner Brothers Entertainment, the respective author and exclusive-film-rights owner to the seven Harry Potter books, sued the publisher of the Harry Potter Lexicon (the “Lexicon”),<sup>5</sup> a reference guide to the Harry Potter novels “including magical spells, potions, maps, lists of wizards [and] all manner of magical items and devices.”<sup>6</sup> At issue was the Lexicon’s use of “fictional facts”<sup>7</sup> from the seven novels and two companion texts in Rowling’s series.<sup>8</sup>

*The Seinfeld Aptitude Test* and the Lexicon are works of fan fiction—more specifically, reference works that employ fictional facts from a primary author’s<sup>9</sup> copyrighted work. These works are unique within the doctrine of copyright law because they exist at the crossroads of fiction and fact. Facts are not generated by an act of authorship and are therefore beyond copyright’s grasp.<sup>10</sup> Fictional facts, by contrast, are born from an author’s original expression.<sup>11</sup> As one scholar sums it up: “Where, then,

3. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 135–36 (2d Cir. 1998) (noting plaintiffs sought to enjoin production of *The Seinfeld Aptitude Test*).

4. *Id.*

5. *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 517–19 (S.D.N.Y. 2008) (considering motion for preliminary injunction and damages against Lexicon publisher).

6. Harry Potter Lexicon, <http://www.hp-lexicon.org/> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (“The most compleat and amazing reference to the world of Harry Potter.”).

7. “Fictional facts are the narrative building blocks with which an author constructs a work of fiction . . . . Where fictional facts differ from words, however, is that fictional facts are themselves creative . . . . The author creates her fictional facts, . . . arranges them, and . . . they are the elements that define her work.” Matt Kellogg, *The Problem of Fictional Facts: Idea, Expression, and Copyright’s Balance Between Author Incentive and Public Interest*, 58 J. Copyright Soc’y U.S.A. 549, 550–51 (2011).

8. See *Warner Bros.*, 575 F. Supp. 2d at 520 (“The content of the encyclopedia entries on the Lexicon website is drawn primarily from the *Harry Potter* series . . . [and] the companion books . . .”).

9. The terms “primary author” and “secondary author” are used throughout this Note to describe the creator (or copyright owner) of the work from which the material was taken and the author of the resulting work that employs the material, respectively. These terms are not intended as normative judgments about the work of either author.

10. 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.11[A] (2014) [hereinafter *Nimmer on Copyright*] (noting facts are not copyrightable); see also *infra* Part I.A (describing copyright’s authorship requirement).

11. For example, it is a fact that the official language of Brazil is Portuguese. The World Factbook, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields>

lies the distinction between uncopyrightable facts and copyrightable expression?”<sup>12</sup>

To establish infringement, the author of a copyrighted work must prove unauthorized copying, first showing the work was actually *copied*, as opposed to independently created, and then demonstrating such copying amounts to improper or unlawful appropriation.<sup>13</sup> With works using fictional facts, secondary authors admit actual copying: Their work is an obvious and intentional homage to the primary author’s work. Thus, the key question to resolve is not whether the secondary author *copied* work of the primary author, but whether the secondary author copied *too much* copyrighted material, amounting to unlawful appropriation.<sup>14</sup> Simply put, a court must determine whether the secondary author’s work bears “substantial similarity”<sup>15</sup> to—and therefore infringes<sup>16</sup>—copyrightable expression in the primary author’s work.

In assessing whether a defendant’s work is substantially similar to a plaintiff’s, a court must first determine what works to compare. A unique issue arises when a secondary author has appropriated material from multiple works in a series or collection by a primary author,<sup>17</sup> as is often the case with fictional-fact reference works.<sup>18</sup> A court must decide whether to examine material taken from each of the primary author’s

/2098.html (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014). It is also a fact that the official language of the Star Trek Klingons is Klingon. About the Klingon Language, Klingon Language Inst., <http://www.kli.org/tlh/> (last visited Nov. 14, 2014) (on file with the *Columbia Law Review*) (“While there have been other artificial languages, and other languages crafted for fictional beings, Klingon is one of the rare times when a trained linguist has been called upon to create a language for aliens.”). The latter of these two facts is fictional, created by an author, but accepted as fact.

12. 1 Nimmer on Copyright, *supra* note 10, § 2.11[F].

13. See, e.g., *Laureyssens v. Idea Grp., Inc.* 964 F.2d 131, 139–40 (2d Cir. 1992) (describing elements of infringement claim).

14. See *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) (“[T]he claimant is constrained to prove that ‘defendant took from plaintiff’s works so much . . . that defendant wrongfully appropriated something which belongs to the plaintiff.’” (quoting *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946))).

15. See *infra* Part I.C (discussing substantial-similarity test and infringement analysis).

16. Even if a secondary author’s work employs material from a primary author’s work, if the works are not “substantially similar,” there is no copyright infringement. See 4 Nimmer on Copyright, *supra* note 10, § 13.03[A][1] (“[C]opyright does not protect against the borrowing of abstract ideas contained in the copyrighted work . . . . [I]f the only similarity . . . is that of the abstract idea, there is an absence of *substantial* similarity and hence, no infringement results.”).

17. See *id.* § 13.03[A][3] (noting “oddity” at issue in such a case).

18. See, e.g., *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 135 (2d Cir. 1998) (concerning infringement of eighty-four episodes of television series); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993) (regarding infringement of eight teleplays and episodes in television series); *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 517 (S.D.N.Y. 2008) (involving infringement of multiple novels and companion texts in series).

individual works (such as the individual episodes of *Seinfeld* or each book in the Harry Potter series) or to analyze the body of works collectively as a single series. The latter approach has been referred to as “aggregation” analysis, approach, or theory.<sup>19</sup> Courts’ use of aggregation analysis has been inconsistent<sup>20</sup> and detrimental to secondary-author defendants in cases involving fictional-fact reference works;<sup>21</sup> aggregation alters the test for infringement and obscures analysis of fair use and de minimis defenses. *Nimmer on Copyright*, a leading treatise on copyright law, suggests such an approach defies the statutory language of the Copyright Act<sup>22</sup> and upsets copyright law’s ultimate goal of balancing the interests of authors and the public.<sup>23</sup>

The trouble with aggregation is often clearest when a plaintiff successfully proves infringement and has elected to receive statutory damages.<sup>24</sup> In such a case, a court might aggregate a plaintiff’s works when determining substantial similarity and infringement, but subsequently disaggregate when determining damages; this could result in multiple awards for a plaintiff (one for each book or episode infringed), despite a finding of liability based on the series as a whole.<sup>25</sup> This disharmony between the infringement and damages phases often is not reconciled or goes unmentioned, and it results in inconsistency within and across jurisdictions.

This Note highlights the unpredictable application of aggregation analysis, examines how the analysis defies the language of the Copyright

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19. See, e.g., *Castle Rock*, 150 F.3d at 138 (mentioning support for “aggregate analysis”); *Kroencke v. Gen. Motors Corp.*, 270 F. Supp. 2d 441, 443 (S.D.N.Y. 2003) (declining to adopt “rather amorphous ‘aggregation’ theory”).

20. See *infra* notes 86–90 and accompanying text (providing examples of acceptance and rejection of aggregation theory within and across jurisdictions).

21. See *Castle Rock*, 150 F.3d at 138, 146 (employing aggregation theory to find *The Seinfeld Aptitude Test* infringed upon *Seinfeld* and affirming injunctive relief); *Twin Peaks*, 996 F.2d at 1380–81 (aggregating episodes in television series and finding infringement); *Warner Bros.*, 575 F. Supp. 2d at 535–37 & n.14 (accepting aggregation theory and finding Lexicon substantially similar to Harry Potter series).

22. This Note cites to Title 17 of the United States Code when referring to the Copyright Act of 1976; the Act enacted Title 17 into positive law.

23. See 4 *Nimmer on Copyright*, *supra* note 10, § 13.03[A][3] (stating “[Copyright] Act itself” suggests favoring individual, rather than aggregate, analysis); see also *infra* Part I.A (discussing fundamental goals of copyright law).

24. A plaintiff in a copyright suit can elect to receive statutory damages rather than have the court determine damages based on the amount of harm suffered. 17 U.S.C. § 504(a) (2012). This provides a set damages award for infringement of a copyrighted work. *Id.* § 504(c).

25. See, e.g., *Twin Peaks*, 996 F.2d at 1381 (finding infringement of aggregate television series containing eight episodes warranted eight statutory-damages awards); *Warner Bros.*, 575 F. Supp. 2d at 535 n.14 (awarding damages based on seven separate novels and two companion books in series despite aggregation of series for purposes of infringement).

Act, and argues the unsettling discord that the analysis creates undermines the fundamental goals of copyright law. Part I explains the relevant copyright doctrine underlying claims subject to aggregation analysis. Part II cites prominent cases involving fictional-fact reference works as examples that illuminate the risks of aggregation. It also discusses the doctrinal and statutory arguments for and against aggregation and the issues that arise when a plaintiff elects to receive statutory damages. Part III offers alternatives to aggregation analysis that aim to promote consistent interpretation of the Copyright Act and avoid a windfall for copyright owners when courts find infringement.

## I. DOCTRINAL FOUNDATION: COPYRIGHT PROTECTION AND INFRINGEMENT

To appreciate the unique nature of the copyright suits examined throughout this Note, it is important to understand the type of claims and underlying principles involved. This Part considers background copyright doctrine applicable to infringement claims generally, in addition to those involving fictional facts. Part I.A discusses the idea-expression dichotomy and its significance in the doctrine. Part I.B examines fictional facts and their interesting presence in copyright law. Part I.C sets forth the requirements for showing an author has infringed upon the work of another and the tests courts employ to evaluate this showing. Part I.D introduces aggregation analysis, its effect on the test for infringement, and courts' inconsistent application of aggregation.

### A. *Originality, Authorship, and the Idea-Expression Dichotomy*

The fundamental goal of copyright law is to provide protection to an author's original, creative expression in exchange for an (arguably<sup>26</sup>) limited monopoly over her work for a fixed amount of time.<sup>27</sup> Copyright doctrine seeks not to reward the creator's labor,<sup>28</sup> but rather to incentiv-

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26. See *Eldred v. Ashcroft*, 537 U.S. 186, 242-43 (2003) (Breyer, J., dissenting) (arguing copyright-term extension grants authors functionally perpetual monopoly).

27. See 17 U.S.C. § 302(a) ("Copyright in a work . . . subsists from its creation and . . . endures for a term consisting of the life of the author and 70 years after the author's death.").

28. Intellectual property doctrine rejects a Lockean, labor-based notion of reward for the work's author; a work instantly and easily produced from a stroke of brilliance receives protection just like a work resulting from a long, arduous, or complex process of development. See Miriam Bitton, Trends in Protection for Informational Works Under Copyright Law During the 19th and 20th Centuries, 13 Mich. Telecomm. & Tech. L. Rev. 115, 172 (2006) (noting Supreme Court has "sounded the death knell for the 'sweat of the brow' doctrine"); Jane C. Ginsburg, No "Sweat"? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*, 92 Colum. L. Rev. 338, 343 (1992) ("The Court made clear that expenditure of 'sweat of the brow' does not make a work original, no matter how useful the ensuing production.").

ize the production of new works for public benefit.<sup>29</sup> Indeed, even the constitutional basis for the protection of intellectual property dictates that public benefit is the aim of the law: Congress has the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>30</sup> Society benefits from this induced productivity: Creative works are more abundant and available for edification and enjoyment.<sup>31</sup>

Copyright protection exists in “original works of authorship”<sup>32</sup> that are “fixed in any tangible medium of expression.”<sup>33</sup> Originality requires independent creation and a “modicum of creativity.”<sup>34</sup> Authorship status stems from this independent, creative conception. The idea–expression dichotomy further clarifies the scope of copyrightable material. Copyright only extends to an author’s original *expression*, not the idea upon which it was built.<sup>35</sup> Without such a distinction, an author’s very use of an idea would preclude others from employing the same idea in a distinct manner.<sup>36</sup> With the idea–expression dichotomy, however, while Shakespeare’s contemporary could not copy a soliloquy from *Romeo and Juliet*—Shakespeare’s unique copyrightable<sup>37</sup> *expression*—she would be

29. See Roberta A. Gorman, Jane C. Ginsburg & R. Anthony Reese, *Copyright Cases and Materials* 14 (8th ed. 2011) (“[T]he ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare . . .”).

30. U.S. Const. art. I, § 8, cl. 8.

31. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 326 (1989) (noting copyright doctrine must, in order to promote economic efficiency, “maximize the benefits from creating additional works” while reducing “losses from limiting access and the costs of administering copyright protection”).

32. The word authorship has broad meaning under the Copyright Act; painters, composers, sculptors, and photographers all qualify as “authors” for the purpose of copyright protection. 17 U.S.C. § 102(a).

33. *Id.*

34. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

35. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any *idea*, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” (emphasis added)); see also H.R. Rep. No. 94-1476, at 57 (1976) (noting “basic dichotomy between expression and idea remains unchanged” in revision of Copyright Act).

36. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (stating without idea–expression distinction “playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended”).

37. If Shakespeare wrote today, his plays and sonnets would be protected expression. But Shakespeare’s works were never protected by copyright because the Statute of Anne, the first copyright law in England, was not passed until 1710, nearly a century after his death. Kevin Smith, *Shakespeare and Copyright*, *Scholarly Comm. @ Duke* (Feb. 18, 2011), <http://blogs.library.duke.edu/scholcomm/2011/02/18/shakespeare-and-copyright/> (on file with the *Columbia Law Review*).

free to write a play about two star-crossed lovers from feuding families—the unprotectable *idea* being expressed.

Support for this distinction exists in both the Copyright Act<sup>38</sup> and case law,<sup>39</sup> as courts have long recognized the importance of differentiating idea from expression as a means of promoting the constitutional goals of copyright law.<sup>40</sup> Without such a distinction, far more material would be protected by each copyright. This could discourage authors from producing, because unless a particular idea had never before appeared in any copyrighted work its use would constitute infringement. Such an exceedingly high standard for originality would be impractical and seemingly impossible, as nearly every work employs some idea or concept used in a past work.<sup>41</sup> Thus, the idea-expression tenet of copyright law “strike[s] a definitional balance between the First Amendment and the Copyright Act”<sup>42</sup> by allowing the unrestricted communication of ideas, while still protecting an author’s original expression.<sup>43</sup>

### B. *The Value and Unique Nature of Fictional Facts*

As a general rule, copyright protection does not extend to facts. Facts lack the requisite originality for protection,<sup>44</sup> and although they may be “discovered,” facts are not generated by an act of authorship.<sup>45</sup> It is a fact that Denver, Colorado, is located at a higher elevation than

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38. See *supra* note 35 (describing statutory support for idea-expression dichotomy).

39. See *Baker v. Selden*, 101 U.S. 99, 104 (1880) (recognizing “confusion of ideas produced by the peculiar nature of the art described in the books which have been made the subject of copyright”); *Nichols*, 45 F.2d at 121 (noting protection is never extended to ideas, only expression).

40. See *supra* notes 26–31 and accompanying text (discussing fundamental goals of copyright law).

41. For example, author Christopher Booker argues that all storytelling follows one of seven archetypal themes. See generally Christopher Booker, *The Seven Basic Plots: Why We Tell Stories* (2004) (detailing recurring themes of “Overcoming the Monster,” “Rags to Riches,” “The Quest,” “Voyage and Return,” “Comedy,” “Tragedy,” and “Rebirth” throughout all literature).

42. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (alteration in original) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)) (internal quotation marks omitted).

43. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1108–09 (1990) (noting “monopoly created by copyright . . . rewards the individual author in order to benefit the public,” but “[m]onopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process” (quoting *Harper & Row*, 471 U.S. at 546)).

44. See 1 Nimmer on Copyright, *supra* note 10, § 2.11[A] (“No one may claim originality as to facts.”).

45. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (“[F]acts do not owe their origin to an act of authorship.”).

Death Valley, California.<sup>46</sup> It is also a fact that Holden Caulfield was expelled from Pencey Prep.<sup>47</sup> The distinction between the two is that J.D. Salinger *invented* the second fact. In this sense, it is a “fictional fact” born from Salinger’s expression and is, in itself, creative. As one author describes them, fictional facts are “the narrative building blocks with which an author constructs a work of fiction.”<sup>48</sup>

Fictional facts are part of our daily lives and lexicons. When readers in a book club or viewers of a television series discuss the work’s characters or the events that took place, they are speaking in fictional facts.<sup>49</sup> While at least one author has argued that fictional facts do not take on a life outside the expressive work in which they appear,<sup>50</sup> it seems that in some sense, they do. Audiences (and, in particular, fan-fiction authors) rely on fictional facts as a type of “cultural currency” when explaining, commenting on, praising, or critiquing a work.<sup>51</sup> An entire business has emerged incorporating fictional facts from popular television series into guided fan tours,<sup>52</sup> and fictional brands have also been given life in the real market.<sup>53</sup>

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46. Elevations and Distances in the United States, U.S. Geological Survey (2001), available at <http://egsc.usgs.gov/isb//pubs/booklets/elvdist/elvdist.html> (on file with the *Columbia Law Review*).

47. J.D. Salinger, *The Catcher in the Rye* 6 (Back Bay Paperback ed. 2001) (1951).

48. Kellogg, *supra* note 7, at 550.

49. See Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513, 547 (S.D.N.Y. 2008) (recognizing defendant’s argument “that it is impossible to describe an imaginary object that exists only in a fictional world without using some of the language that invented it”).

50. See Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 *Notre Dame L. Rev.* 43, 87 (2007) [hereinafter Hughes, *Created Facts*] (stating fictional facts “are understood to be located within and only within the expressive work”).

51. Kellogg, *supra* note 7, at 559–60.

52. See Kramer’s Reality Tour, <http://www.kennykramer.com/RealityTourText.html> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (“Kenny ‘The Real’ Kramer . . . invites you to join him as he takes you on a 3-hour theatrical multi-media stage, bus and video tour of New York City to the sites made famous in the world’s most popular sitcom.”); “*Mad Men* Places” Tour, Vill. of Ossining Bicentennial, [http://www.celebrateossining.com/event\\_13.html](http://www.celebrateossining.com/event_13.html) (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (“This tour will cover some of the real and fictional Ossining locations mentioned in the ‘*Mad Men*’ TV program.”); *Sex and the City* Hotspots Tour, On Location Tours, <http://onlocationtours.com/tour/sex-and-the-city/> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (“On this guided *Sex and the City* tour, follow in the footsteps of Carrie, Samantha, Charlotte, and Miranda—you’ll drink where they drank, shop where they shopped, and gossip where they gossiped.”).

53. See Top Ten Fake TV Brands that Made It to the Real World, Digi Titles, <http://www.digititles.com/content/top-10-fake-tv-brands-that-made-it-to-the-real-world> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (listing franchises that have “sprung from fiction” and “made their way to markets around the globe”).



Secondary works that contain fictional facts, such as a guidebook to a popular television show,<sup>54</sup> a glossary of terms in a multivolume work of literature,<sup>55</sup> a collector's guide to a popular children's toy,<sup>56</sup> or a trivia game testing knowledge of a television series,<sup>57</sup> fit in a "narrow genre of non-fiction reference guides to fictional works."<sup>58</sup> These works must employ precise fictional facts "so readers know where to look for [these facts] and how they fit within the larger narrative."<sup>59</sup> Authors of these reference works<sup>60</sup> treat appropriated material as "facts" for the purpose of their works; they are largely uninterested in the primary authors' expression. In other words, such works use fictional facts in their *factual* capacity.<sup>61</sup> To the secondary author, fictional facts, like all facts, are objects in the world open to use by the public. To the primary author, fictional facts are creative *expression*, and maintaining control over their use may be essential to upholding the integrity of her work.<sup>62</sup>

Thus, fictional facts—and the reference works that employ them—occupy an intrinsically tricky and awkward spot in copyright law,<sup>63</sup> one not easily resolved by the idea-expression dichotomy. If truly factual in nature, fictional facts are unprotected blocks on which other authors can build. If copyrightable expression, their use by secondary authors might be infringement.

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54. See *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993) (adjudicating infringement suit regarding book about television series *Twin Peaks*).

55. See *Warner Bros. Entm't v. RDR Books*, 575 F. Supp. 2d 513, 519–20 (S.D.N.Y. 2008) (regarding copyright suit over publication of the *Lexicon*).

56. See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 515 (7th Cir. 2002) (involving copyright infringement action against publisher of *Beanie Babies* collector's guides).

57. See *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 135 (2d Cir. 1998) (noting plaintiff sought to enjoin production of *The Seinfeld Aptitude Test*).

58. *Warner Bros.*, 575 F. Supp. 2d at 526. It is worth noting that disagreement exists as to whether such reference works are a subset of a larger class of fan fiction, or whether they stand alone as a unique category of secondary work. This Note treats these reference works as a type of fan fiction, though the distinction is largely immaterial for the purposes of this piece.

59. Kellogg, *supra* note 7, at 558.

60. For purposes of this Note, the term "reference work" is used, regardless of the actual function of the work. For example, any difference arising from whether the fictional facts are employed as part of a trivia game for entertainment, as opposed to used in a glossary for locating or defining information in a more truly "reference" function, is beyond the scope of this Note; it makes no difference for the sake of their classification as reference works here.

61. The *Lexicon* is an example of this type of work; author Steve Vander Ark used fictional facts created by Rowling in a factual capacity by employing them in a dictionary for use by Harry Potter readers.

62. See Kellogg, *supra* note 7, at 558 ("[A]uthors might view fictional facts as a means to protect the integrity of their works.").

63. See Hughes, *Created Facts*, *supra* note 50, at 43 (noting "unique" place of fictional facts in copyright).

C. *Infringement Actions and Substantial Similarity*

To sustain a copyright infringement claim, a plaintiff must prove unauthorized copying of copyrighted work.<sup>64</sup> To do so, the plaintiff has to show that (1) the defendant copied (as opposed to independently created) protected material and (2) such copying amounts to unlawful appropriation.<sup>65</sup> To demonstrate unlawful appropriation, the plaintiff must prove substantial similarity between her work and the defendant's.<sup>66</sup> There is no legal remedy in the absence of *substantial* copying.<sup>67</sup>

The inquiry into whether copying is substantial, and consequently infringing, is often a complicated task: A court must assess whether the defendant's work employs enough material from the plaintiff's work as to make the two works substantially similar to one another. However, not all appropriated material is protected. For example, *uncopyrightable* material is irrelevant to a substantial-similarity inquiry,<sup>68</sup> so an author can use unprotected ideas and facts from the work of another without infringing.<sup>69</sup> Similarly, expression in the public domain can be used in an identical manner by multiple authors.<sup>70</sup> Trivial or *de minimis* similarities between the plaintiff's and defendant's works also do not result in infringement.<sup>71</sup> Thus, before determining the extent of substantial similarity

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64. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (describing plaintiff's burden in establishing infringement).

65. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (setting out two essential elements in infringement claims); Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187, 1204 (1990) (refining elements of proof in copyright infringement claims).

66. See 4 Nimmer on Copyright, *supra* note 10, § 13.03[A] ("[S]ubstantial similarity between the plaintiff's and defendant's work is an essential element of actionable copying.").

67. *Id.*

68. *Id.* § 13.03[A][1] ("[C]opyright does not protect against the borrowing of abstract ideas contained in the copyrighted work . . . . [I]f the only similarity . . . is that of the abstract idea, there is an absence of *substantial* similarity and hence, no infringement results."); cf. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 915 (2d Cir. 1980) ("Where the similarity demonstrated pertains solely to noncopyrightable material, summary judgment is appropriate.").

69. See 17 U.S.C. § 102(b) (2012) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); see also 1 Nimmer on Copyright, *supra* note 10, § 2.11[A] ("No one may claim originality as to facts.").

70. After a copyright expires, the work falls into the public domain and its use by others is not infringement. See 17 U.S.C. § 302(a) (providing only limited period of copyright protection).

71. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) ("[D]e *minimis* can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying."); see also *Newton v. Diamond*, 388 F.3d 1189, 1195–96 (9th Cir. 2004) (holding defendant's sampling of three notes from plaintiff's musical composition was de

between two works, a court must distinguish uncopyrightable material from protected material.

*Nimmer on Copyright* identifies two situations in which similarities between works might arise: “comprehensive nonliteral similarity” and “fragmented literal similarity.”<sup>72</sup> Comprehensive nonliteral similarity describes the situation where “the fundamental essence or structure of one work is duplicated in another,” despite the fact that no word-for-word similarity exists between the two.<sup>73</sup> For example, two plays about a feud over the union of the Jewish daughter from one family and the Irish son from another would exhibit comprehensive nonliteral similarity, even if there were no overlap in dialogue between the two works.<sup>74</sup> In order to establish infringement with comprehensive nonliteral similarity, the contested similarity between the works must constitute copyrightable expression<sup>75</sup> and not merely abstract ideas.<sup>76</sup> This distinction underscores the importance of the idea-expression dichotomy in the determination of liability.

The second type of similarity between works is fragmented literal similarity, characterized by instances of identical or nearly identical text throughout the plaintiff’s and defendant’s works.<sup>77</sup> Literal similarity necessarily implicates an author’s unique expression. Here, the question for the court is not whether the secondary author has used an idea or expression, but whether the *amount* of expression taken is substantial enough<sup>78</sup> to establish infringement.<sup>79</sup>

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minimis and noninfringing); *Werlin v. Reader’s Digest Ass’n*, 528 F. Supp. 451, 463–64 (S.D.N.Y. 1981) (finding use of two sentences from plaintiff’s article was de minimis copying). But see *Epic Metals Corp. v. Condec, Inc.*, 867 F. Supp. 1009, 1013 (M.D. Fla. 1994) (holding defendant’s use of two out of twelve photographs from brochure was not de minimis copying).

72. See 4 *Nimmer on Copyright*, supra note 10, § 13.03[A][1]–[2] (describing two forms of similarity).

73. *Id.* § 13.03[A][1]; see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”).

74. See *Nichols*, 45 F.2d at 120–21 (describing similar plot lines of two plays).

75. See *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (noting to attain copyright, material “must be . . . the author’s tangible expression of his ideas”).

76. In the above example, if the two plays shared solely the overarching plot, the similarity would only extend to the idea and not the playwrights’ expression. However, if the plays shared additional elements, such as similar settings, characters, monologues, and conversations, even though not literally identical, the comprehensive similarity would likely extend to the playwrights’ *expression* of that idea.

77. See 4 *Nimmer on Copyright*, supra note 10, § 13.03[A][2] (describing fragmented literal similarity).

78. See *id.* (“At what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement?”).

Comprehensive nonliteral similarity and fragmented literal similarity have been widely accepted by courts,<sup>80</sup> but they are admittedly not the only means by which to demonstrate substantial similarity. Disputes concerning fictional-fact reference works are a particularly poor fit for either of these categories of similarity.<sup>81</sup> A work composed of thousands of entries in a lexicon or hundreds of trivia questions is not *comprehensively* similar to a copyrighted series of books or episodes of a television show, nor do such works necessarily appropriate description, dialogue, or other protectable expression as to constitute *literal* similarity.<sup>82</sup> Because of the unique nature of these works, courts may adopt alternative constructions to assess substantial similarity.<sup>83</sup>

#### D. *Aggregation Analysis in Copyright Infringement Claims*

In an infringement suit, the court must compare the defendant's work with the plaintiff's copyrighted material. When the defendant has appropriated material from multiple works in the plaintiff's series, the court must choose either to compare the defendant's work with each individual unit of work in the series or to perform the substantial-similarity analysis between the defendant's work and the plaintiff's collective series. The latter approach has been referred to as "aggregation" analysis, approach, or theory.<sup>84</sup> If the plaintiff holds a copyright in individual works in a series or collection, the defendant's work may be substantially similar to the plaintiff's work as a whole, but

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79. Courts differ in the tests they employ to assess substantial similarity, depending on the type of similarity at issue. Commonly used tests include the "Abstractions Test," "Pattern Test," and "Total Concept and Feel" test. See *id.* § 13.03[A][1].

80. E.g., *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l.*, 533 F.3d 1287, 1303 (11th Cir. 2008); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1073 (2d Cir. 1992); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1234 n.26 (3d Cir. 1986); see also Gorman, Ginsburg & Reese, *supra* note 29, at 588 (citing concepts of comprehensive nonliteral similarity and fragmented literal similarity).

81. See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 140–41 (2d Cir. 1998) (finding comprehensive nonliteral similarity and fragmented literal similarity tests "unhelpful" and "unnecessary" in analyzing similarity of fictional facts in *Seinfeld* and *The Seinfeld Aptitude Test*).

82. A trivia question that asks about a character's occupation may not appropriate protectable description or dialogue from the work, while use of a direct quote may.

83. E.g., *Castle Rock*, 150 F.3d at 138–41 (rejecting use of conventional substantial-similarity tests and applying qualitative–quantitative test); see also 4 Nimmer on Copyright, *supra* note 10, § 13.03[A][3] (discussing cases falling outside conventional categories of similarity). For a description of the qualitative–quantitative test, see *infra* notes 98–99 and accompanying text.

84. See *supra* note 19 (providing examples of courts' acknowledgment of aggregation theory).

lack substantial similarity when compared to individual works in the plaintiff's collection (or vice versa).<sup>85</sup>

The following example demonstrates these divergent results. Author *A* writes four spy novels, each revolving around a different child protagonist and each taking place in a different European city. The four novels are each copyrighted, published simultaneously, and sold both separately and together. Author *B* writes a story about a child spy who has characteristics similar to those of the protagonist from Author *A*'s first novel, employs a plotline analogous to that of *A*'s third novel, and takes place in a city similar to that described in *A*'s fourth novel. If a court chooses to compare Author *B*'s story to all four novels in Author *A*'s series as an aggregated collection, the two "works"—*B*'s story and *A*'s series—might be substantially similar. But when comparing *B*'s story with each of *A*'s individual novels, the court might find the story only infringes upon expression from one or two of *A*'s four novels, or perhaps that it is not substantially similar to any of them.

The former approach of comparing the secondary work with the series as a whole—aggregation analysis—has been applied in copyright infringement claims involving work of various media.<sup>86</sup> Plaintiffs generally argue in favor of aggregating their own copyrighted works, but the approach has also been proposed as a means of looking at the defendant's purportedly infringing works.<sup>87</sup> Defendants have also advanced the aggregation theory.<sup>88</sup> Courts' applications of the approach have been inconsistent, particularly in the Second Circuit,<sup>89</sup> which, along with the

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85. See 4 *Nimmer on Copyright*, supra note 10, § 13.03[A][3] (discussing question raised by multiple episodes in television series at issue in *Castle Rock*).

86. See, e.g., *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993) (television series); *New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990) (literary work of biography's subject); *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (newspaper research abstracts), abrogated on other grounds by *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006); *Doody v. Penguin Grp. (USA) Inc.*, 673 F. Supp. 2d 1144, 1155–56 (D. Haw. 2009) (novels); *Team Play, Inc. v. Boyer*, 391 F. Supp. 2d 695, 702 (N.D. Ill. 2005) (video games); *Kroencke v. Gen. Motors Corp.*, 270 F. Supp. 2d 441, 442 (S.D.N.Y. 2003) (visual works); *Craft v. Kobler*, 667 F. Supp. 120, 121–22 (S.D.N.Y. 1987) (work of biography's subject).

87. See, e.g., *Doody*, 673 F. Supp. 2d at 1155–56 (containing argument by plaintiff that court should assess substantial similarity by aggregating entire collection of defendant's books because plaintiff believed more similarities would emerge if plaintiff's work was examined against defendant's whole collection).

88. See, e.g., *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71–72 (2d Cir. 1999) (rejecting defendant's request to aggregate 90,000 of plaintiff's articles). In *Nihon*, the defendant felt aggregating the plaintiff's work would minimize the amount defendant appropriated from any particular article. *Id.*

89. Compare *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (accepting aggregation of TV series, rather than individual-episode analysis), *Warner Bros. Entm't v. RDR Books*, 575 F. Supp. 2d 513, 535 n.14 (S.D.N.Y. 2008) (accepting aggregation theory in regard to plaintiff's series of books and other

Ninth Circuit, adjudicates the majority of copyright infringement claims. For example, in one case, a judge applied aggregation analysis and then declined to do so in a case decided just six months later.<sup>90</sup>

Often, the aggregation approach is explicitly advanced by one of the parties, and a court openly acknowledges and reasons its choice to accept or deny it.<sup>91</sup> However, at times, a court simply aggregates multiple works in a series when determining liability without discussion or clear reasoning.<sup>92</sup> In such a case, it is unclear if a court has considered the alternative individual-works analysis and rejected it or if nonaggregation was never contemplated at all.<sup>93</sup>

## II. DEFINING “WORK”: ISSUES WITH AGGREGATION ANALYSIS

When courts are faced with potential infringement of a series composed of multiple works, the decision to aggregate presents complex analytical questions. This Part identifies issues raised by aggregation through examination of prominent cases involving fictional-fact reference works. Part II.A provides the background, details, and application of aggregation analysis in these cases. Part II.B then turns to the statutory arguments against aggregation analysis and identifies the inconsistency that arises when a plaintiff elects to receive statutory damages. Part II.C discusses the task of balancing the fundamental goals of copyright law and questions aggregation analysis’s “author-centric” approach to defining work. Part II.D examines specific risks that arise when applying aggregation analysis in the context of fictional-fact reference works, including the distortion of the substantial-similarity test and analysis of fair use and de minimis defenses.

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copyrightable materials), and *Warner Bros. v. ABC*, 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982) (aggregating plaintiff’s movies, television programs, and comic books), with *Nihon*, 166 F.3d at 71–72 (rejecting aggregation theory and finding plaintiff entitled to separate protection of each of 90,000 articles), and *Kroencke*, 270 F. Supp. 2d at 443 (declining to adopt “rather amorphous ‘aggregation’ theory” in regard to artist’s visual works).

90. Compare *Castle Rock*, 150 F.3d at 138 (Walker, J.) (accepting aggregation analysis in context of *Seinfeld*), with *Nihon*, 166 F.3d at 71–72 (Walker, J.) (rejecting aggregation analysis despite having applied it six months earlier in *Castle Rock*).

91. See, e.g., *Doody*, 673 F. Supp. 2d at 1155–56 (rejecting for lack of legal support plaintiff’s argument that court must assess substantial similarity by examining aggregate collection of books); *Kroencke*, 270 F. Supp. 2d at 443 (rejecting plaintiff’s “rather amorphous ‘aggregation’ theory”).

92. See, e.g., *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152 (2d Cir. 1990) (referring to plaintiff’s material as plural “works” throughout opinion, yet failing to mention aggregation of individual works when determining infringement).

93. The terms “individual-works analysis” and “nonaggregation” are employed and used interchangeably throughout this Note to denote the alternative to aggregation.

A. *Aggregation Analysis in Fictional-Fact Reference-Work Cases*

In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the Second Circuit assessed whether a quiz book testing knowledge from *Seinfeld* infringed upon the copyrighted television series.<sup>94</sup> *The Seinfeld Aptitude Test*, a book authored by Beth Golub and published by Carol Publishing Group, contained 643 trivia questions and answers concerning characters, scenes, and plots from eighty-four episodes of *Seinfeld*.<sup>95</sup>

The *Castle Rock* court noted an absence of both comprehensive nonliteral similarity and fragmented literal similarity between *Seinfeld* and *The Seinfeld Aptitude Test*.<sup>96</sup> However, the court rejected conventional substantial-similarity tests<sup>97</sup> and applied an alternative approach that focused on whether the copying was “quantitatively *and* qualitatively sufficient to support the legal conclusion that infringement (*actionable* copying) ha[d] occurred.”<sup>98</sup> The court explained that the qualitative element “concern[ed] the copying of expression, rather than ideas,” and that the quantitative element “concern[ed] the amount of the copyrighted work that [was] copied.”<sup>99</sup>

In regard to the qualitative component, the Second Circuit found that unlike facts in an atlas or almanac, which lack authorship, “each ‘fact’ tested by *The [Seinfeld Aptitude Test]* [was] in reality fictitious expression created by *Seinfeld*’s authors.”<sup>100</sup> When examining the quantitative component, the court assessed the amount of expression *The Seinfeld Aptitude Test* had taken from the aggregate series of *Seinfeld*, rather than the amount taken from each episode.<sup>101</sup> Under this aggregation approach, the *Castle Rock* court found *The Seinfeld Aptitude Test* was substantially similar to protected expression from *Seinfeld* and therefore infringing.<sup>102</sup> Additionally, the court rejected the defendants’ defense

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94. 150 F.3d at 135.

95. *Id.* at 135–36.

96. *Id.* at 140–41; see also *supra* notes 72–83 and accompanying text (introducing concepts of comprehensive nonliteral similarity and fragmented literal similarity and discussing circumstances in which neither applies).

97. See *Castle Rock*, 150 F.3d at 139 (“[T]ests for substantial similarity other than the quantitative/qualitative approach are not particularly helpful to our analysis.”); see also *supra* notes 72–79 and accompanying text (describing conventional similarity tests).

98. *Castle Rock*, 150 F.3d at 138 (emphasis added by *Castle Rock*) (quoting *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997)).

99. *Id.* at 138 (quoting *Ringgold*, 126 F.3d at 75).

100. *Id.* at 139.

101. *Id.* at 138 (“Where the secondary work focuses on an entire continuous television series such as *Seinfeld*, there is no basis for looking in isolation at the amount copied from each separately copyrighted episode.”).

102. See *id.* at 141 (“*The [Seinfeld Aptitude Test]* easily passes the threshold of substantial similarity between the contents of the secondary work and the protected expression in the original.”).

that the trivia questions were fair use<sup>103</sup> of the material.<sup>104</sup> The plaintiff was awarded damages and the defendants were permanently enjoined from publishing the book.<sup>105</sup>

More than a decade later, in *Warner Bros. Entertainment v. RDR Books*, another court considered aggregation in the context of fictional facts.<sup>106</sup> Steve Vander Ark created the Harry Potter Lexicon, an online encyclopedia of information from Rowling's Harry Potter series.<sup>107</sup> The Lexicon contained entries for characters, locations, spells, magical creatures, and objects from the Harry Potter books and companion texts, as well as material from newsletters and public interviews with Rowling.<sup>108</sup> Rowling herself had lauded Vander Ark's website and used it as a resource while writing.<sup>109</sup> But when defendant RDR Books, in collaboration with Vander Ark, announced plans to publish the Lexicon in print, Warner Brothers Entertainment, owner of the exclusive film rights to the Harry Potter series, filed a lawsuit claiming infringement of their copyrights.<sup>110</sup>

As in *Castle Rock*, the *Warner Bros.* court analyzed the Lexicon's quantitative and qualitative copying of Rowling's work.<sup>111</sup> To determine the quantitative component, the court, relying on *Castle Rock*, analyzed the amount of expression the Lexicon took from the aggregate Harry Potter series.<sup>112</sup> As was the case with *The Seinfeld Aptitude Test*, the court held that "each 'fact' reported by the Lexicon [was] actually expression invented by Rowling" and that the Lexicon's use of "thousands of fictional facts from the Harry Potter works" established a prima facie case of infringement.<sup>113</sup>

The following sections will consider the statutory and doctrinal opposition to aggregation and the particular issues that arise when aggregation analysis is applied in disputes over fictional-fact reference works.

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103. See *infra* Part II.D.2 (discussing fair use standard).

104. See *Castle Rock*, 150 F.3d at 146 (rejecting defendants' fair use defense).

105. *Id.* at 146.

106. 575 F. Supp. 2d 513, 535 & n.14 (S.D.N.Y. 2008).

107. See *id.* at 520 (describing origins of Lexicon).

108. See *id.* (describing content of Lexicon).

109. See *id.* at 521 (quoting Rowling's praise of Lexicon as her "natural home" and way to "check a fact") (internal quotation marks omitted).

110. *Id.* at 518, 523–24.

111. See *id.* at 534–36 (finding both sufficient quantitative and qualitative copying).

112. See *id.* at 535 n.14 ("The Court analyzes the amount of expression copied from the Harry Potter series in the aggregate, rather than from each individual novel . . .").

113. *Id.* at 535–36, 538.



B. *Statutory Resistance to Aggregation Analysis: Defining “Work” Under the Copyright Act*

The language of the Copyright Act disfavors the aggregation approach; § 106 of the Act, which defines the exclusive rights of copyright owners, provides support for nonaggregation. Courts’ established interpretation of § 504(c), which outlines statutory damages as a remedy for infringement, also discourages aggregation when assessing substantial similarity in order to promote consistency in the liability and damages phases of a copyright suit.

1. *Defining the Concept of “Work.”* — To determine the scope of a copyright owner’s exclusive rights, a court must first define the copyrighted work at issue. Section 101 of the Copyright Act provides definitions for “collective work,” “joint work,” and “anonymous work,” among many others,<sup>114</sup> but is silent on a definition for the singular term “work.”<sup>115</sup>

Despite its ambiguity, the term “work” pervades the Act and is critical when identifying copyrightable subject matter, establishing liability, assessing fair use, and determining statutory damages.<sup>116</sup> There is much at stake in defining the work at issue in an infringement dispute; without knowing what the copyrighted work *is*, a court is unable to determine the exclusive rights associated with it. As one scholar remarks, “It is not an overstatement to argue that if one pulls too hard on the thread of the copyrighted work, the fabric of copyright law as a whole might unravel.”<sup>117</sup> One categorization of a work might favor a claim of infringement, while another categorization might weigh against it. In determining what constitutes the work at issue for purposes of establishing substantial similarity and liability, the choice to aggregate or not can “identify a boundary between sameness . . . on the one hand, and the changed and the new, on the other hand.”<sup>118</sup>

Even without a clear definition of work, however, the Copyright Act is not entirely void of direction when defining the term. Other defini-

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114. See 17 U.S.C. § 101 (2012) (providing definitions for Copyright Act).

115. See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *Fordham L. Rev.* 575, 576 (2005) [hereinafter Hughes, *Size Matters*] (“[T]he law runs silent on the foundational concept on which these definitions are built.”).

116. See, e.g., 17 U.S.C. § 101 (providing definitions for Copyright Act); *id.* § 102 (defining subject matter of copyright); *id.* § 106 (defining exclusive rights in copyrighted works); see also Michael J. Madison, *The End of the Work as We Know It*, 19 *J. Intell. Prop. L.* 325, 326, 328 (2012) [hereinafter Madison, *End of the Work*] (“The concept of the work appears to have little or no fixed meaning or meanings in the law, despite decades of inclusion of both term and concept in relevant statutes and treaties.”).

117. Madison, *End of the Work*, *supra* note 116, at 329.

118. *Id.* at 341.

tions in § 101 provide insight.<sup>119</sup> For example, in regard to the creation of a work, the Act states:

A work is “created” when it is fixed in a copy . . . for the first time; *where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time*, and where the work has been prepared in different versions, each version constitutes a separate work.<sup>120</sup>

Hence, the Act “clearly applies to things that are completed in pieces.”<sup>121</sup> While “[i]t is less clear that the statute applies, or should apply, to every successful stroke of a pen or brush,”<sup>122</sup> this Note does not argue for protection of fictional facts themselves.<sup>123</sup> Yet, when a series contains clearly defined, separately produced units such as novels or episodes, their existence as part of a larger, related—and perhaps later completed—collection does not strip them of their status as individual works.<sup>124</sup> The unit “remains a work even when it is included in a compilation.”<sup>125</sup>

2. *Defining “Work” in the Context of Owner’s Rights.* — Section 106 identifies six exclusive rights granted to copyright owners.<sup>126</sup> Subject to other provisions of the Copyright Act, a copyright owner has the exclusive right to do and to authorize any of the following:

- (1) to reproduce the copyrighted *work* in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted *work*;
- (3) to distribute copies or phonorecords of the copyrighted *work* to the public by sale or other transfer of ownership, or by rental, lease, or lending;

119. When the definition of a word in a statute is ambiguous, the canon of construction *noscitur a sociis* (“it is known by its associates”) suggests the word’s meaning may be established by reference to the rest of the statute. Black’s Law Dictionary 1160–61 (9th ed. 2009); see, e.g., *Maracich v. Spears*, 133 S. Ct. 2191, 2201 (2013) (relying on “familiar canon of *noscitur a sociis*, the interpretive rule that ‘words and people are known by their companions’” (quoting *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000))); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 229 (2008) (stating canon of *noscitur a sociis* “instruct[s] that words in a series should be interpreted in relation to one another”).

120. 17 U.S.C. § 101 (emphasis added).

121. Madison, *End of the Work*, *supra* note 116, at 343 n.58.

122. *Id.*

123. Such protection would defy the existing tenets of the law that prohibit copyrightability of “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs.” 37 C.F.R. § 202.1(a) (2014).

124. See Hughes, *Size Matters*, *supra* note 115, at 603 (“It is perfectly clear . . . if printed as a separate and distinct work . . . it does not lose that character, by being found in company with other compositions.” (quoting *White v. Geroch*, (1819) 106 Eng. Rep. 376 (K.B.) 376; 2 B & Ald. 298, 300–01)).

125. *Id.* (emphasis added).

126. 17 U.S.C. § 106 (2012) (listing exclusive rights granted to copyright owners).

(4) in the case of literary, musical, dramatic, and choreographic works,<sup>127</sup> pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted *work* publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted *work* publicly; and

(6) in the case of sound recordings, to perform the copyrighted *work* publicly by means of a digital audio transmission.<sup>128</sup>

The statutory language indicates that these exclusive rights apply to copyrighted work in the singular.<sup>129</sup> If a separate copyright exists in each Harry Potter novel or *Seinfeld* episode, under the Act, the copyrighted work at issue in a substantial-similarity analysis should be that individual novel or episode, not the collective series. Thus, the Act's use of the singular weighs against aggregation.<sup>130</sup>

Choosing to aggregate despite statutory language to the contrary is even more problematic when a court fails to provide any reasoned basis for doing so. At times, a court will explicitly acknowledge when it is aggregating individual units of a series into one (as was the case in *Castle Rock* and *Warner Bros.*), but often it is implicit.<sup>131</sup> In cases where a court does not openly address the decision to aggregate, it is unclear if the language of the statute was contemplated or if an alternative individual-

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127. It is worth noting that this plural use of "works" is not addressing the right associated with the actual copyrighted *work* (singular), but rather the general category of artistic works to which the right applies. See *id.* § 101 (providing definitions for Copyright Act).

128. *Id.* § 106 (emphasis added).

129. The *Castle Rock* court recognized that the language of the Copyright Act supported an individual-episode analysis, yet chose to rely on precedent in which courts had applied aggregation analysis to multiple units in a series. See *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) ("Our precedents, however, tend to support the aggregate analysis.").

130. *Nimmer on Copyright* declares that this statutory language requires courts to reject aggregation of multiple works when determining substantial similarity. See 4 *Nimmer on Copyright*, *supra* note 10, § 13.03[A][3] n.115.8 ("The rights accorded to copyright owners under 17 U.S.C. § 106 all refer to the 'work' in the singular." (citing *Castle Rock*, 150 F.3d at 138)). In *Castle Rock*, the Second Circuit expressly addressed the fact that § 106 discourages aggregation, yet rejected the plain language of the Act and instead looked to precedent as the basis for aggregating. See 150 F.3d at 138 ("17 U.S.C. § 106 speaks throughout in the singular, referring to the allegedly infringed 'work,' thus bolstering an individual-episode analysis."). According to the court, to treat each of eighty-four episodes of *Seinfeld*, "a discrete, continuous television series," as individual works, as the statute suggests, "would elevate form over substance." *Id.*

131. See *supra* notes 91–92 (noting examples of explicit and implicit use of aggregation).

works analysis was considered. If a court chooses to reject the language of the Copyright Act, the decision should be clearly justified as to offer explanation for deviation from the statute and provide interpretive guidance for future disputes.

3. *Defining "Work" in the Context of Damages.* — An additional implication of rejecting the language of the Copyright Act and aggregating arises when a plaintiff elects to receive statutory damages. Under § 504, an infringer of a copyright is liable for either the copyright owner's actual damages and any additional profits, or statutory damages.<sup>132</sup> The copyright owner may elect to recover statutory damages at any point before the court renders final judgment.<sup>133</sup>

Under the former Copyright Act of 1909, statutory damages were available based on each separate act of infringement.<sup>134</sup> For example, if a defendant made fifty unlawful copies or gave fifty unauthorized performances, a plaintiff was granted fifty awards.<sup>135</sup> Under the current Copyright Act of 1976, a plaintiff is entitled to "an award of statutory damages for all infringements involved in the action, *with respect to any one work.*"<sup>136</sup> As a result, a plaintiff can only collect one penalty for an infringement of a particular work, regardless of how many times that work was infringed.<sup>137</sup> Thus, the Act in its current form places its focus on the definition of work, because the infringement of a *work* could only produce a single award, while the infringement of multiple *works* could warrant multiple awards.

When calculating statutory damages, the central question, once again, is how the court defines the work at issue. As noted, the Act does

132. 17 U.S.C. § 504(a).

133. *Id.* § 504(c)(1).

134. Copyright Act of 1909, ch. 320, § 25, 35 Stat. 1075, 1081 (specifying statutory damages for each copy, delivery, or performance of infringing material), repealed by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1332).

135. See, e.g., *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F. Supp. 531, 539 (S.D.N.Y. 1977) ("[T]he Court awards total damages of \$1 *per copy* of the album set either sold or in its possession . . ." (emphasis added)).

136. 17 U.S.C. § 504(c)(1) (emphasis added); see also *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (noting compared to Copyright Act of 1909, 1976 Act "shifts the unit of damages inquiry from number of infringements to number of works").

137. See *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) ("[S]tatutory damages are to be calculated according to the number of works infringed, not the number of infringements."); see also H.R. Rep. No. 94-1476, at 162 (1976) ("A single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series."). A plaintiff who proves one defendant committed ten separate infringements of one copyrighted work can recover only one statutory-damages award, not ten.

not define “work,”<sup>138</sup> but § 504(c), which authorizes statutory damages, provides guidance: “For the purposes of this subsection, all the parts of a *compilation* or derivative work constitute one work.”<sup>139</sup> Thus, as Professor Bert Huang observes, § 504(c) addresses the express ambiguity of what a work means under the Act; the provision grants courts some flexibility at the statutory-damages phase to determine if the material at issue is part of a compilation deserving only one award.<sup>140</sup> The term “compilation”—and the resulting discretion it affords in the determination of statutory damages—is noticeably absent from § 106, which sets forth the copyright owner’s exclusive rights and promotes an understanding of work in the singular.<sup>141</sup>

In practice, multiple courts interpreting § 504(c) have determined that individual episodes in a continuous television series are each considered a separate work infringed, and not a compilation, for the purposes of statutory damages.<sup>142</sup> This interpretation creates discord: Courts can aggregate the episodes into one series to determine substantial similarity and infringement, but then subsequently disaggregate to grant multiple statutory-damages awards. For example, in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, the defendants had published a book about the television show *Twin Peaks*, relying on material from eight episodes in the first season of the series.<sup>143</sup> The *Twin Peaks* court aggregated the episodes to determine whether there was substantial similarity between the defendants’ book and the television program.<sup>144</sup> After find-

138. See supra Part II.B.1 (discussing ambiguity in Copyright Act’s definition of work).

139. 17 U.S.C. § 504(c)(1) (emphasis added).

140. See Bert I. Huang, *Concurrent Damages*, 100 Va. L. Rev. 711, 755 (2014) (referring to “terms ‘work’ and ‘compilation’ in the Copyright Act” and noting “elasticity in the words themselves”).

141. See 17 U.S.C. § 106 (failing to mention term “compilation”); see also supra Part II.B.2 (discussing use of “work” in the singular in § 106).

142. See *MCA Television Ltd. v. Felner*, 89 F.3d 766, 770 (11th Cir. 1996) (“[T]he district court properly awarded damages for each television episode, rather than for each series, broadcast as a separate ‘work.’”); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (finding infringement of eight separate episodes warranted eight statutory-damages awards); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1118 (1st Cir. 1993) (“We conclude that Gamma is entitled to four awards of statutory damages for Ean-Chea’s infringement of four separate ‘works.’”).

143. 996 F.2d at 1370. The facts of *Twin Peaks* are analogous to those of *Castle Rock*. The book contained chapters describing characters, recounting plot twists, and discussing the creator, producer, and location of the show. *Id.* It also contained a final chapter with trivia questions. *Id.*

144. See *id.* at 1372 (discussing teleplays and episodes in the aggregate, rather than individually). There is no discussion in the court’s opinion of what material was appropriated from each individual *Twin Peaks* teleplay or episode. See *id.* (“[T]wo chapters of the Book . . . consist of extensive direct quotations from the teleplays. . . . [T]he District Court was entitled to find that the identity of 89 lines of dialogue between the works constituted substantial similarity.”).

ing infringement, however, the court disaggregated the works and granted eight damages awards, one per episode.<sup>145</sup> The *Twin Peaks* court failed to acknowledge this inconsistent use of aggregation.

Similarly, to determine infringement, the *Warner Bros.* court analyzed the amount of expression the Lexicon had taken from the aggregate Harry Potter series, rather than the individual books. The court reasoned aggregation at the substantial-similarity phase was justified “because the *Harry Potter* novels tell one coherent narrative in a series, rather than tell discrete tales.”<sup>146</sup> Yet, at the statutory-damages phase, the court disaggregated the works, awarding the plaintiffs damages for *each* of the seven Harry Potter novels and two companion texts.<sup>147</sup> The opinion makes no mention of this discord.<sup>148</sup>

Thus, courts are willing to adopt aggregation when assessing substantial similarity and establishing infringement, but reject it when determining statutory damages.<sup>149</sup> In light of courts’ interpretation of episodes and novels as individual works under § 504(c), it is an inconsistent reading of the Act, and an unlikely interpretation of congressional intent, to allow aggregation of individual units when proving infringement and then subsequent disaggregation of the units when awarding statutory damages.

C. *Balancing the Goals of Copyright: Issues with an “Author-Centric” Approach to “Work”*

While copyright law is concerned with consistent interpretation of the Copyright Act, resolution of infringement disputes should also uphold the fundamental objectives of copyright law.<sup>150</sup> To accomplish the ultimate goal of “promot[ing] the Progress of Science and useful Arts,”<sup>151</sup>

145. The opinion stated that the example before the court was an “easy case of infringement of eight *separate* works that warrant eight statutory awards.” *Id.* at 1381 (emphasis added).

146. *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 535 n.14 (S.D.N.Y. 2008).

147. *Id.* at 554.

148. See *id.* at 553–54 (granting nine damages awards, but failing to acknowledge aggregation at substantial-similarity phase).

149. An exception often exists in the case of infringements of CDs containing multiple songs. An author’s arrangement of individual songs into a CD counts as a “compilation” under § 504(c) and courts grant just one statutory-damages award, even if multiple songs are infringed. The reasoning is that if the copyright holder *issues the work as a compilation* in album form, it is assessed as such for the purposes of statutory damages. See, e.g., *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010) (limiting statutory-damages award to one sum for each of plaintiff’s albums). But see *WB Music Corp. v. RTV Commc’ns Grp., Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (granting thirteen, rather than seven, statutory awards for thirteen individual songs infringed across seven CDs compiled by *defendants*).

150. See *supra* Part I.A (discussing fundamental goals of copyright doctrine).

151. U.S. Const. art. I, § 8, cl. 8.

copyright law incentivizes authors to produce by granting them exclusive rights in their work.<sup>152</sup> This exclusivity extends only over that which is the author's original expression.<sup>153</sup> To grant protection beyond this would unjustly benefit the copyright owner.<sup>154</sup>

In cases where the plaintiff is the author of the work in dispute in addition to being the copyright owner,<sup>155</sup> it may make sense to allow her to define the allegedly infringed work at issue.<sup>156</sup> If Rowling feels her unique expression has been infringed, she might be best suited to determine what that expression is. While in practice courts often do take an "author-centric" approach and defer to an author's definition of her work,<sup>157</sup> it should not be a simple "matter of the author's unilateral designation."<sup>158</sup> Although an author has an artistic and integrity interest in how her work is defined, there is a distinction between the meaning of "work" under the law and the meaning of "work" as art. As Professor Michael Madison describes it, "Authors and audiences create artistic works; the legal system creates copyrightable . . . works."<sup>159</sup> While definitions of "work" may vary by artist, an equitable copyright system requires a consistent interpretation.

In discussing *Castle Rock*, one scholar remarks that the "notable thing about the case" was not the "unduly elastic concept of the work," but rather "the broad discretion that the court gave to the plaintiff in choosing how to characterize the work."<sup>160</sup> The right to define one's work is not specifically enumerated in § 106 or elsewhere in the Copyright Act.<sup>161</sup> The discretion to aggregate (or not) grants the same plaintiff in separate actions the opportunity to define her work in a manner most

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152. See 17 U.S.C. § 106 (2012) (listing exclusive rights granted to copyright owners).

153. See *supra* notes 35–43 and accompanying text (discussing idea–expression dichotomy).

154. See *supra* notes 28–31 and accompanying text (discussing copyright law's focus on public benefit).

155. Although copyright originally vests in a work's creator (with the exception of works made for hire), that individual might not hold the copyright to the work at the time of trial. Intellectual property, just like real property, is alienable. See H.R. Rep. No. 94-1476, at 123 (1976) (upholding "principle of unlimited alienability of copyright").

156. See Madison, *End of the Work*, *supra* note 116, at 330 ("A work often is defined as what an author creates, or as what an author claims or alleges to be the author's creation.").

157. See Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 UCLA L. Rev. 1175, 1178 (2011) ("The vast majority of cases . . . confirm that a copyrighted work is what the author says it is.").

158. Madison, *End of the Work*, *supra* note 116, at 347.

159. *Id.* at 328; see also Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 Case W. Res. L. Rev. 381, 478 (2005) (discussing "role of the law in preserving and shaping the forms that our 'creative' institutions produce").

160. Madison, *End of the Work*, *supra* note 116, at 350.

161. See 17 U.S.C. § 106 (2012) (listing exclusive rights of copyright holders).

conducive to the claim at issue. For example, had the defendant in *Castle Rock* appropriated material from only two episodes of *Seinfeld*, the plaintiff might have chosen to define the work as just those two episodes, rather than the aggregate series, to increase the likelihood of finding substantial similarity between *The Seinfeld Aptitude Test* and the two episodes. In a separate infringement suit against a different defendant, the plaintiff might attempt to redefine her work. The Act surely does not envision such discretion.

Another core concern raised by the author-centric approach to aggregation is that this discretion might create an advantage for a particular type of plaintiff. The opportunity to aggregate arises exclusively in situations where multiple units are part of a “discrete, continuous” series<sup>162</sup> with a sole author or copyright holder (as was the case with both *The Seinfeld Aptitude Test* and the *Lexicon*). Indeed, the court in *Castle Rock* distinguished the case at hand from a scenario in which a trivia book would test knowledge from eighty-four “unrelated television programs, books, movies, or any combination of creative works that do not constitute a discrete series.”<sup>163</sup> The single plaintiff-author of a collection can bundle together the individual units in a collection and then jointly assert the aggregated work against a defendant. This option is not available if the plaintiff’s works are not part of a collection or series,<sup>164</sup> or if the defendant has appropriated material from copyrighted works by multiple authors. Where the material of multiple authors has been used by a secondary author, each primary author could bring a separate infringement claim, but the opportunity to aggregate would not exist.<sup>165</sup> Thus, applying aggregation analysis to the works of these particu-

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162. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998).

163. *Id.*

164. See, e.g., *Kroencke v. Gen. Motors Corp.*, 270 F. Supp. 2d 441, 444 (S.D.N.Y. 2003) (noting neither Copyright Act nor precedent supports “view that a plaintiff’s entire *oeuvre*, or even an aggregated portion of it, may be used as the point of comparison where the works included therein bear little or no relation to one another beyond ‘style’”). In *Kroencke*, the plaintiff relied on *Warner Bros. v. ABC*, 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982), a case determining whether a television series infringed copyrighted works relating to the character Superman. See *Kroencke*, 270 F. Supp. at 443. The *Kroencke* court distinguished *ABC*, stating that “all the[] works relating to Superman were expressly connected to one another by common themes, concepts, characters, and plots that formed part of their very meaning, context, and expression.” *Id.* The court reasoned the case at hand was distinct because the *Kroencke* plaintiff sought “to ‘aggregate’ what [were] at best some common stylistic tendencies in otherwise unrelated illustrations created to serve different purposes in different contexts.” *Id.*

165. To illustrate this concept using a nonliterary example, in *Blanch v. Koons*, visual artist Jeff Koons created a collage, typical of his “neo-Pop art” style. 467 F.3d 244, 246 (2d Cir. 2006). The work at issue incorporated altered versions of advertisements, Koons’s own photographs, and other familiar objects into a collage overlaid on a natural landscape. *Id.* at 247–48. The resulting work and subject of the lawsuit, “Niagara,” portrays four pairs of



lar plaintiffs may encourage a system that advantages creators with larger, related bodies of work or the most prolific or well-known authors.

An author-centric approach to defining work is at odds with an additional tenet of copyright doctrine: the idea-expression dichotomy.<sup>166</sup> When aggregating, authors may claim to have exclusive rights over material that is not copyrightable, such as an idea or character type that emerges in a particularly broad series of work.<sup>167</sup> Often, the more installments the series contains, the more the author is associated with the larger idea behind the work, rather than just his copyrightable expression. *Nimmer on Copyright* identifies this risk and illustrates it by using the James Bond films as an example:

Given enough installments in that series, the danger arises that plaintiff could monopolize every scenario involving a suave spy who uses fancy gadgets while fraternizing with beautiful women—with the concomitant claim that every new spy flick that any defendant could develop would be substantially similar to elements of that earlier oeuvre.<sup>168</sup>

As this example demonstrates, aggregating the works of a series—particularly a series with a large number of units or volumes—makes it more difficult to distinguish between unprotected ideas, such as character types or general plot lines, and copyrightable expression, such as dialogue or specific storylines. The result is that described in the treatise:

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female legs hanging over images of doughnuts, pastries, and other desserts, with an image of Niagara Falls in the background. Jeff Koons, *Niagara*, Guggenheim, <http://www.guggenheim.org/new-york/collections/collection-online/artwork/10734> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014). One of the images of legs was taken from an advertisement in *Allure* magazine, photographed by the plaintiff, Andrea Blanch, a prominent fashion photographer. *Blanch*, 467 F.3d at 247–48. Blanch’s work represented only one piece of material Koons used. The Second Circuit compared “Niagara” with Blanch’s original image from the *Allure* advertisement. *Id.* at 257–58. Owners of the other images did not join in the suit, but had they done so, based on the court’s treatment of Blanch’s work, the court likely would have compared each plaintiff’s image individually against Koons’s work to determine substantial similarity between the two, rather than aggregating the separately authored works. Similarly, had Blanch been the copyright owner in each separate image incorporated in “Niagara,” such as if the images came from distinct advertisements or photographs, the court could have assessed each work separately against Koons’s. See *Kroencke*, 270 F. Supp. 2d at 444 (declaring despite existence of cohesive style, artist cannot aggregate entire body of work or portions of it for purposes of establishing infringement).

166. See Madison, *End of the Work*, *supra* note 116, at 330 (describing “substantial risks” of allowing authors to define work).

167. See *id.* (“[A]uthors have little incentive not to claim in law more than they actually created . . .”).

168. 4 *Nimmer on Copyright*, *supra* note 10, § 13.03[A][3] n.115.16. This example references *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, an infringement suit involving a commercial featuring a James Bond-like character. 900 F. Supp. 1287, 1291–92 (C.D. Cal. 1995).

Aggregation risks expanding the monopoly granted to copyright owners and eclipsing space for future noninfringing works.<sup>169</sup>

D. *Aggregation Analysis in the Context of Fictional-Fact Reference Works*

Disputes over fictional-fact reference works illuminate the trouble with aggregation. In addition to defying the language of the Copyright Act and permitting an author-centric approach that risks undermining the goals of copyright, aggregation distorts the test for infringement and obscures analysis of a defendant's fair use and de minimis defenses.

1. *Distorting the Test for Substantial Similarity.* — The two-pronged test for infringement requires a plaintiff to prove actual copying and unlawful appropriation in the form of substantial similarity.<sup>170</sup> The test is conjunctive. The first prong—actual copying—necessitates a showing of (1) the defendant's access to the plaintiff's copyrighted work<sup>171</sup> and (2) probative<sup>172</sup> or "striking" similarity between the two works.<sup>173</sup> With fan-fiction works, copying will either be obvious or the secondary author will admit to taking material;<sup>174</sup> the secondary work is intended as a tribute to the primary author's work. This is especially true in the case of fictional-fact reference works, where the secondary author's work only has value or

169. 4 Nimmer on Copyright, supra note 10, § 13.03[A][3]; see also supra notes 26–31 and accompanying text (discussing fundamental goals of copyright law).

170. See supra Part I.C (discussing infringement actions and determination of substantial similarity).

171. See, e.g., *Price v. Fox Entm't Grp., Inc.*, No. 05 Civ.5259 SAS, 2007 WL 241389, at \*8 (S.D.N.Y. Jan. 26, 2007) (finding possibility of access to screenplay through multiple theories); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976) (inferring defendant's access from top-hit status of plaintiff's song), aff'd sub nom. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

172. See *Latman*, supra note 65, at 1190 ("A similarity . . . is probative of copying if, by definition, it is one that under all the circumstances justifies an inference of copying.").

173. Circuits are split on whether the access and probative-similarity requirements for actual copying are conjunctive. Compare *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946) ("In some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation."), with *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) ("Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be, . . . if the defendant did not copy the accused work, there is no infringement.").

174. See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) ("[Author] freely admitted that she created *The [Seinfeld Aptitude Test]* by taking notes from *Seinfeld* programs at the time they were aired on television and subsequently reviewing videotapes . . ."); *Warner Bros. Entm't v. RDR Books*, 575 F. Supp. 2d 513, 534 (S.D.N.Y. 2008) ("There is no dispute that the *Lexicon* actually copied from Rowling's copyrighted works. [The *Lexicon's* author] openly admitted that he created and updated the content of the *Lexicon* by taking notes while reading the *Harry Potter* books . . .").

makes sense when accessed alongside the primary copyrighted work.<sup>175</sup> For example, *The Seinfeld Aptitude Test* has no purpose unless the reader is familiar with *Seinfeld*, and the Lexicon derives use only when employed as a reference to the Harry Potter series. This unique aspect of these works functionally eliminates the need for the plaintiff to prove the first prong of the infringement test—actual copying. Therefore, in a dispute over a fictional-fact reference work, the entire focus of the inquiry is whether the defendant's work is substantially similar to the plaintiff's,<sup>176</sup> making the determination of what constitutes the works in question the keystone of the court's analysis.

The ability to aggregate distorts this sole remaining prong of the infringement test, as the outcome of a substantial-similarity analysis may vary depending on whether aggregation is applied. Consider the following scenarios. *The Seinfeld Aptitude Test* might test knowledge of a character or event with a minimal role in one episode of *Seinfeld*, yet a more significant role throughout the series as a whole. If a court compares *The Seinfeld Aptitude Test* with the entire *Seinfeld* series, the use of the material might meet the quantitative or qualitative threshold to establish substantial similarity, advantaging the plaintiff. On the other hand, a character or event might appear only once throughout the series, but play a significant role in a particular episode. In such a case, the plaintiff might argue for individual-works analysis to help prove that *The Seinfeld Aptitude Test* and the single episode were substantially qualitatively or quantitatively similar.

This Note recognizes that assessing substantial similarity is no easy task. In some sense, aggregation is a favorable approach for the sake of efficiency. When aggregating, a court can compare just two works, rather than perform the substantial-similarity analysis multiple times for each unit in a collection or series.<sup>177</sup> When defining the work in dispute, a court will necessarily face a difficult line-drawing task. What is the threshold beyond which aggregation might be prudent simply for purpose of feasibility? Is it when the copyrighted work is 7 books in a series, 84 television episodes, or 372 music samples?<sup>178</sup> But courts are accustomed to

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175. See *Castle Rock*, 150 F.3d at 136, 143 (declaring “plain purpose” of *The Seinfeld Aptitude Test* is to “satisfy [fans’] between-episode cravings”); *Warner Bros.*, 575 F. Supp. 2d at 520 (noting Lexicon aimed to “enrich the experience of readers of the *Harry Potter* series”).

176. See *supra* Part I.C (discussing determination of substantial similarity).

177. It is worth noting that, in some circumstances, delimiting the *aggregated* work might be a challenging task in itself. For example, if an author's poems were compiled into five volumes, each with a specific theme, the question might arise whether the aggregated work is the particular volume or the multivolume set. In such a case, in addition to choosing whether to aggregate or not, the court is faced with the task of defining the aggregated work.

178. See *Girl Talk*, *Illegal Art*, <http://illegal-art.net/girltalk/> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (“With the grand intent of creating the most

such challenging determinations, and if nonaggregation creates burdensome discovery or lengthy trials, parties might be encouraged to settle and avoid the expense, time, and publicity associated with litigation.

2. *Obscuring a Fair Use Defense.* — Originally, fair use was a judge-made doctrine, but it has been codified in § 107 of the Copyright Act.<sup>179</sup> Fair use is a limitation on an author's exclusive rights over his work.<sup>180</sup> The doctrine "excuse[s] reasonable unauthorized appropriations" of copyrighted material when use of the material does not significantly decrease the economic worth of the primary work and promotes a public benefit.<sup>181</sup>

Fair use is an affirmative defense against infringement;<sup>182</sup> the defense only arises after the court has determined that there is substantial similarity between the works. The Act identifies four factors courts should consider when assessing whether the appropriation of material is 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>183</sup>

Fair use is a "context-sensitive inquiry,"<sup>184</sup> and the four factors should not be assessed independently but "explored, and the results weighed together, in light of the purposes of copyright."<sup>185</sup>

insane and complex pop collage album ever heard, large catalogs of both blatantly appropriated melodies and blasts of unrecognizable fragments were assembled for the ultimate Girl Talk record (clocking in at 71 minutes and 372 samples).").

179. 17 U.S.C. § 107 (2012).

180. Gorman, Ginsburg & Reese, *supra* note 29, at 805.

181. *Id.*; see also *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (noting fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster" (quoting *Iowa State Univ. Research Found., Inc. v. ABC*, 621 F.2d 57, 60 (2d Cir. 1980))); cf. H.R. Rep. No. 94-1476, at 65-66 (1976) (providing guidance on application of doctrine and illustrating examples of fair use).

182. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) ("The drafters resisted pressures . . . to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis."); see also H.R. Rep. No. 102-836, at 1 (1992) ("[C]onsistent with Congress's codification of fair use in the 1976 Copyright Act, the courts are to determine the *affirmative defense* of fair use of unpublished works on a case-by-case basis . . ." (emphasis added)).

183. 17 U.S.C. § 107(1)-(4).

184. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

185. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

Fair use is a powerful defense: “Together with the idea–expression dichotomy, the ‘fair use’ exception to copyright protection constitutes perhaps the most significant . . . limitation on an author’s or copyright holder’s prerogatives.”<sup>186</sup> Because fictional facts exist at the intersection of fact and expression, their copyrightability is not easily resolved by way of the idea–expression dichotomy.<sup>187</sup> Thus, it is especially important that any analysis of a fair use defense raised by an author of a fictional-fact reference work take into account the complexities involved.<sup>188</sup>

There is an unavoidable link between the test for infringement and the third factor<sup>189</sup> of fair use, that is, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>190</sup> This factor may weigh in favor of a plaintiff when the amount a defendant appropriated has crossed either a quantitative or qualitative threshold.<sup>191</sup>

186. Gorman, Ginsburg & Reese, *supra* note 29, at 805.

187. See *supra* Part I.B (discussing idea–expression dichotomy in context of fictional facts).

188. The fact that a work is one of pop culture or mainstream entertainment, as is true of *The Seinfeld Aptitude Test* or the Lexicon, does not render it outside § 107. See *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1374 (2d Cir. 1993) (noting work “about a television program is no less entitled to the defense of fair use because its subject is a program of mass appeal and the author aims his comment at a lowbrow audience”). It makes no difference whether a secondary work “concerns ‘Masterpiece Theater’ and appears in the *New York Review of Books*” or is about “‘As the World Turns’ and appears in *Soap Opera Digest*.” *Id.* Courts should avoid aesthetic judgments when conducting a fair use analysis. See *id.* (“Courts must be alert to the risk of permitting subjective judgments about quality to tilt the scales on which the fair use balance is made.”). Reference works containing fictional facts—and fan fiction more generally—still warrant the application of the fair use defense. See, e.g., *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (“[T]he fact that the subject matter of the quiz is plebeian, banal, or ordinary stuff does not alter the fair use analysis.”).

189. While this Note focuses on the effect of aggregation on the third factor of fair use, the balance of the first factor also depends on the size of the plaintiff’s copyrighted work. See 17 U.S.C. § 107(1) (2012) (stating first fair use factor is “purpose and character of the use”). Often, the test for the first factor involves assessing whether the new work has sufficiently transformed the material from the copyrighted work. When the defendant appropriates material from multiple units in a series or collection, the very synthesis and assembly of the material can be transformative under the first factor, weighing in favor of the defendant and suggesting fair use. See Leval, *supra* note 43, at 1111 (“I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*.”). If the plaintiff’s copyrighted work is treated as a single, aggregated piece, however, it may be more difficult for the defendant to sufficiently transform the material and tilt the first factor in his or her favor. See Hughes, *Size Matters*, *supra* note 115, at 619 (arguing size of plaintiff’s work influences defendant’s chances of prevailing on first factor of fair use defense).

190. 17 U.S.C. § 107(3).

191. See *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990) (noting courts have denied fair use where appropriated material composed “substantial percentage” of copyrighted work or where it was “essentially the heart” or core of copyrighted work (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985))); see also 4 *Nimmer on Copyright*, *supra* note 10, § 13.05[A][3]

A defendant could simply take quantitatively too much material from a plaintiff's work to constitute fair appropriation, for example, the use of a 500-word excerpt from a 1,000-word essay.<sup>192</sup> A defendant could also take very little material, but appropriate the "heart" of the work in a qualitative sense.<sup>193</sup> While there are not "absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use,"<sup>194</sup> how a court defines the copyrighted work will heavily influence the third factor of the analysis.

The language of the third factor of fair use is significant in two respects. First, the third factor examines the amount of appropriated material "in relation to the *copyrighted work*,"<sup>195</sup> placing the focus of the inquiry on the plaintiff's work<sup>196</sup> and not the defendant's.<sup>197</sup> Second, the determination is made "in relation to the copyrighted *work as a whole*."<sup>198</sup> As with the test for substantial similarity, whether the third factor weighs in favor of the plaintiff or defendant again depends largely on what the court accepts as the "work as a whole."

Before the defendant can raise a fair use defense, the court must have first reached a conclusion as to infringement.<sup>199</sup> If the court has already aggregated when assessing substantial similarity, it will inevitably aggregate when determining fair use.<sup>200</sup> Here, the aggregation approach

("The proper analysis here includes a determination of not just quantitative, but also qualitative substantiality." (footnotes omitted)).

192. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 98–99 (2d Cir. 1987) (finding defendant's appropriation of "protected sequences constituting at least one-third of 17 letters and at least 10 percent of 42 letters" was substantial appropriation weighing against finding of fair use).

193. *Harper & Row*, 471 U.S. at 564–65 (quoting district court opinion).

194. *New Era*, 904 F.2d at 158 (quoting *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1263 (2d Cir. 1986)).

195. 17 U.S.C. § 107(3) (emphasis added).

196. Here, the dangers of an author-centric approach, described *supra* Part II.C, arise again.

197. See, e.g., 4 *Nimmer on Copyright*, *supra* note 10, § 13.03[A][2][a] ("[T]he question in each case is whether the similarity relates to matter that constitutes a substantial portion of [*the pre-existing work*]—not whether such material constitutes a substantial portion of [*the allegedly infringing work*]." (emphasis added)).

198. 17 U.S.C. § 107(3) (emphasis added); see, e.g., *Craft v. Kobler*, 667 F. Supp. 120, 128–29 (S.D.N.Y. 1987) (considering third factor in context of entire body of "extensive Craft-Stravinsky [w]ritings").

199. See 4 *Nimmer on Copyright*, *supra* note 10, § 13.05[A][3] ("[I]n order even to reach the stage at which the affirmative defense of fair use comes into play, plaintiff must already have demonstrated substantial similarity."); see also *id.* § 13.05 ("[F]air use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial.").

200. See, e.g., *Craft*, 667 F. Supp. at 128–29 (considering plaintiff's multiple books, containing "[w]ritings of over 2 million words," to determine both whether defendant's book was in competition with copyrighted material and whether book constituted fair use of copyrighted material).

again obscures the analysis. With multiple units in a collection or series, the defendant's appropriation might meet the quantitative threshold for infringement for one unit, but not another. Likewise, with the qualitative component, there might be multiple "hearts"<sup>201</sup> at stake among the units, and the defendant might not have taken the heart of every single novel or episode. As a result, aggregation does double duty for the plaintiff by limiting the defendant's ability to successfully raise a fair use defense for all—or at least some—units within a collection or series.

The court's analysis in *Castle Rock* illuminates this point. The defendant's work, *The Seinfeld Aptitude Test*, contained 643 trivia questions from eighty-four separate episodes.<sup>202</sup> When assessing substantial similarity, the Second Circuit determined the plaintiffs' work was the aggregate series of *Seinfeld*, rather than the individual episodes of the show.<sup>203</sup> The court noted that twenty of the questions came from a single episode, "The Cigar Store Indian."<sup>204</sup> If the court had compared *The Seinfeld Aptitude Test* with each individual episode of *Seinfeld*, rather than the aggregated series, the outcome for fair use might have differed by episode. Where *The Seinfeld Aptitude Test* contained only one or two questions testing knowledge from a single episode, the third prong of fair use may have weighed in favor of the defendant. But in the case of the twenty questions from "The Cigar Store Indian," the plaintiffs may have prevailed. Here, the individual-episode approach allows for a more nuanced analysis. Additionally, under such circumstances, it is possible that *The Seinfeld Aptitude Test's* author could have revised or tailored the book so as to avoid infringement of particular episodes while still allowing the public access to the work and thus preserving the fundamental goals of copyright.<sup>205</sup>

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201. Each novel in a series may focus on a particular character or event that "[t]o a large extent . . . make[s] the book worth reading." *Salinger v. Random House, Inc.*, 811 F.2d 90, 98–99 (2d Cir. 1987).

202. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 135 (2d Cir. 1998).

203. *Id.* at 138 ("[W]e shall treat *Seinfeld*—a discrete, continuous television series—as a single work.").

204. *Id.* at 136.

205. Indeed, such was the ultimate outcome with the *Lexicon*. Vander Ark later revised the version at issue and published the book in print. The revised version was not subject to any further legal challenges from the *Warner Bros.* plaintiffs. See Steve Vander Ark et al., *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials*, at vii (2009) ("One of the most important goals of this new book is to avoid giving too much away or using J.K. Rowling's unique expressions . . . . [N]ew readers deserve to . . . read the series, with the plot unfolding for them the way the author intended.").

This Note recognizes that an individual-works analysis will not always favor the defendant, nor will aggregation always favor the plaintiff;<sup>206</sup> nonaggregation might still yield a finding of infringement or result in an unsuccessful fair use defense. The point is not that aggregation will always weaken the defendant's fair use defense, but rather that aggregation *obscures* the analysis of fair use, just as it obscures the analysis of substantial similarity.

3. *Weakening the Opportunity for a De Minimis Defense.* — In addition to allowing some copying under the fair use doctrine, courts also recognize that certain appropriation is *de minimis*. A *de minimis* rule “allow[s] the literal copying of a small and usually insignificant portion of the plaintiff’s work”<sup>207</sup> without legal consequences. Replicating the precise wording of a trivial amount of copyrighted work may not be substantial enough to support a claim of infringement.<sup>208</sup> Here, as with fair use, the determination of *de minimis*—and therefore lawful copying—is largely dependent on how the court defines the copyrighted work.<sup>209</sup>

The *Castle Rock* opinion explicitly recognizes how aggregation alters the analysis of a *de minimis* defense. The court conceded that if *The Seinfeld Aptitude Test* had “copied a few fragments from each of 84 *unrelated* television programs (perhaps comprising the entire line-up on broadcast television), defendants would have [had] a stronger case under the *de minimis* doctrine.”<sup>210</sup> Focusing on the continuous nature of the series, rather than the “form” of each separately produced episode,<sup>211</sup> the court aggregated the episodes and rejected the defendant’s *de minimis* defense.

Here, the argument against aggregation is similar to that under the third factor of fair use: *The Seinfeld Aptitude Test* might contain one trivia

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206. See *supra* notes 87–88 and accompanying text (noting scenarios in which defendant argued for aggregation or plaintiff sought to aggregate *defendant’s* work).

207. *Warner Bros. v. ABC*, 720 F.2d 231, 242 (2d Cir. 1983).

208. See *G.R. Leonard & Co. v. Stack*, 386 F.2d 38, 40 (7th Cir. 1967) (affirming district court’s finding of *de minimis* copying where five entries in defendant’s 90,000-entry guide were copied from plaintiff’s work); *Werlin v. Reader’s Digest Ass’n*, 528 F. Supp. 451, 463–64 (S.D.N.Y. 1981) (finding copying of two sentences from plaintiff’s work was *de minimis*); *Jackson v. Wash. Monthly Co.*, 481 F. Supp. 647, 650 (D.D.C. 1979) (finding copying of two sentences to be noninfringing); see also 4 *Nimmer on Copyright*, *supra* note 10, § 13.03[A][2][a] (discussing fragmented literal similarity).

209. See *Hughes, Size Matters*, *supra* note 115, at 577 (critiquing doctrines of fair use and *de minimis* “because each takes the *work* as its starting point to measure the amount of copying”).

210. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (emphasis added). For an additional and highly contrasting case considering aggregation and a *de minimis* defense, see *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71–72 (2d Cir. 1999) (denying defendant’s *de minimis* defense due to *rejection* of aggregation theory).

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



question from a single episode, or the Lexicon might include an entry that appears only once in a single Harry Potter book, but numerous times throughout the aggregate series. These examples might qualify as de minimis copying when assessed against the individual unit. But assessed against the aggregate series, the trivia question or Lexicon entry might appear multiple times, resulting in a finding of more substantial appropriation.<sup>212</sup>

In assessing whether a taking is de minimis, it is possible aggregation could weigh in favor of, rather than against, the defendant.<sup>213</sup> For example, if material appears in only one unit of the series, aggregation might render the taken expression de minimis, while individual-works analysis would lead to a finding of substantial similarity. In such a case where aggregation would be favorable for the defendant, however, the primary author may argue for nonaggregation.<sup>214</sup> Yet, as with the test for infringement and fair use, aggregation is troubling not because it is necessarily always detrimental to the defendant, but because it distorts the analysis of whether appropriation is substantial or de minimis.

### III. ADOPTING A SOLUTION TO THE DISCORD

This Part proposes two alternatives to the current aggregation approach. Part III.A suggests courts should forgo aggregation and instead assess substantial similarity on a mandatory individual-works basis, employing the interpretation of work encouraged by the language of the Copyright Act. Part III.B offers an approach that grants discretion to courts to aggregate or not, but requires that the definition of work adopted for the assessment of statutory damages parallel that employed at the substantial-similarity phase. Part III.B also proposes that courts leverage an “independent-economic-value” test at both the substantial-similarity and statutory-damages phases to assist courts with the decision of whether to apply aggregation analysis. The solution presented in Part III.A avoids the doctrinal and analytical problems of aggregation, but denies courts flexibility. The approach proposed in Part III.B is more flexible and results in greater consistency within opinions, yet fails to

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212. One could imagine an even more extreme example: An author could create a book called *The Obscure and Forgotten World of Harry Potter*, a fictional-fact reference work composed of information that appeared only once throughout the entire series. If a court were to apply aggregation analysis, it might find infringement because every single piece of information was taken from the Harry Potter series, even though no single piece of information plays a substantial role in any unit of the series.

213. See, e.g., *Nihon*, 166 F.3d at 71–72 (rejecting *defendant's* argument that material taken from plaintiff's aggregated body of work was de minimis and declaring “failure to copy a larger percentage of [plaintiff's] total works does not insulate [defendant] from liability”).

214. This illuminates the gamesmanship concerns associated with an author-centric approach, described *supra* Part II.C.

fully prevent the risks associated with aggregation. Both solutions aim to avoid contradiction within opinions and encourage a more just determination of both infringement and statutory damages.

#### A. *Mandatory Individual-Works Analysis*

One option for courts is to abandon the use of aggregation altogether.<sup>215</sup> To do so would accord with the language of the Copyright Act, which grants exclusive rights to owners of copyrighted *work* in the singular.<sup>216</sup> Individual-works analysis also conforms to the goals of copyright law by reducing plaintiffs' discretion in defining their work and the subsequent risks that accompany an author-centric approach.<sup>217</sup> Additionally, mandating individual-works analysis would result in a more precise and consistent determination of fair use and de minimis defenses.<sup>218</sup>

In eradicating aggregation, the definitions of work under §§ 106 and 504(c) of the Copyright Act would be made largely<sup>219</sup> consistent,<sup>220</sup> resolving discord within opinions.<sup>221</sup> Under an individual-works analysis, if the defendant were found liable for infringement, the grant of multiple damages awards for each unit in the series would not seem inequitable; such an outcome would follow logically from a nonaggregated determination of infringement.<sup>222</sup> Additionally, mandatory individual-works analysis would, at the statutory-damages phase, eliminate the need for courts to calculate how many works were infringed because the number of works at issue would have already been established at the infringement phase.<sup>223</sup>

There are, however, some cases in which eliminating aggregation would not result in full accordance between the analyses for substantial similarity and statutory damages. When works are part of a compila-

215. Though not advocating for outright abandonment of aggregation, *Nimmer on Copyright* suggests "great caution is required before adopting any rule that plaintiff may aggregate the works of a series into a single claim." 4 *Nimmer on Copyright*, supra note 10, § 13.03[A][3]; see also *Kroencke v. Gen. Motors Corp.*, 270 F. Supp. 2d 441, 443 (S.D.N.Y. 2003) (finding "aggregation" theory to be "rather amorphous" and unsupported).

216. See supra Part II.B (discussing how Copyright Act discourages aggregation).

217. See supra notes 160–161 and accompanying text (describing risks of granting excessive discretion to author in defining "work").

218. See supra Part II.D.2–3 (discussing how aggregation can obscure assessment of fair use and de minimis defenses).

219. See infra notes 224–227 and accompanying text (accepting existence of some inconsistency when compilations are at issue).

220. See supra Part II.B.2 (discussing statutory disapproval of aggregation).

221. See supra Part II.B.3 (noting discord between definition of "work" at substantial-similarity and statutory-damages phases).

222. See supra Part II.B.3 (noting that having distinct interpretations of work under §§ 106 and 504(c) is unlikely reading of Copyright Act).

223. As mentioned above, supra notes 177–178 and accompanying text, aggregation does allow courts to avoid performing multiple tests for substantial similarity.

tion,<sup>224</sup> such as songs in an album, courts aggregate when calculating statutory damages.<sup>225</sup> In such a situation, eradicating aggregation at the substantial-similarity phase would retain the troubling discord between the two phases. But such situations are the rare exception and therefore would not significantly undermine a proposal to eliminate aggregation.<sup>226</sup> Additionally, courts or Congress could resolve this inconsistency by establishing specific exceptions to mandatory individual-works analysis.<sup>227</sup>

Mandatory nonaggregation would also avoid the risks of an author-centric approach to defining work. A plaintiff would not be able to request aggregated treatment against a defendant in one dispute and subsequently propose nonaggregated treatment if more favorable against a defendant in a different dispute. Thus, eradicating aggregation eliminates this type of plaintiff gamesmanship and promotes a consistent definition of work for future infringement suits.

To be sure, if a court does find infringement, an individual-works analysis at the statutory-damages phase is unfavorable for defendants, who are forced to pay multiple awards. However, such a result is compelled by the statute, not this Note's analysis, and could be resolved by new legislation.

#### B. *Discretionary but Symmetric Analysis*

Application of aggregation analysis is currently inconsistent across, and even within, jurisdictions.<sup>228</sup> At times, a court both explicitly acknowledges and rationalizes the aggregation of multiple works, but often aggregation is implicit or unreasoned.<sup>229</sup> Judges might aggregate when

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224. See 17 U.S.C. § 504(c)(1) (2012) (“For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”).

225. See, e.g., *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–41 (2d Cir. 2010) (treating all songs in album as singular compilation warranting one statutory-damages award).

226. Additionally, compilations are unlikely to arise in the context of fictional-fact reference works.

227. See *infra* Part III.B (suggesting court discretion predicated on symmetric analysis at both infringement and statutory-damages phases could solve such discord within opinions).

228. See *supra* notes 86–90 and accompanying text (noting inconsistent acceptance and rejection of aggregation theory).

229. See *supra* notes 91–92 (noting examples of explicit and implicit use of aggregation).

they feel the substance of the work dictates such an analysis<sup>230</sup> or might do so simply for the sake of efficiency.<sup>231</sup>

Judicial discretion in aggregating may not be inherently unfavorable.<sup>232</sup> One of the most troubling issues with aggregation is the disharmony between the court's definition of "work" at the infringement and statutory-damages phases, when a court aggregates to establish infringement and subsequently disaggregates when awarding statutory damages.<sup>233</sup> A just and practical solution may be to allow aggregation with the addition of an important stipulation: The same analysis must be applied at both the substantial-similarity and statutory-damages phases. Thus, if the court assesses substantial similarity on an individual-works basis and finds infringement, the damages must also be awarded on a per-episode or per-book basis.<sup>234</sup> However, if the court chooses to aggregate at the substantial-similarity phase, it must also do so for the purposes of determining statutory damages<sup>235</sup> and grant the plaintiff a single damages award.<sup>236</sup>

One weakness of this discretionary solution is that it fails to solve the gamesmanship issues associated with an author-centric approach to

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230. See *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (declaring individual-episode analysis would "elevate form over substance").

231. See *supra* notes 177–178 and accompanying text (describing upshot of efficiency when aggregating).

232. See Huang, *supra* note 140, at 754 ("[T]he concurrent damages option . . . allows for some tailoring, case by case, to different conceptions of harm . . .").

233. See *supra* Part II.B.3 (discussing discord resulting from aggregation at substantial-similarity phase and subsequent disaggregation at statutory-damages phase).

234. This Note acknowledges that such discretionary but symmetric analysis would disrupt some precedent, particularly when assessing damages for "compilations" under § 504(c). For example, if the *plaintiff* copyright holder issued the songs together as a unit, despite some sales of individual songs through a service like iTunes, the court might be inclined to award statutory damages on a per-album basis. See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–41 (2d Cir. 2010) (limiting statutory-damages award to one award per album). In such a case, if the court wishes to follow precedent when assessing damages, it would aggregate at the substantial-similarity phase, *knowing* it will subsequently assess statutory damages in the aggregate as well. If the court finds infringement, the analysis at both phases achieves optimal symmetry. If the court does not find infringement, it will never reach the issue of damages at all. This example simply demonstrates that a desire to follow the precedent of aggregating at the latter statutory-damages phase can influence the prior decision to aggregate in the initial substantial-similarity phase, a kind of reverse-symmetric decisionmaking.

235. See Huang, *supra* note 140, at 760 (noting "familiar heuristic that, for optimal deterrence, damages should be pegged to the same unit as the harm").

236. Some judicial discretion would still exist when determining statutory damages, independent from the aggregation choice made during the substantial-similarity phase. Under § 504(c)(1), the court can award between \$750 and \$30,000 for each work infringed. 17 U.S.C. § 504(c)(1) (2012). If the court feels that appropriation from an aggregated work warrants a somewhat larger award, the amount of statutory damages the court grants can reflect this.

aggregation; without a mandatory rule, a plaintiff could change the definition of the work depending on the facts of the case at hand.<sup>237</sup> To curb this risk, courts could establish an additional rule that once a plaintiff has defined her copyrighted work in the context of an infringement dispute, the same definition of that work must be used in any future litigation.

If aggregation is discretionary, how will courts determine whether its use is appropriate? As noted, relying on an author's definition of the work at issue is problematic.<sup>238</sup> For guidance in this decision, courts can leverage the independent-economic-value test,<sup>239</sup> an objective, functional test that courts sometimes apply in the calculation of statutory damages. When determining whether individual units in a series should be treated as separate works or a compilation<sup>240</sup> warranting one award, the test focuses on "whether each expression . . . has an independent economic value and is, in itself, viable."<sup>241</sup> In *Gamma Audio & Video, Inc. v. Ean-Chea*, the defendant sold and rented complete sets of an entire copyrighted television series to video stores and was found liable for infringement.<sup>242</sup> Yet, the court awarded damages on an individual-episode basis because each episode could be rented and viewed independently<sup>243</sup> and therefore had value *independent of the series as a whole*.<sup>244</sup>

237. See supra Part II.C (discussing issues with author-centric approach to defining work).

238. See supra Part II.C (noting possible gamesmanship associated with author-centric approach).

239. See *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–18 (1st Cir. 1993) (discussing and applying independent-economic-value test); see also *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) ("[S]eparate copyrights are not distinct works unless they can 'live their own copyright life.'" (quoting *Robert Stigwood Grp. Ltd. v. O'Reilly*, 530 F.2d 1096, 1105 (2d Cir. 1976))).

240. See supra notes 138–141 and accompanying text (discussing compilation language under § 504(c) of Copyright Act).

241. *Gamma Audio*, 11 F.3d at 1117.

242. *Id.* at 1112, 1119.

243. *Id.* at 1117.

244. Even in circuits that adopt the independent-economic-value test, not all "parts of a whole" are accorded independent value to warrant individual statutory-damages awards. In *MCS Music America, Inc. v. Yahoo! Inc.*, while the court accepted the test as valid, it felt the case at hand, involving individual sound recordings of a musical composition, did not meet the criteria for independent awards. No. 3:09-cv-00597, 2010 WL 500430, at \*3 (M.D. Tenn. Feb. 5, 2010). The court held that although the recordings might have independent economic value, they did not qualify for statutory damages if they were "simply . . . variation[s]" of the copyrighted composition. *Id.* Similarly, in *Walt Disney Co. v. Powell*, the court found the defendant, who sold shirts depicting Mickey and Minnie Mouse in six different poses, only infringed two of Disney's works, rather than six. Each shirt was essentially identical, only the poses varied. See 897 F.2d at 570 ("While Mickey and Minnie are certainly distinct, viable works with separate economic value . . . Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or his right."). Additionally, not all courts have had the opportunity to apply the independent-economic-

Statutory damages were awarded on the basis of *each work* infringed upon<sup>245</sup> because *each work* had potential economic value for the copyright owner.<sup>246</sup> Currently, courts give no such attention to the notion of economic value at the substantial-similarity phase.<sup>247</sup> But determining what constitutes a work for the purposes of infringement also contains an implicit judgment about value: If the plaintiff owns a copyright in each separate unit in a series, then the law recognizes that in *each* unit there is something original and protectable.

In deciding whether to aggregate at the substantial-similarity phase, a court might apply the independent-economic-value test by making a prospective, hypothetical assessment of statutory damages. If the units in a collection would pass the independent-economic-value test for statutory damages—as would, for example, episodes in a television series—then a court could assess the episodes independently for purposes of determining infringement. If, however, multiple units within a series—for example, individual poems in a collection—would not possess independent economic value, then a court could be encouraged to aggregate the poems when performing the substantial-similarity test.

If a collection or series contains numerous units—for example, eighty-four episodes—a nonaggregated substantial-similarity analysis could be particularly burdensome for a court. Discretionary but symmetric analysis grants courts this needed flexibility when feasibility or efficiency concerns weigh in favor of aggregation. In such a case, a court could aggregate the works at the substantial-similarity phase, knowing it would commit to granting a single statutory-damages award if it finds infringement.

#### CONCLUSION

A finding of infringement imposes severe legal and reputational consequences on secondary-author defendants; a just determination of infringement is predicated on how a court defines the copyrighted work at issue. Aggregating works when determining substantial similarity defies the statutory language of the Copyright Act, risks plaintiff gamesman-

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value test. In *Bryant v. Media Right Productions, Inc.*, the Second Circuit recognized that other circuits had applied the test, but declined to do so itself. 603 F.3d 135, 142 (2d Cir. 2010). The court felt the albums at issue fit squarely within the compilation language of the Copyright Act and such an interpretation was consistent with congressional intent. See *id.* (“This language [of the Copyright Act] provides no exception for a part of a compilation that has independent economic value . . .”).

245. See *supra* notes 136–137 and accompanying text (discussing damages scheme under Copyright Act).

246. See *supra* notes 120–125 and accompanying text (discussing singular use of “work” in § 106).

247. Admittedly, § 106 does not contain the flexible compilation language of § 504(c). See Huang, *supra* note 140, at 754–56 (noting some “elasticity” in terms of § 504(c)).

ship, and creates discord within opinions and among jurisdictions when courts find infringement and award statutory damages.

Disputes involving fictional-fact reference works illuminate this trouble of aggregation, as its application distorts the test for infringement, impairs analysis of an affirmative defense of fair use, and limits the opportunity for a *de minimis* defense. Aggregation threatens the fate of these works, possibly discouraging their production by secondary authors and denying the benefit of their utility and entertainment to the public. By eliminating aggregation analysis or allowing discretionary but symmetric aggregation analysis at both the infringement and damages phases, courts can avoid inconsistency within opinions and ensure adherence to the goals of copyright law.

