

1 DENNIS JACOBS, Circuit Judge, concurring:

2 I concur in the majority opinion and subscribe in
3 nearly all respects to its analysis, with the following
4 further observations.

5 The majority opinion assumes that Dr. Ross and his co-
6 defendants may have acquired the NXIVM training manual in
7 bad faith, and observes that the district court did not
8 explore this question. Even assuming such bad faith, the
9 majority opinion nonetheless concludes that the defendants'
10 quotation from the NXIVM original was a fair use protected
11 by § 107. This is because Ross used the passages from
12 NXIVM's manuals to criticize the original, i.e., with a
13 literary intention and effect that differed sufficiently
14 from that of the original to be transformative.
15 Accordingly, Dr. Ross' publication of the quoted material
16 did not enter the marketplace as a potential substitute for
17 NXIVM's original. In the majority's words, "[a]ll of the
18 alleged harm arises from the biting criticism of [the
19 defendant's] fair use, not from usurpation of the market"
20 that properly belongs to the plaintiff. **Maj. Op. at [20].**

21 With all of this I completely agree. The fact that the
22 defendants might have acted in bad faith in acquiring the

1 plaintiff's material did not bar a finding of fair use. I
2 would go somewhat further. The majority assumed, based on
3 the Supreme Court's having said so in Harper & Row
4 Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562-63
5 (1985), that bad faith on the part of secondary users has a
6 proper place in the fair use analysis. The Court's
7 observation in Harper & Row was, however, a make-weight
8 wholly unnecessary to the outcome; rejection of the fair use
9 defense was compelled by the essential statutory
10 considerations: the defendant took the "heart" of the
11 plaintiff's book (the part the public was most interested in
12 reading), and in so doing, usurped a significant part of its
13 market.

14 The Supreme Court's most recent consideration of fair
15 use in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585
16 n.18 (1994), treats as an open question whether the
17 secondary user's good or bad faith is pertinent to the fair
18 use inquiry (contrary to its observation in Harper & Row).
19 The present case affords an occasion to assess whether bad
20 faith on the part of a secondary user plays a productive
21 role in the fair use inquiry. For the reasons that follow,
22 I think that the secondary user's good or bad faith in

1 gaining access to the original copyrighted material ought to
2 have no bearing on the availability of a fair use defense.
3 Fair use defines the outer boundary of copyright protection,
4 and that perimeter should be drawn by reference to the
5 central objectives of copyright. Copyright itself would be
6 distorted if its contours were made to depend on the
7 morality and good behavior of secondary users.

8 **I**

9 Twenty years ago in Harper & Row, the Supreme Court
10 held that THE NATION'S scoop of a TIME magazine article
11 previewing the memoirs of President Ford was an
12 infringement. Harper & Row, 471 U.S. at 569. Although THE
13 NATION contended that the newsworthiness of its piece
14 compelled a finding of fair use, the article failed every
15 prong of the fair use statute, 17 U.S.C. § 107: its conceded
16 purpose was to scoop the authorized publication by TIME
17 magazine and thus "supplant[] the copyright holder's
18 commercially valuable right of first publication," id. at
19 562; it appropriated the "heart" of the memoir, id. at 564-
20 66; and it "directly competed for a share of the market for
21 prepublication excerpts," id. at 568. In short, Harper &

1 Row was not a close case. Nevertheless, in its review of
2 the "purpose and character" of THE NATION'S infringement, the
3 Court made the additional observation that "[f]air use
4 presupposes good faith and fair dealing" and noted the
5 district court's finding that "The Nation knowingly
6 exploited a purloined manuscript" to get its scoop. Id. at
7 562-63.

8 However, when the Supreme Court next considered fair
9 use, in a challenge to 2 Live Crew's pop parody of a Roy
10 Orbison song, the pertinence of bad faith was treated as an
11 open question, not as a point settled by Harper & Row:

12 [R]egardless of the weight one might place on the
13 alleged infringer's state of mind, compare Harper
14 & Row, 471 U.S. at 562 [] (fair use presupposes
15 good faith and fair dealing) (quotation marks
16 omitted), with Folsom v. Marsh, 9 F. Cas. 342, 349
17 (No. 4,901) (C.C.D. Mass. 1841) (good faith does
18 not bar a finding of infringement); [Pierre N.]
19 Leval, [Toward a Fair Use Standard, 103 Harv. L.
20 Rev. at] 1126-27 (good faith irrelevant to fair
21 use analysis), we reject [the] argument that 2
22 Live Crew's request for permission to use the
23 original should be weighed against a finding of
24 fair use. Even if good faith were central to fair
25 use, 2 Live Crew's actions do not necessarily
26 suggest that they believed their version was not
27 fair use If the use is otherwise fair,
28 then no permission need be sought or granted.

29 Campbell, 510 U.S. at 585 n.18 (emphasis added). In
30 opposition to Harper & Row's assumption that "fair use

1 presupposes good faith and fair dealing," the Campbell
2 footnote highlighted the seemingly contrary inference of
3 Justice Story's classic statement of the fair use principles
4 in Folsom, as well as an often-cited study that questions
5 whether good faith should be weighed in the balancing of
6 "the social benefit of a transformative secondary use
7 against injury to the incentives of authorship." Pierre N.
8 Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105,
9 1126-27 (1990) ("Leval I"). Campbell's contrary-to-fact
10 phrasing--"[e]ven if good faith were central to fair use"--
11 rather suggests that it should not.

12 So, even if Harper & Row did state in passing that fair
13 use presupposes good faith, Campbell reopened the question.
14 See, e.g., Religious Tech. Ctr. v. Netcom On-Line
15 Communication Servs., Inc., 923 F. Supp. 1231, 1244 n.14
16 (N.D. Cal. 1995) ("Campbell . . . hardly endorses the good
17 faith requirement."). Campbell's footnoted discussion
18 questioning the pertinence of good faith reinforces the
19 entire thrust of the decision, which requires that fair use
20 be assessed primarily in light of whether the secondary work
21 quotes the original with a transformative purpose and
22 whether it usurps a market that properly belongs to the

1 original author--issues as to which the defendant's good
2 faith in accessing the plaintiff's original work does not
3 matter.

4 II

5 Campbell reinvigorated the doctrine, paramount since at
6 least Justice Story's opinion in Folsom v. Marsh, 9 F. Cas.
7 342 (C.C.D. Mass. 1841) (No. 4,901), that the fair use
8 defense exists to encourage the creation of original works
9 that do not "supersede the objects"--and thus the market
10 value--of the original. 510 U.S. at 576 (quoting Folsom, 9
11 F. Cas. at 348); see also Pierre N. Leval, Nimmer Lecture:
12 Fair Use Rescued, 44 U.C.L.A. L. Rev. 1449, 1465 (1997)
13 ("Leval II") ("[Campbell] revives the transformative
14 -superseding dichotomy as the dominant consideration.").

15 Fair use is not a doctrine that exists by sufferance,
16 or that is earned by good works and clean morals; it is a
17 right--codified in § 107 and recognized since shortly after
18 the Statute of Anne--that is "necessary to fulfill
19 copyright's very purpose, '[t]o promote the Progress of
20 science and the useful arts'" Campbell, 510 U.S. at
21 575 (quoting U.S. Const., art. I, § 8, cl. 8). The fair use

1 doctrine "requires courts to avoid rigid application of the
2 copyright statute" when it "would stifle the very creativity
3 which that law was designed to foster." Id. at 577
4 (emphasis added) (citation, internal quotation marks, and
5 alteration omitted); see also, Leval II, 44 U.C.L.A. L. Rev.
6 at 1465. The main purpose of the first-factor inquiry under
7 § 107 is to see whether the new work merely supersedes the
8 original or "instead . . . is 'transformative.'" Campbell,
9 510 U.S. at 578-79 (quoting Leval I, 103 Harv. L. Rev at
10 1111). Two closely-related inquiries are crucial: Does the
11 secondary work quote or copy the first with the same
12 literary intention as the original or with a new,
13 transformative purpose? Does the secondary work usurp some
14 of the market for the first by serving as an alternate means
15 of acquiring the quoted material? As Campbell pointed out,
16 these inquiries, specified in the first and fourth listed
17 factors of § 107, are correlated: the greater the
18 transformative purpose of the secondary use, the less
19 potential purchasers will see it as an alternative means of
20 acquiring the original. See id. at 591. Similarly, the
21 more the secondary work quotes the original to communicate
22 an identical message or purpose, the more likely it is that

1 potential purchasers will see the secondary work as an
2 alternate means of acquiring the first--in which case, the
3 secondary work will likely usurp the original's rightful
4 market. The bad faith of the secondary user in gaining
5 access to the original author's material has no rational
6 bearing on those crucial interrelated inquiries. See Leval
7 I, 103 Harv. L. Rev. at 1126. A person who acquires the
8 original work by crooked or unsavory means may expose
9 himself to all sorts of civil claims and criminal charges;
10 but the question of fair use itself should be decided on the
11 basis of the transformative character and commercial effects
12 of the secondary use. If the use satisfies the criteria of
13 § 107, it is fair because it advances the utilitarian goals
14 of copyright.

15 It might seem that it can never hurt to put bad faith
16 at a disadvantage. But copyright is not about virtue; it is
17 about the encouragement of creative output, including the
18 output of transformative quotation. Its goals are not
19 advanced if bad faith can defeat a fair use defense. The
20 limited monopoly bestowed by the copyright statute "is
21 intended to motivate the creative activity of authors and
22 inventors, by the provision of a special reward, and to

1 allow the public access to the products of their genius
2 after the limited period of exclusive control has expired.”
3 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S.
4 417, 429 (1984). Though the statute allows a copyright
5 holder to recover damages suffered at the hands of an
6 infringer, see, e.g., 17 U.S.C. § 504 (1996), the reward to
7 be gained (or the loss suffered) is a “secondary
8 consideration” in the copyright scheme; its “primary object
9 . . . lies in the general benefits derived by the public
10 from the labors of authors.” See United States v.
11 Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (quoting
12 Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

13 In Campbell, the Court affirmed that the fair use
14 defense exists to further these same goals; it is not, as
15 its label may connote, a privilege conferred on the well-
16 intentioned. Fair play is no defense to infringement, see,
17 e.g., Folsom, 9 F. Cas. at 349 (finding infringement despite
18 having “no doubt [] that [defendant’s copying was] deemed
19 [by him] a perfectly lawful and justifiable use of the
20 plaintiff’s work”), and bad faith should be no obstacle to
21 fair use. Thus a hotelier who stocks each room with
22 photocopies of a newly copyrighted translation of the Bible

1 is not saved from infringement by his piety; similarly, a
2 movie reviewer who critiques--and reveals--a surprise ending
3 is not deprived of the fair use defense by his malice or
4 spite. Nor should a book critic be denied the fair use
5 protection because she gained access to a prepublication
6 manuscript by deceit. Fair use is not a permitted
7 infringement; it lies wholly outside the domain protected by
8 the author's copyright.

9 Bad faith is a slippery concept in the copyright
10 context. It (i) is difficult to define, (ii) may be
11 impossible to detect, and (iii) given weight, may lead to
12 the suppression of transformative works that are valuable to
13 the expansion of public knowledge. In deciding whether to
14 publish a work derived from copyrighted source material, a
15 publisher ought to be able to make a judgment based solely
16 on a comparison of the two works in light of market
17 conditions, as indicated by the factors expressly set out in
18 § 107. The goals of copyright are disserved if publishers
19 (and editors) risk liability on the basis of the (often
20 unknown or unsuspected) tactics and morals of authors who
21 produce transformative works. Incremental risks drive up
22 the cost of publication, thus the prudent publisher may

1 elect to forgo a new work altogether if the good faith of
2 the creator cannot be assured. And when bad faith is
3 apparent or discovered, an otherwise transformative work
4 will not be published at all--a result in tension (at least)
5 with the public good that copyright exists to promote. See
6 Sony, 464 U.S. at 429-34. "The monopoly privileges that
7 Congress may authorize [pursuant to Article I, section 8]
8 are neither unlimited nor primarily designed to provide a
9 special private benefit . . . [and anyone] who makes a fair
10 use of the work is not an infringer of the copyright with
11 respect to such use." Id. at 429, 433 (emphasis added).

12 **III**

13 Not unreasonably, the majority opinion considers us
14 bound by Harper & Row. That case undoubtedly said that
15 "fair use presupposes good faith and fair dealing," an
16 observation that the Supreme Court has never expressly
17 disavowed. Nonetheless, the Campbell footnote invites and
18 provokes discussion of the issue as an open question where
19 it may arise.

20 This case illustrates why bad faith on the part of the
21 secondary user should not be factored into the fair use

1 analysis. Dr. Ross and his co-defendants quoted from
2 NXIVM's manual to show that it is the pretentious nonsense
3 of a cult. Potential purchasers of NXIVM's services will
4 not buy the secondary work as an alternative means of
5 acquiring the material quoted from the original; the
6 secondary articles therefore do not usurp or supersede a
7 market that properly belongs to NXIVM. Certainly, no critic
8 should need an author's permission to make such criticism,
9 regardless of how he came by the original; nor should
10 publication be inhibited by a publisher's anxiety or
11 uncertainty about an author's ethics if his secondary work
12 is transformative. The majority opinion thus properly
13 affirms the district court's finding of fair use,
14 notwithstanding the possibility that the defendant might
15 have obtained the plaintiff's materials by an act of
16 deception or otherwise in bad faith.