



## *Fair Use and Social Practices*

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“Fair use” is perhaps the best known and least understood arrow in the quiver of the copyright defendant. The doctrine, which is codified in section 107 of the U.S. Code,<sup>1</sup> declares that certain uses of copyrighted works are not infringements, even though they appear to violate one or more of the copyright owner’s exclusive rights. The question is, as it has been for more than 150 years, what the doctrine means, and why we have it.

By reputation, fair use is notoriously uncertain both in theory and in application. Fair use is claimed to be a narrow exception to the copyright owner’s exclusive rights, reserved for teachers, scholars, journalists, and critics. Yet, at times fair use excuses the wholesale reproduction of copyrighted works. Fair use is claimed to be a cure for transactions costs that limit the functioning of an efficient market for copyrighted works. Yet, at times fair use will be found where no transactions cost barrier exists, and the copyright owner expressly and clearly rejected an offer to be compensated in exchange for permission to use the work. And fair use is claimed to be merely a defense to a claim of infringement being pursued in litigation, and an expensive and unpredictable defense at that. Yet, broad swaths of creative endeavor involve regular, unchallenged reliance on fair use, safely out of the turbulent waters of the litigation process, and it is entirely legitimate that this be the case.

In this chapter, I attempt briefly to explain why that reputation is undeserved and to show that, when held within proper limits, fair use can make a substantial contribution to our understanding of copyright law as a whole.

### **WHAT FAIR USE SHOULD BE<sup>2</sup>**

Scholarly discussions of fair use, which are extensive,<sup>3</sup> characteristically begin by quoting the fair use statute in full, by noting its pre-statutory history as a

judicially-created doctrine, and by parsing the terms of the statute in light of leading cases—particularly three cases decided by the U.S. Supreme Court. I save my version of that discussion for the next section. Here, I want to set out my own understanding of what fair use should be, in order to put that standard recitation in context. I write “should be” because only the most naïve optimist could claim to possess a working theory of what fair use truly “is.” I base my own understanding on readings of precedent, history, and theory, and I believe that my view has support both there and in the statutory text. But as all of copyright is as much aspiration as it is experience, so is my view of fair use.

To begin, then, I reject the conventional view that fair use is best understood as implementing the idea that copyright law on the whole, and any copyright dispute in particular, should carefully balance the interests of the author and publisher in incentive and reward on the one hand, and the interests of the reader, consumer, and new author in access to existing material, on the other hand.

I reject the standard “balancing” account for several reasons. First, of course, is that like any “balancing” standard, achieving an acceptably “good” or “right” balance in copyright and in the particular case is often prohibitively expensive, if it is possible at all. Second, even if it turns out that the balance is the right one in the particular case, achieving a good or right balance on a consistent basis across cases is all but impossible, because of the highly variable character of the perspectives that an all-out balancing approach accommodates. And third, in practice a “balancing” approach to fair use has been a failure, if one assumes, as I do, that fair use is to mean something affirmative, that is, as something more than as a default category for places where the copyright owner’s exclusive rights simply stop. The reason for the failure is clear. Courts that balance all of the various interests are quick to recognize that the copyright owner’s interest in compensation for use of the work may be characterized in compelling terms, and at that point the defendant’s claim to be excused from the duty to compensate becomes difficult, which is not to say impossible, to meet.

As an alternative to balancing, I begin with the premise that the point of copyright in general is to offer a legal structure that prompts and promotes the development and distribution of human creativity—expressive creativity, as distinguished from inventive creativity, which is the province of patent law. No less than the exclusive rights of the copyright owner now listed in section 106 of the Copyright Act, fair use, too, ought to be understood as a tool in service of creativity, not merely as an exception or limitation designed for narrow or special cases.

The exclusive rights of the copyright owner, on the one hand, and fair use, on the other hand, thus represent two complementary mechanisms by which society gets what it wants out of copyright, which is more (and sometimes better) creative expression, or what the U.S. Constitution characterizes as “progress.” “What is fair use?,” the eternal question that bedevils copyright lawyers, becomes the task of differentiating the mechanism that produces returns in creativity via

the owner's exclusive rights, on the one hand, and the mechanism that produces returns in creativity via fair use. My view is that this distinction is, and has long been, a distinction based on markets, on the one hand, and social practices, or what I refer to as social patterns or practices, on the other hand. Exploitation and use of a copyrighted work that occurs principally via market exchange is the realm of section 106. Exploitation and use of a copyrighted work—and naturally, that means in some instances the *same* copyrighted work—via nonmarket processes, but instead via practices, norms, habits, and so on that exist outside of a framework supplied by the market, constitutes fair use. Put slightly differently, section 106 governs the autonomous market actor; fair use governs social use of the work. Fair use is not a curative for market failure, that is, it is not merely a recognition that market exchange cannot supply all that copyright desires. Fair use is a knowing departure from the market.

How should this principle be limited, to avoid the problem that any individual, idiosyncratic use can claim that it is “not of the market,” that is, how can a genuine claim of fair use be identified and distinguished from an argument under some other (market-oriented) limitation on the rights of the copyright holder—for example, that the defendant's use of the work does not implicate the exclusive rights of the copyright owner under section 106, or that the use implicates the distinction between unprotected idea and copyrighted expression? The answer is to require that the arguably fair individual use be connected to some social structure. The statutory fair use factors, which I review in the next section, are each and all somewhat clumsy fact-based proxies for analyzing whether the use is the sort of thing that we ordinarily associate with market-based exploitation of the work. Something that we recognize as a social practice, such as criticism and scholarship based on copyrighted material, exists and is valued precisely because it is not of the market. (Indeed, “authorized” or licensed scholarship is suspect precisely because the audience understands that the criticism is not independent of market-based constraints.) Fair use is an individual use that is credibly tied to some larger, identifiable social practice. Individual use within that social practice will be constrained by it, if, in fact, the social practice actually exists, and if the claim of individual use of the copyrighted work is genuine. The multifactor “balancing” analysis that characterizes conventional fair use decisionmaking turns out to be a tool to measure the genuineness of the individual claim.

Social practices of this sort are not perfectly accessible, either to laypersons or to the legal system. Their existence and their scope are not uncontroverted. They are not eternal. Over time, they evolve. No fair use doctrine will eliminate litigation over their meaning, and no doctrine will enable perfect prediction regarding what is fair and what is not. But they are sufficiently autonomous, accessible, durable, and independent of the copyright system itself that they offer meaningful guides for achieving the benefits that fair use is meant to offer. “Teaching,” “scholarship,” and “journalism” are examples of social practices that offer points of entry to understanding what social practices might be; the idea that someone is

or is not reproducing a copyrighted work as part of a genuine “teaching” exercise is both a meaningful question and one that, in practice, is likely to offer a useful guide to the outcome of an actual copyright infringement dispute. A genuine “teaching” use of a copyrighted work is, in fact, more likely than not to be fair use. In response to the anticipated objection that the proposal wrongly turns lawyers into social scientists, I note that lawyers are amateur anthropologists as it is, and lawyers in fair use cases already engage in this sort of analysis and argument.<sup>4</sup> To be clear, my goal is not an algorithm for perfect and automatic decisionmaking, but instead a framework in which participants in the copyright system and in creative activities can plan their affairs with a reasonable degree of certainty, and courts can access structures that lend their decisions an acceptable degree of legitimacy. Decisionmaking with reference to identified and identifiable social practices offers such a framework.

The claim requires one more step, since I argued from the outset that fair use is more than simply a constraint on market-based exploitation of copyrighted works, but also an engine of creativity in its own right. My claim is that social practices or patterns generate more than the negative value that arises from relying on them to constrain claims that a given use is or is not “of the market.” The affirmative case for social practices as fair use guideposts is this: Not only is there a strong intuition, shared by courts and laypersons, that these social structures exist to a large degree autonomously of the law itself, there is an equal intuition, which is backed by some provocative social science research, that the creativity that the copyright system seeks is generated not only by individuals (or firms) working alone in “innovation” markets, but also emerges probabilistically via practice in socially-defined disciplines.<sup>5</sup> That is, creativity depends on, even requires, the discipline of context. The copyright system, then, encourages creativity not only by focusing on the end results of creative processes, but by recognizing and reinforcing those processes themselves. The dominant process is the market, which is a context of a sort, but one in which virtually all relevant information about the manner in which goods and services are produced and consumed is abstracted into a single concept: price. Secondary, but still important processes, are valued, but recognized non-market structures, in which the conditions of production and consumption are not abstracted, but remain alive and in the forefront of cultural understanding. Courts can and do look to the existence of those processes in judging claims of fair use. Creators, consumers, and lawyers can look to their existence in assessing plans.

## WHAT FAIR USE HAS BEEN

The final step in my argument is that the law of fair use, properly understood, actually relies on this sense of social patterns and practices, which renders the doctrine more comprehensible and less unpredictable than the conventional wisdom holds. Which is not to say that every court gets every case right, and which is not to say, as well, that the theory accounts for all flavors of fair use that

are found in copyright law. I do argue, however, that the theory makes good sense of the dominant themes of fair use jurisprudence.

### The Fair Use Statute

Because fair use is now part of the statutory framework of copyright, reference to the statute is the essential starting point. The text follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>6</sup>

The syntactic and definitional ambiguities of this text are well known. Here, it is sufficient to point out that the weight to be given to each of the four factors is not specified; that what other factors might be relevant is not spelled out; that a number of key terms (“purpose and character,” “amount and substantiality,” “potential market for or value of”) are not defined; and that relationship between the four factors and the initial sentence is not given. In practice, courts that rely heavily and exclusively on the four factors tend to obscure the basis for their decision more than they illuminate it. When asking “what is fair use?” the statute is typically the first place to look, and the first resource to discard.

As I try to make clear in the next sections on history, precedent, and theory, however, the language is both clearly flexible enough to accommodate the social pattern or practice approach that I described earlier, and also, significantly, intended by Congress to accommodate a contextual approach to the doctrine. Courts that engage the doctrine most thoughtfully use the statutory text in this way.<sup>7</sup> Specifically, the four factors can be readily understood as framing two questions. First is a manageable factual inquiry into the existence of a social practice not based on the market. This is the framework supplied by the opening sentence of the statute. Second is whether the accused infringement genuinely fits that pattern. This question is guided by the four factors, and by the first and fourth factors in particular.

The fair use statute is only the most recent chapter in the history of the doctrine, however, since fair use emerged from the cases and was only codified in the statutory revision enacted by Congress in 1976. Making sense of my social practices argument thus requires a sizable dose of history, as well as a review of judicial precedent and some earlier theoretical work.

### Fair Use History

As a formal concept, fair use dates to a pair of lower federal court decisions written in the middle of the nineteenth century by Justice Joseph Story, riding the circuit: *Folsom v. Marsh*<sup>8</sup> and *Lawrence v. Dana*.<sup>9</sup> Of the two, *Lawrence* is remembered chiefly for introducing the phrase “fair use” to the vocabulary of American copyright law.<sup>10</sup> The more important case, *Folsom* gave us the syntax of fair use, though the features for which it is chiefly known, its formulation of what has come down to us as the four statutory fair use factors, are less important than the narrative structures that Story used to frame his opinion. Both because of its relationship to the text of the statute, and because of the stature of its author, *Folsom* continues to exercise a significant influence over contemporary fair use law.

The plaintiffs in *Folsom* were the publishers of a twelve-volume compendium of the papers of George Washington, including both private and public material, letters, correspondence, and the like. The defendants published a two-volume work, *The Life of Washington in the Form of an Autobiography*, intended to be marketed to children and students. Most of the defendants’ work consisted of the story of Washington’s life ostensibly narrated by Washington, as to which there was no claim of infringement. What prompted the suit was the defendants’ inclusion of verbatim copies of some of the letters included in the plaintiffs’ work in order to punctuate and illustrate the defendants’ “autobiography.” As Story noted, although the quantity of material copied was relatively slight, both in relation to the original work and in relation to the defendants’ work, the defendant had selected “the most instructive, useful and interesting to be found in that large collection.”<sup>11</sup>

Did the defendants’ copying thus infringe the plaintiffs’ copyright? To the modern reader, Story’s decision that it did follows from application of the nineteenth century version of the four statutory factors. Reproduction of the work is not infringing based on “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”<sup>12</sup> Reading the case in its entirety, however, makes clear that the factors were neither drawn from an abstract sense of the plaintiffs’ “property” interest or of the market for the original work, nor applied as such. Story reviewed several possibilities, rejecting each in turn. First, the defendants’ work might have been considered to be an abridgment of the plaintiffs’.<sup>13</sup> If so, it would have been lawful, for under the law as it existed at the time, “abridgment,” sometimes known as “fair

abridgment,” was not an exclusive right of the copyright owner.<sup>14</sup> Alternatively, it might have been a compilation of the plaintiffs’ work. As such, it would constitute a fair restatement and not a piracy. As Story explained, “[a] compilation of this kind (an encyclopedia) may differ from a treatise published by itself; but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an encyclopedia would be a recipe for completely breaking down literary property.”<sup>15</sup> What Story referred to as “a collection of beauties of an author”<sup>16</sup> was his third attempt at characterization; such a defense likewise would have failed, for the defendant would have appropriated merely the most valuable of the plaintiff’s work and have added nothing of his own.<sup>17</sup> The facts of this case, however, fell somewhere between these extremes, since Story acknowledged that the defendant author had copied letters from the plaintiffs’ work in the context of a longer narrative of Washington’s life.

Story focused on two meaningful possibilities, either of which would have exonerated the defendants. The first was “that the defendant ha[d] selected only such materials, as suited his own limited purpose as a biographer.”<sup>18</sup> From this premise, Story rendered his now-famous discussion of the character of the material copied, the value of that material in the context of the original work, and the extent to which that copying was likely to diminish the profitability of the original. He concluded implicitly, but clearly, that crediting the biographical motives of the defendant was more than a little disingenuous; a true biography (and a true biographer) would not have been intended, nor would it in fact substitute for a collection of primary source materials authored by the subject. But asking whether a given author is “really” a biographer, or whether that author’s work product is “really” a biography, is difficult. In context, it is clear that Story elucidated his “factors” for fair use as a proxy for determining whether the defendants’ work was “really” a biography.

The same conclusion comes through in the second category to which the defendants’ work arguably belonged—the review. The defendants might have been reviewing or critiquing the plaintiffs’ work, rather than reviewing Washington’s life. If so, they were entitled to present quotations from the work, but only to the extent that doing so was consistent with the reviewer’s purpose.<sup>19</sup> Otherwise, the defendants would not have produced a review (which would be fair) but “in substance a copy, whereby a work vested in another is prejudiced.”<sup>20</sup> “[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.”<sup>21</sup> Again, the economic injury worked by an effective substitution served as a proxy for the determination of whether or not the defendants’ work constituted a “review”: “It is not a case, where abbreviated or select passages are taken from particular letters; but the entire letters are taken. . . .”<sup>22</sup>

It is true, as others have noted,<sup>23</sup> that *Folsom* did not confront or, in its four-factor formulation, appear to try to capture the broad variety of potential fair “uses” that courts and copyright communities have wrestled with during the

twentieth century and into the twenty-first. But Story's method was both broader and more contextual than is commonly understood.<sup>24</sup> If the four factors do not stand alone, but instead substitute analytically, when necessary, for the related, but prior, question of the character of the defendant's practice, then that analytic technique transcends the facts of *Folsom* and related cases involving "biography" and "review." The practice of biography or review in this instance was not a label to attach to a successful defense, but the crux of the case itself.

*Folsom* may be the most famous early fair use opinion, and the most influential, but the modern law of fair use has even earlier antecedents in English copyright law. Some of those cases were cited and relied on by Justice Story in *Folsom*, and careful examination reveals that they, too, rely on an inquiry into social context much as Story did in *Folsom*.

The leading prior English case is *Cary v. Kearsley*,<sup>25</sup> decided in the King's Bench in 1802. The plaintiff and the defendant were each authors of books (really surveys) of roads. On the question of infringement, Lord Ellenborough stated the issue broadly as "Was the matter so taken used fairly with that view [for the promotion of science and the benefit of the public], and without what I may term the *animus furandi* [in effect, an intent to pirate]?"<sup>26</sup> and more narrowly, in this case, as "whether what [was] so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff?"<sup>27</sup> That is, the defendant was either a compiler, in the sense that the defendant arranged the underlying public information in some manner of his own design, or not a compiler, in which case he merely appropriated the arrangement offered in the plaintiff's work.

The concept of *animus furandi* concerned both English and American courts for decades and comes down to modern American copyright cases in the notion that a successful fair use defense must incorporate credible evidence of "good faith."<sup>28</sup> In the context of *Cary*, however, Lord Ellenborough intended that element as a proxy for the same kind of examination of the defendant's practice that Story pursued in *Folsom*. A counterpart to *animus furandi*, sometimes referred to as a requirement that the defendant have made a "productive" use of the plaintiff's work and sometimes expressed in early English cases as the notion that the successful defendant was engaged "in the fair exercise of a mental operation,"<sup>29</sup> had a similar function.

The Supreme Court has made much of statements in the legislative history to section 107 that codifying the fair use doctrine was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."<sup>30</sup> From this statement, the Court has concluded that the "equitable" nature of the doctrine renders it incapable of precise definition except by reference to the four factors stated in the statute. As the House Report that accompanied the final bill put the matter:



Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107....<sup>31</sup>

There is more to the legislative history than this, however. Congress left the matter less open-ended than these quotations make it appear. Congress codified the fair use doctrine at least in part in order to encourage courts to render the doctrine more comprehensible. The House Report, for example, notes that the doctrine, as such, is not stated in the four factors themselves, but in the first sentence of section 107, which has come to be referred to as the preamble. According to the House Report, “[t]hese criteria [the four factors stated in the statute] are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case.”<sup>32</sup> This statement, that the four factors implement the doctrine, rather than define it, gives courts a contextual standard by which application of the four factors can be measured. That standard is coupled with the statement later in the House Report:

The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.<sup>33</sup>

As an early commentary on statutory fair use observed, this language suggests that it is wrong for courts (or scholars) to conclude that fair use was intended by Congress to remain an open-ended invitation to fact-and case-specific equitable balancing:

In any event, one thing is manifest in both the statute and its legislative history: Congress intended to replace the witches’ brew of equity and ad hoc policy balancing with more finely refined elixirs, but without curtailing development of the doctrine in the common law tradition. Now that the fair use doctrine has been codified, equity and policy cannot be the sole basis for decision, or even a first resort.<sup>34</sup>

Whether the four factors themselves supply courts with the tools they need to develop a common law of fair use is an open question, though I argued above that they do. Abstracting these factors from the contexts in which they were developed,

some courts have mistakenly concluded that context is not relevant. Congress was well aware of its relevance.

Among the *Studies on Copyright* commissioned by Congress in anticipation of its revision of copyright,<sup>35</sup> the study on *Fair Use of Copyrighted Works*<sup>36</sup> reviewed the case law of fair use by characterizing it as “The Problem in Context,”<sup>37</sup> and breaking the cases down into eight categories of uses: incidental use, review and criticism, parody, scholarship, personal or private use, news, use in litigation, and use for nonprofit or government purposes.<sup>38</sup> The study drew a conclusion that relies ultimately on the same foundation as my own. Its author concluded that fair use could be analyzed according to the question, “[W]ould the reasonable copyright owner have consented to the use?”<sup>39</sup> “Reasonableness” would be determined, in part, by customary practice,<sup>40</sup> rather than simply from the perspective of the copyright owner.

The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law likewise characterized fair use in contextual terms. The Report described the judicial doctrine of fair use as providing “that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner’s market for his work.”<sup>41</sup> That the Report framed its summary in terms of “reasonableness” and “legitimacy” confirms the importance of context in its articulation of the history of fair use and therefore in the material that Congress was relying on when it passed section 107.<sup>42</sup>

To conclude that Congress was speaking contextually rather than abstractly in section 107 is not to argue that Congress necessarily had any particular contextualizing methodology in mind, or that any such methodology is required by the text of the statute. What we do know from the legislative history suggests that the abstract approach adopted on the surface of the Supreme Court’s fair use opinions is at odds with this history, as well as with the judicial tradition. The Supreme Court may be incorrect to conclude that fair use must remain open-ended, but correct to emphasize that Congress intended not to change its underlying conceptual framework. I argue below that a better reading of *Sony*, *Harper & Row*, and *Campbell* reconciles these cases with congressional intent and with the judicial tradition that began with *Folsom v. Marsh*.

### Fair Use Precedent

The Supreme Court has taken up fair use in detail in three opinions, each decided after adoption of section 107. I review each of them briefly to illustrate how the Court’s approach to fair use is consistent with the social practices theory that I argue guides the application of the doctrine.

*Sony Corporation of America v. Universal City Studios, Inc.* Though the paradigm of classical fair use might be criticism or scholarship, the first fair use case to reach the Supreme Court, *Sony Corporation of America v. Universal City*

*Studios, Inc.*,<sup>43</sup> involved an argument based on personal or private use, that is, the reproduction of copyrighted works by individuals who were not themselves engaged in obviously creative acts. Universal City Studios, owners of copyrights in broadcast television programming, sued Sony, the manufacturer of the Betamax videotape recorder (VTR), for facilitating copyright infringement by VTR users. VTR users were reproducing Universal's programming by recording it; Sony was alleged to be secondarily liable because it provided those users with the technical means that enabled the reproduction.

The Court held that Sony was not liable, in the end, in a 5-4 opinion that remains significant for its adoption of the following standard: So long as Sony's device was capable of "substantial noninfringing use," Sony would not be held liable as a secondary infringer for infringements committed by end users. What was the "substantial noninfringing use" in this case? Fair use of the Betamax, by television viewers who used their machines to engage in "time-shifting," or recording television broadcasting (including complete copies of copyrighted works) for viewing at some later time.

While this result is intuitively appealing, especially to consumers now inured to VTR (and now TiVo) viewing habits, the Court's formal fair use reasoning has been criticized for both its substantive emptiness in the context of the fair use doctrine<sup>44</sup> and for its relatively slapdash approach to the realities not only of the VTR marketplace but also of VTR use. Four Justices dissented on the ground that "time-shifting" did not meet their criteria of "productive" fair use, and as Paul Goldstein has noted, they were convinced, until late in the deliberative process, that theirs would be the majority opinion.<sup>45</sup>

It is the second of these criticisms, dealing with the character of VTR use, that I wish to focus on. The now well-known explosion of consumer interest in VTRs occurred almost immediately following the decision in *Sony*,<sup>46</sup> suggesting that the Justices were unable to give appropriate weight to the ways in which VTRs were being used and could have been used. At the trial level, both parties introduced surveys purporting to show how VTR users were using their machines and concluding that "time-shifting" was the dominant use. Both surveys were conducted in 1978, six years before the Supreme Court's opinion was released. What consumers were doing with VTRs in 1984, when the opinions were released, was anyone's guess.

The majority's opinion is noteworthy, then, for its apparent failure to grapple with what was really the key fair use question before it: contemporary practice with VTRs. Instead, the majority focused on the manner in which VTRs were being absorbed by some population of television viewers, and more particularly, on the manner in which a given VTR was absorbed in the experience of a given viewer. The Court described the capabilities of each VTR. The Court recounted the results of the parties' surveys regarding the dominant uses of each consumer's VTR. At trial, Sony offered direct testimony of individual VTR users (who were named as nominal defendants by the plaintiff in order to procure favorable testimony), who testified to a range of taping habits, including time-shifting for

convenience, time-shifting in order to avoid watching television commercials, and building libraries of recorded tapes.

Would taping of broadcast programming by an individual television viewer—given that contextual evidence—constitute copyright infringement in any case? That is, would the individual television viewer exercise one of the exclusive rights reserved to the copyright holder by recording a broadcast television program without the holder's permission?

The court of appeals, which ruled in the plaintiff's favor, found that it would. The Supreme Court majority was silent on this point, although the conclusion is implicit in the overall framework of its opinion. But the omission is telling. The majority did not clearly state that the home tapper is an infringer but for the broadcaster's permission or an applicable defense. It skipped ahead, to the presence of authorized copying and to the conclusory (but ultimately determinative) statement that "the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity."<sup>47</sup> More particularly, and despite the Court's account of the evidence, it appears that the majority of the Court did not much care what the typical VTR user did with the machine. To be sure, the Court colored its fair use analysis with asides that "time-shifting" might yield broader distribution of copyrighted works and societal benefits in general, but possible offsetting economic losses were dismissed as speculative. But its factor-based fair use analysis is extremely thin, and it does not withstand scrutiny. Even "personal" time-shifting consumers were making copies of whole, creative, copyrighted works. Where the alleged injury consisted of the loss of advertising revenue because fewer viewers would be measured as watching broadcast programming, with virtually no discussion the Court deferred to the district court's conclusion that consumers would watch broadcast commercials along with the recorded programming. Instead, the result can be explained by the majority's clear sense that whether the viewer's "use" of the televised "work" is fair or not, that is, whether or not time-shifting caused economic harm, the use of the machine is clearly legitimate. That analysis emerges from its reliance on patent law for the "substantially noninfringing use" standard used to exonerate Sony. There was a relevant social practice at work here, but that practice preceded the consumer's encounter with broadcast television. It was the practice of selling VCRs.

In dissent, four Justices took the majority to task for failing to apply what they discerned as the principle of "productive" use that unified the fair use statute and the tradition of judicial fair use before it. But the majority and dissent disagreed principally on the characterization of the relevant practice, not on the underlying approach to fair use: "Each of [the uses described in § 107 and the fair use case law] . . . reflects a common theme: each is a productive use, resulting in some added benefit to the public beyond that produced by the first author's work."<sup>48</sup> The majority's opinion is remembered today for its statement that "commercial" use of a copyrighted work is presumptively unfair, and that injury to a copyright owner's potential market likely defeats a claim of fair use.<sup>49</sup> Time-shifting for

personal use by consumers was neither commercial nor economically harmful. The dissent, however, disagreed not on these points, but on a question of practice. The dissent drew a sharp distinction between the “researcher” and the “scholar,” on the one hand, and the “ordinary user,” on the other hand. To the dissent, the relevant practice was not the sale of the VTR by a manufacturer and vendor (which then had no continuing relationship with each purchaser), but the dynamic that occurs (or, to the dissent, that fails to occur) in the VTR owner’s living room.

*Harper & Row, Publishers, Inc. v. Nation Enterprises.* The Court’s approach in *Sony* set a tone that has been followed in each of the later Supreme Court opinions addressing fair use: formal attention is paid to the four factors of the statute, and to comparative characterization of the relevant works prepared by plaintiffs and defendants. But significant, even determinative, weight is given to how the Court characterized the relevant pattern or practice before it. The question the Court has answered has been: “What are the defendants doing?” rather than “What have the defendants produced?”

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>50</sup> *The Nation* magazine published a short column detailing certain paraphrases and a handful of brief quotations from the about-to-be-published memoir of former President Gerald Ford. Virtually all of the quotations concerned circumstances surrounding President Ford’s decision to pardon his predecessor, Richard Nixon. *The Nation*’s 2250-word article consisted of “quotes, paraphrases, and facts drawn exclusively from the manuscript.”<sup>51</sup> Three hundred of those words consisted of quotations from President Ford’s memoirs, which the Court characterized as the “heart” of President Ford’s manuscript.<sup>52</sup> Harper & Row, the publisher of the memoir, had authorized the appearance of prepublication excerpts in *Time*.<sup>53</sup> *Time* declined to go forward with publication of the authorized excerpt and refused to pay the fee it had agreed to deliver to Harper & Row.

The Supreme Court rejected *The Nation*’s fair use defense by a 6–3 majority. The majority relied heavily on the circumstance that President Ford’s manuscript was unpublished, though protected by statutory copyright. (The Court characterized the manuscript itself, in the hands of *The Nation*, as “purloined.”)<sup>54</sup> Though publication no longer signified an election of statutory copyright, in *Harper & Row* it remained an important sign of the author’s intent to reveal the work to the public. That intent, in turn, had significant consequences for fair use. To the Court, *The Nation* purposely supplanted Harper & Row’s right to control publication, did so for commercial purposes, and knowingly relied on an unauthorized copy of the Ford manuscript. *The Nation* copied portions of an arguably creative work that was not yet published. It had purposefully selected portions that were “among the most powerful passages”<sup>55</sup> from book chapters that addressed the Nixon pardon, and that those selections served as the “dramatic focal point”<sup>56</sup> of *The Nation*’s article.<sup>57</sup> *Time*’s refusal to pay the balance of the amount due under its original agreement with Harper & Row confirmed the existence of actual harm. The nature of the practice in which *The Nation* engaged (competing for

first serialization rights for yet-to-be-published book manuscripts, without bidding fairly for those rights) threatened to disrupt this established market as a whole.

As in *Sony*, however, the Court's formal fair use analysis leaves much to be desired. *The Nation* did something that the Court did not approve. But the Ford autobiography was hardly a work of real literature; it was anticipated by the public (and thus valuable to *Time*) not because of Ford's rhetorical skill, but because he might disclose new information about the Nixon pardon. Given the unprecedented character of the Watergate scandal, it could not be argued reasonably that the public interest was disserved by the earliest possible disclosure of information about Ford's role in the end of the Nixon administration. What, then, concerned the Court? More important to the Court, *The Nation* tried "to profit from exploitation of the copyrighted material without paying the customary price."<sup>58</sup> This reference to the "customary" price might be taken as the license fee negotiated between *Time* and Harper & Row, but it might equally and more plausibly concern the bookstore price of the book. If *The Nation* had bought a copy of the manuscript and published the story that it did, it is difficult to imagine Harper & Row succeeding on its infringement claim. The market injury at stake may not have been the injury to the market for the work, but to the market for the book.

The Court seems to have been concerned partly at an ethical level—ruling in favor of *The Nation* would amount to "judicially enforced 'sharing,'" suggesting that such an outcome would have been improper in and of itself, regardless of the economic injury alleged by the plaintiff—and partly at an economic level. But, as in *Sony*, the ethical dimension suggests that *Time*'s "market" injury alone might not have been enough to tip the scales in its favor. *The Nation* erred by knowingly relying on a copy of an unpublished manuscript that was provided to it under murky circumstances. *The Nation* parsed the manuscript in order to locate the "heart" of its literary and commercial appeal. It closely paraphrased a selection of statements from that "heart" and published that selection in the magazine. Finally, *The Nation*'s publishing of the paraphrases was calculated to conceal the fact that *The Nation*'s reportage originated with Victor Navasky (editor of *The Nation* and author of the Ford article at issue), rather than with President Ford. In sum, the majority expressed its implicit acceptance of the relevance of established practices in the book-publishing industry and its explicit rejection of the possibility that *The Nation*'s conduct was consistent with journalistic practice. In fact, to avoid the obvious conclusion that *The Nation* was acting journalistically in reporting such "news" as was contained in the book, the Court characterized the relevant "news" as the publication of the book (since the "new information" reported by *The Nation* was in fact already in the public record), a shift that allowed the Court to reframe the issue as a competition between the authorized publisher and the unauthorized magazine in deciding when and how this "event" should take place. The contents of the book may have been subject to claims by competing journalists, but the book itself was off limits, just as any new novel could not be published preemptively by an unauthorized printer.

This aspect of the Court's ruling is made clear by the principal arguments of the three dissenting Justices in an opinion by Justice Brennan. The dissent disputed the characterization of *The Nation's* conduct as an appropriation of protected literary expression. It then argued that the majority had misapplied the fair use doctrine, on the grounds that the relevant "purpose of the use" was news reporting; that the proper characterization of the work was "factual" or "historical," rather than "unpublished"; that the amount of copying of President Ford's literary expression was consistent with its news reporting purpose; and that any injury suffered by Harper & Row was precisely the sort of injury suffered by any provider of news that is beaten to the marketplace by a competitor. In short, while the majority viewed the dispute as a case between rival publishers, the dissent looked at the case as a matter of accepted journalistic practice.

*Campbell v. Acuff-Rose Music, Inc.* *Campbell v. Acuff-Rose Music, Inc.*<sup>59</sup> is sometimes thought to have restored order to the Court's fair use thinking,<sup>60</sup> because the Court decided a fair use case unanimously; because the Court decided the case in a way that clearly favored a claim of fair use; and because the Court gave its stamp of approval to claims to legitimate parody and "transformation." A closer look at the case, however, suggests that it was decided along much the same narrative lines that framed the Court's opinions in *Harper & Row* and *Sony*: a declaration of the pattern of use into which the defendant fell, rather than an analysis of the defendant's work and a comparison with the plaintiff's work.

The defendants in *Campbell*, the rap group 2 Live Crew, produced a rap version of the classic song "Oh, Pretty Woman," originally recorded by Roy Orbison, and they did so not only without the permission of the copyright owner but also following the copyright owner's express refusal to grant a license. The fair use defense characterized the rap version as a "parody" of the pop original. In a unanimous opinion, the Supreme Court reversed an appellate court decision that ordered summary judgment in favor of the plaintiff.

The Court's ruling for the defendants typically is characterized as reversing the presumption in fair use cases disfavoring "commercial" use and emphasizing market injury to the copyright owner, which originated in *Sony* and was continued in *Harper & Row*. In its place, the Court installed a presumption favoring "transformative" use and otherwise mandating that all four factors be weighed together. As the Court did in *Harper & Row* and in *Sony*, it exercised its judgment formally through the four statutory factors. In this case, the first factor weighed in favor of fair use because the 2 Live Crew version of "Oh, Pretty Woman" was credibly perceived as a parody, a form of "transformative" use that offset the otherwise influential commercial character of the song. The second factor weighed in favor of the plaintiff because the original song was creative. The third factor weighed slightly in favor of the defense. The parody version borrowed more than a small amount, yet not the entirety of the original—enough to conjure it up in the minds of listeners, but not so much as to displace it entirely. The Court

left the fourth factor for reconsideration on remand, indicating that the plaintiff would have one more chance to introduce evidence of market injury.

A closer reading of *Campbell* suggests that its restatement and application of the statutory factors is no more effective than the Court's earlier application of the statute in *Sony* and *Harper & Row*. The analysis hinges entirely on the Court's conclusion that 2 Live Crew's work was perceived reasonably as a parody. That caused the first factor to flip in the defendant's favor and, as in *Sony*, caused the second and third factors to become far less important. The Court's treatment of the fourth factor, harm to the plaintiff's market, is inconsistent: if the defendant's song really was a parody, as the Court concluded, then its critical character rendered its market impact by definition nonsubstitutional. The Court then should have remanded the case with instructions to reinstate the judgment in the defendants' favor. Instead, it remanded the case with instructions to consider possible substitutional harm.

What the Court appears to have been up to, then, is the same sort of characterization exercise that dominated its earlier fair use opinions. The Court characterized the defendant's output as "parodic"<sup>61</sup> and possibly "transformative,"<sup>62</sup> but what the Court really appears to have concluded was that the defendant was engaged in an activity that fairly could be characterized as "creating a parody":

For the purposes of copyright law, the nub of the definitions [of parody], and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work.<sup>63</sup>

Concluding, then, that a "parodic character" could "reasonably be perceived" in the defendant's work, the Court was formally engaged in the classic fair use exercise of comparing one work to another. In substance, however, the Court was evaluating the process by which 2 Live Crew had come to that result:

In parody, as in news reporting, . . . context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat.<sup>64</sup>

In other words, the Court characterized the issue in terms of what 2 Live Crew did, rather than in terms of 2 Live Crew's work product. The "transformative use" standard that the Court endorsed has been interpreted widely, and wrongly, as validating precisely an examination of the defendant's work itself. If the defendant's work "transforms" the plaintiff's work, then the defendant wins. It is possible to use this test to reach sensible results, but the reasoning in these



cases seems tortured, and it's difficult to implement the rule on a consistent basis. How transformative is transformative enough? The better reading of "transformation" renders *Campbell* consistent with *Sony* and *Harper & Row*. In effect, 2 Live Crew was engaged in the practice of parody. So long as they did so, the character of the work parodied was irrelevant (second factor), the amount borrowed was legitimate (third factor) since a true parody would take only so much as to make its object recognizable, and no more, and the market effect (fourth factor), if any, was irrelevant.

## FAIR USE THEORY

Finally, it is important to acknowledge the major lines of earlier theorizing about fair use, primarily, here, to illustrate their limitations. Scholarly efforts to rationalize fair use have contributed much to our understanding of copyright overall, but less in the way of a firm structure for fair use.

Theories of fair use closely track theories of copyright more generally. The latter generally can be broken down into those that focus on consequentialist concerns and those that do not. Nonconsequentialist arguments—that is, moral and natural rights arguments—have the weaker hand generally as a matter of copyright doctrine, given the Supreme Court's formal rejection in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>65</sup> of theories of copyright law not based on incentive arguments. As a result, such theories have little to offer by way of affirming fair use.

The most prominent consequentialist account of fair use comes from Wendy Gordon. Taking the goal of copyright as maximizing social welfare and assuming that an economically efficient market system is the best way to reach that goal (because of its ability to process individual utility preferences), fair use plays a role in copyright principally to the extent that it cures "market failures" of one sort or another.<sup>66</sup> Fair use is disfavored if the defendant's use interferes with the operation of an actual or potential market for the work; it is favored if the market is unlikely to permit the transfer and if the defendant can demonstrate the particular social value of the use.<sup>67</sup> Both in its presumption in favor of the market in all cases, and in its focus on the defendant's particular use, the "market failure" approach is seen as not only lacking an affirmative vision of what fair use should be (since as "the market" expands, fair use likely contracts), but is also seen as hostile to fair use in most cases.<sup>68</sup>

Utilitarian arguments have been arrayed in service of an expansive reading of fair use in Raymond Ku's work. He argues that fair use can be theorized as a species of justifiable "creative destruction" of copyright markets, in which uncompensated uses challenge existing production and distribution structures but do not undermine underlying incentives to create new works.<sup>69</sup> The overall efficiency of the system is preserved so long as consumers internalize their costs of consumption not by paying for each additional copy of a work (the premise

of the “market failure” model, above), but by paying for technologies of consumption, such as computers, Internet access, and VTRs. This is a provocative recasting of the economic argument for copyright, but it has relatively little to offer as an affirmative account of fair use. As with Gordon’s “market failure” hypothesis, the “creative destruction” hypothesis allows room for fair use just so long as the efficiency of the underlying market for the creation of new works is preserved—that is, so long as consumers do indeed fully internalize the full cost of their consumption of copyrighted works. To the extent that an efficient market demands that consumers obtain permission, fair use should give way.

Opening up the consequentialist framework to concerns beyond efficiency or monetized utility creates new possibilities for an affirmative role for fair use, but in practice proposals along these lines are unhelpfully broad. Glynn Lunney argues that in any particular case, the court ought to balance the copyright owner’s interest in, and incentive derived from, protection of the copyright against the interests of the individual defendant and the public implicated in access and use.<sup>70</sup> William Fisher proposed a “reconstruction” of fair use that takes largely the same approach, blending concerns of economic efficiency with the goal of achieving “a substantive conception of a just and attractive intellectual culture.”<sup>71</sup> Alternatively, but relatedly, fair use might be designed to privilege or subsidize certain special uses, whether in connection with producing additional creative works (independent of the extent to which such works are, or may be, undervalued by the market) or with subsidizing other valuable social, cultural, and/or political interests.<sup>72</sup> But there is little agreement as to which types of access and use ought to receive such special treatment, limiting the value of this approach. Such privileges may extend to scientific and educational research,<sup>73</sup> “transformative” uses, such as parody and criticism,<sup>74</sup> use that furthers or supports “democratic values” of informed citizenship and political participation,<sup>75</sup> idiosyncratic visions of the good or fair community,<sup>76</sup> personal or private use,<sup>77</sup> and/or noncommercial use,<sup>78</sup> among other things.

In all, the number of competitors and the vigor of the debate lead only to the conclusion that what fair use means, and what it should mean, is no more clear as a theoretical matter than it has been, formally, as a doctrinal matter. Theorizing in the abstract has not helped courts or lawyers construct an affirmative case for fair use that is both consistent with copyright’s overall purpose and administrable in practice. The social practices approach described here is, I suggest, consistent with both objectives.

## CONCLUSION

Participants in commercial activities typically crave certainty and predictability in the law as much as they also try to profit from it. Much of the history of fair use, and in particular efforts to embed it in structures of market exchange, reflects an effort to rationalize the doctrine (that is, to pursue the first goal) in

order to enable exploitation of copyrighted works (that is, to pursue the second). The view that I have expressed in this chapter differs somewhat. I argue that the goal of fair use is, has been, and should be to promote the same creative ends that copyright as a whole serves, but that it should do so by recognizing that in certain social contexts, creative expression emerges from social dynamics that not only do not depend on market exchange, but even thrive outside of it. Much of the argument is devoted to demonstrating that both the long history of fair use and more recent judicial applications of the doctrine lead us in this direction. In an important sense, this is a plea for the implicit reasoning of courts to be brought into the foreground and made an express basis for application of fair use. Assuming, moreover, that one should start with the statutory text, I believe that both the text itself and Congress's intent in adding fair use to the Copyright Act are consistent with this approach.

Those familiar with debates surrounding fair use will note that certain key themes of contemporary debates are missing from my discussion. I have paid scant attention to distinctions between "productive" or "transformative," and "consumptive" or "personal" use of copyrighted works. I have touched lightly at best on concerns regarding the scope of the copyright owner's markets for its works, particularly in contexts where those markets are nascent. Some of the most contentious recent fair use debates have involved market limits: *Princeton University Press v. Michigan Document Services*<sup>79</sup> and *American Geophysical Union v. Texaco*,<sup>80</sup> both of which involved conflicts between those who photocopied academic works without permission and copyright owners organizing to develop a licensing market for those works; *A&M Records, Inc. v. Napster, Inc.*<sup>81</sup> and *BMG Music v. Gonzalez*,<sup>82</sup> which involved a comparable debate in the context of digital versions of recorded music. Each of those cases yielded a ruling for the copyright owners and rejected claims of fair use, because the logic of market harm tends to favor the owner who can plausibly argue that some new market for the work is emerging and should be protected from infringement.

The social practices approach that I advocate cannot prescribe "correct" results in any of these cases, but it can recast many of them as arguments about the existence and scope of social practices, rather than as debates about access to and consumption of copyrighted works. In the process, the social practices approach can sever the virtue of creative social structures, and preserve the social benefits that flow from them, from the expansive logic of market exchange. As in the Supreme Court opinions that are the key precedents for courts to apply, there will always remain debates over the presence and absence of practice and pattern, and over characterization of those that are identified. The form of the law matters, but the advocacy and narrative matter, too. What the social practices approach can do is focus the parties' and courts' attention on a distinction that copyright law must bear in mind. The creativity that both law and society crave emerges not only from exchanges in the market, but also from social structures that exist largely if not entirely outside the market. Using fair use to recognize those social structures gives the law an acceptable degree of predictability, while reconciling

many of the conflicts identified in the Introduction, between narrow and broad versions of fair use, and preserving the flexibility that any law of creativity must possess.

## NOTES

1. 17 U.S.C. § 107 (2004).
2. This section relies heavily on my earlier works, *Rewriting Fair Use and the Future of Copyright Reform*, 23 *Cardozo Arts & Ent. L.J.* 391 (2005), and *A Pattern-Oriented Approach to Fair Use*, 45 *Wm. & Mary L. Rev.* 1525 (2004) [hereinafter *Madison, Patterns*].
3. The best-known writing on fair use is William Patry, *The Fair Use Privilege in Copyright Law* (1985); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *Harv. L. Rev.* 1659 (1988); Wendy J. Gordon, *Fair Use as a Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 *Colum. L. Rev.* 1600 (1982); Pierre N. Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105 (1990); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 *Harv. L. Rev.* 1137 (1990).
4. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 797 (9th Cir. 2003) (noting the defendant's service of a report by an expert situating the defendant's use of plaintiffs Barbie doll in the context of contemporary art); *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1373 & n.9 (N.D. Ga. 2001) (noting defendant's use of expert testimony to situate defendant's work in context of African-American literature), rev'd, 268 F.3d 1257 (11th Cir. 2001).
5. See *Madison, Patterns*, *supra* note 2, at 1677–1687. The literature is reviewed in Michael J. Madison, *Social Software, Groups, and Governance*, 2006 *Mich. St. L. Rev.* 153, 171–176. A representative example is Edwin Hutchins, *Cognition in the Wild* (1995).
6. 17 U.S.C. § 107.
7. E.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Ty, Inc. v. Publications Int'l, Ltd.*, 292 F.3d 512 (7th Cir. 2002) (Posner, J.).
8. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).
9. 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).
10. *Id.* at 44.
11. *Folsom*, 9 F. Cas. at 348.
12. *Id.* at 349.
13. *Id.* at 344–345.
14. See Patry, *supra* note 3, at 3–27 (analyzing early “fair use” and “fair abridgment” decisions in English and American law).
15. *Folsom*, 9 F. Cas. at 348 (quoting *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (K.B. 1807)).
16. *Id.*
17. *Id.* at 347–348.
18. *Id.* at 348.
19. The Nimmer treatise describes a similar “functional test,” under which “a comparison must be made not merely of the media in which the two works may appear, but rather in terms of the function of each such work regardless of media.” Melville B.

Nimmer & David Nimmer, *Nimmer on Copyright* § 1305(B)(1), at 192–193 (Perm ed. 2006). The “function” of each version of the work is determined by the use to which the author apparently intends the audience should put the work.

20. *Folsom*, 9 F. Cas. at 348 (quoting *Roworth*, 170 Eng. Rep. at 890).

21. *Id.* at 344.

22. *Id.* at 349.

23. See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 Fla. L. Rev. 107, 119–120 (2001).

24. See, e.g., L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. Intell. Prop. L. 431 (1998) (criticizing Story for applying natural law concepts to statutory copyright, in order to expand the author’s right). Though the American doctrine of “fair use” was in many respects a narrowing of the English doctrine of “fair abridgement,” even in English cases the law had already begun a shift in favor of the author. See Benjamin Kaplan, *An Unhurried View of Copyright* 18–25 (1967).

25. 170 Eng. Rep. 679 (K.B. 1802).

26. *Id.* at 680 (italics added).

27. *Id.*

28. See Patry, *supra* note 3, at 130 (noting English antecedent of modern “good faith” requirement); Okediji, *supra* note 23, at 121–122 (arguing that at common law, the “good faith” concept embodied both the concern that the defendant not have intended to deprive the plaintiff of the value of his copyright, and the concern that the defendant genuinely have intended to produce a work for the benefit of the public).

29. See *Wilkins v. Aikin*, 34 Eng. Rep. 163, 165 (K.B. 1810).

30. H.R. Rep. No. 94–1476, at 66 (1976); S. Rep. No. 94–473, at 62 (1975). The Court quoted this language in each of its three major fair use decisions. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984).

31. H.R. Rep. No. 94–1476, at 65.

32. *Id.*

33. *Id.* at 66. The Senate Report contains the counterpart definitional sentence: “In any event, whether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.” S. Rep. No. 94–473, at 62.

34. Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. Miami L. Rev. 233, 260 (1988).

35. The legislative process that produced the 1976 revision lasted for more than twenty years.

36. Alan Latman, Study No. 14, *Fair Use of Copyrighted Works* (1958), reprinted in *2 Studies on Copyright* 781 (Arthur Fisher Memorial ed. 1963).

37. *Id.* at 785.

38. See *id.* at 786–792.

39. *Id.* at 793.

40. See *Id.* at 785, 793. The idea of fair use as a “customary” right influenced some pre-1976 commentary. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550–51 & n.4 (1985) (citing older commentary that referred to fair use as “reasonable and customary”); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (1973) (suggesting that a scholar’s handwritten copy of copyrighted article would be fair use as a

“customary fact [] of copyright-life”); Harry N. Rosenfield, *Customary Use as “Fair Use” in Copyright Law*, 25 Buff. L. Rev. 119, 128–140 (1975).

41. Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 24 (1961), reprinted in 2 *Studies on Copyright*, *supra* note 36, at 1199.

42. The Report then illustrates the scope of fair use with examples of permitted uses that closely parallel the list of “favored” uses listed in the preamble to section 107. This list focuses less on the characteristics of the original work of authorship and a subsequent work that relied on it, and more on the character of the accused infringer’s activities.

43. 464 U.S. 417 (1984).

44. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 65 (1987) (“Sony and Harper & Row are more sound in their results than in their reasoning.”).

45. See Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* 149–156 (rev. ed. 2003).

46. See James Lardner, *Fast Forward: Hollywood, the Japanese, and the VCR* 312–328 (1987).

47. Sony Corp., 464 U.S. at 449.

48. *Id.* at 478 (Blackmun, J., dissenting).

49. See Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. Rev. 975 (2002).

50. 471 U.S. 539 (1985).

51. *Id.* at 543.

52. *Id.* at 564–565.

53. Time had paid \$12,500 to Harper & Row already and had promised to pay an additional \$12,500 upon publication of the excerpt.

54. *Id.* at 542.

55. *Id.* at 565.

56. *Id.* at 566.

57. The district court was even more clearly concerned with the fact that the unique value of the “scoop” to *The Nation* lay in the ability to present what the court characterized as “essentially the heart of the book.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983).

58. See *Harper & Row*, 471 U.S. at 562.

59. 510 U.S. 569 (1994).

60. Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. Rev. 1449, 1464–1466 (1997).

61. *Campbell*, 510 U.S. at 581.

62. *Id.* at 583.

63. *Id.* at 580.

64. *Id.* at 589 (footnotes omitted).

65. 499 U.S. 340 (1991).

66. See Gordon, *supra* note 3, at 1610–1614.

67. Some recent cases have adopted this approach. In *American Geophysical Union v. Texaco, Inc.*, the U.S. Court of Appeals for the Second Circuit wrote:

[I]t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. . . . [I]t is sensible that a

particular unauthorized use should be considered “more fair” when there is no ready market or means to pay for the use. . . . The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.

*Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930–31 (2d Cir. 1994); see also *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1386–88 (6th Cir. 1996).

68. See Lunney, *supra* note 49, at 985–988 (arguing that fair use represents an affirmative balancing between users and copyright owners). Gordon has noted that her initial proposal placed more emphasis on distributive values than has been recognized typically. See Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in *The Commodification of Information* 149 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. Rev. 1031 (2002).

69. See Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 Berkeley Tech. L.J. 539 (2003).

70. See Lunney, *supra* note 49, at 981–985.

71. See Fisher, *supra* note 3, at 1477.

72. See Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-Line Commerce*, 12 Berkeley Tech. L.J. 115, 134–135 (1997).

73. See Goldstein, *supra* note 45, at 230; J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51, 101 n.216 (1997).

74. See Leval, *supra* note 3.

75. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 364–382 (1996).

76. See Fisher, *supra* note 3, at 1744–94.

77. See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 283–289 (1996).

78. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19, 39–47 (1996).

79. 99 F.3d 1381 (6th Cir. 1996).

80. 60 F.3d 913 (2d Cir. 1994).

81. 239 F.3d 1004 (9th Cir. 2001).

82. 430 F.3d 888 (7th Cir. 2005).