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Cover Page Footnote

Dane Professor of Law, Harvard Law School. This Article is a revised version of the 1998 Donald C. Brace Memorial Lecture, delivered at the Fordham University School of Law on November 12, 1998. Robert Gorman and Benjamin Kaplan gave helpful comments on this revision. Benjamin Gruenstein gave valuable research assistance.

LECTURE

FAIR USE

Lloyd L. Weinreb*

THE place of fair use in the law of copyright calls to mind Justice Holmes's remark that the Equal Protection Clause is "the usual last resort of constitutional arguments."¹ Fair use is the usual last defense to a charge of copyright infringement and, if it succeeds more often than does a last-ditch appeal to equality, it is not because it is noticeably more definite. For all its exposure, our understanding of fair use has not progressed much beyond Justice Story's observation in *Folsom v. Marsh*,² the case usually cited as the source of the doctrine in this country, that the issue before him was "one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases."³ Melville Nimmer illustrated the discussion of fair use in his casebook with a drawing of the weary traveler who, having at last scaled the mountain to reach the venerable sage, asks with his last breath, "What is 'fair use'?"⁴ The sage's reply is not recorded.

It is not for want of trying. We have the benefit of William Patry's thorough, carefully documented treatise devoted exclusively to fair use,⁵ as well as an array of wide-ranging, scholarly articles exploring its theoretical and practical underpinnings.⁶ When it enacted the comprehensive statutory revision of 1976, Congress gave the matter of fair use close attention and, after much study, for the first time made the

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1. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

2. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

3. *Id.* at 344.

4. Melville B. Nimmer et al., *Cases and Materials on Copyright* 473 (4th ed. 1991).

5. See William F. Patry, *The Fair Use Privilege in Copyright Law* (2d ed. 1995).

6. Among the more important contributions are Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. Miami L. Rev. 233 (1988); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600 (1982); and Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990) [hereinafter Leval, *Toward a Fair Use Standard*]. The articles by Professors Fisher and Gordon are discussed in the text accompanying notes 57-96, *infra*. I wrote a comment to Judge Leval's article. See Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137 (1990).

doctrine of fair use an express statutory matter. In doing so, Congress indicated that it was confirming the common law as it had developed in the preceding hundred-plus years.⁷ Since enactment of the statute, we have had three major opinions of the Supreme Court⁸ and any number of lower court opinions in which the statutory provision has been construed and applied. The sequence of the Court's three opinions is oddly reminiscent of W.W. Jacobs's story *The Monkey's Paw*,⁹ in which the person who possesses the paw has three wishes, the first two of which turn out disastrously; he uses his third wish to restore, as well as he can, the situation before the first.¹⁰

The explanation for all this flailing around is that rather than, as it appears, raising a subsidiary, if important, question about infringement—when, and for what reasons, ought an author's entitlement to the fruits of his authorship give way to another use?—fair use expresses lingering doubt and uncertainty about the wisdom of granting a copyright in the first place.¹¹ Closely examined, what are presented as grounds for a departure from the norm are in fact grounds for questioning the norm itself. Although copyright as a general matter is commonly regarded as “in the nature of things,” of course it is not; and most often, serious consideration of the reasons for granting it is obviated by the settled convention that authorial works are copyrightable. Fair use looks explicitly beyond the convention. In doing so, it takes us to the center of copyright, and the center will not hold.

The question sometimes arises whether a finding of fair use is a finding that the accused use is simply not infringing, because it is not within the scope of the rights protected by copyright, or is rather a finding of fair use is a finding that, although the use is within the scope of those rights, it is also within a more particular exception to them—not noninfringing as such but would-be-infringing-but-for the exception.¹² That sort of analytic nicety may exercise academics more than

7. See 17 U.S.C. § 107 (1994); H.R. Rep. No. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680. The study of fair use prepared by Alan Latman in preparation for revision of the Copyright Law and the comments following it also trace the common law. See Subcommittee on Patents, Trademarks, and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 1st Sess., *Fair Use of Copyrighted Works* (Comm. Print 1960).

8. The cases in the Supreme Court are: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); and *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

9. W.W. Jacobs, *The Monkey's Paw*, in *Selected Short Stories* 31 (1975).

10. See *id.* at 31-42.

11. For a skeptical discussion of the justifications of copyright, in which I conclude that they “turn out to be based on theoretical assumptions having little more concrete underpinning than a conventional understanding that books and certain other kinds of authorial works are copyrightable,” see Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 Harv. L. Rev. 1149, 1153, 1211-45 (1998).

12. See, e.g., Saul Cohen, *Fair Use in the Law of Copyright*, 6 Copyright L. Symp. (ASCAP) 43, 47 (1955) (noting that a court must first determine whether there has been an infringement, and then decide whether it is privileged under the fair use doc-

it does practitioners and judges. But it is not without significance. Before fair use was cast as a distinct doctrine, a court's consideration whether a use was "fair" was simply part of the effort to determine the proper bounds of copyright. The first American copyright statute, like the Statute of Anne,¹³ conferred upon authors of certain kinds of works an exclusive right to copy, without delimiting it.¹⁴ Yet, unmistakably, the right had limits. It could scarcely have been supposed that the stated constitutional purpose "[t]o promote the Progress of Science"¹⁵ could be achieved if readers of a copyrighted work were precluded from making a record of what they had read; the early copyrighted works were more often than not collections of fact.¹⁶ The cases that gave rise to the doctrine of fair use were efforts to spell out the limits of copyright or, more simply, what a copyright is. In doing so, the courts had no guidance from the legislature or, indeed, any guidance at all except for similar efforts by English judges and their own common sense of the matter.

The early English cases that are cited in the history of fair use are all of this kind. In one of the earliest cases, for example, the plaintiff, who had the copyright in Hale's *Pleas of the Crown*, sought an injunction to stay the printing of a book, *Modern Crown Law*, which he alleged was copied verbatim from Hale's treatise, with insignificant omissions.¹⁷ The Lord Chancellor observed that the Statute of Anne undoubtedly prohibited the printing of a book that is only "colourably shortened," but did not "restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful . . ." ¹⁸ To bring all abridgments within the statute, he said, "would be of mischievous consequence," for it would prevent the printing of abridgments of "the books of the learned."¹⁹ The question why an abridgment should not be an infringement became

trine). The statute says that "fair use . . . is not an infringement of copyright." 17 U.S.C. § 107. That formula is used repeatedly in the sections that manifestly provide for exceptions to the general scope of copyright, *see, e.g., id.* §§ 108, 110-12, which perhaps suggests that fair use also should be so regarded. The structure of chapter one of the Act suggests that as well, § 107 being first among the sections providing exceptions. The context of § 107, however, is quite different from the other exceptions. One might argue that the generality of the fair use provision bespeaks not an exception but a line of division.

13. Act for the Encouragement of Learning, 1710, 8 Anne, ch. 19 (Eng.).

14. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124.

15. U.S. Const. art. I, § 8.

16. *See* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1873 (1990).

17. *See* Gyles v. Wilcox, 26 Eng. Rep. 489, 489 (Ch. 1740).

18. *Id.* at 490.

19. *Id.*

vexatious later,²⁰ but early on the answer was plain. An abridgment was not a "copy" as that term was understood and was, therefore, not within the copyright; on the contrary, it was a new work, which served the advancement of learning.

In a later case, the plaintiff alleged that portions of the text and some prints from a book about Greek antiquities were copied by the defendant in a book about Doric architecture.²¹ Finding that there was much that was copied but also much that was not, Lord Chancellor Eldon temporized. Referring throughout the opinion to what is "fair," he said that the question—the "fair question" indeed—is whether the defendant's use was "the fair exercise of a mental operation, deserving the character of an original work."²² Interestingly, for all the "fair" this and "fair" that, the Chancellor did not use the phrase "fair use." Similarly, without mentioning fair use, a court refused to interfere with the quotation from a report for purposes of comment and criticism, in view of the "trifling" value of the extract and the "extreme minuteness" of the injury to the plaintiff. Otherwise, the court observed, newspapers could enjoin the quotation of their articles "for the purpose of questioning or criticizing the opinions expressed therein," a result that the court appeared to believe was self-evidently unsound.²³

Early American cases are the same. In *Folsom v. Marsh*,²⁴ Justice Story did not suggest that there was any rule of fair use distinct from the question whether a use is infringing. Rather, certain uses, such as "a fair and bona fide abridgment of an original work,"²⁵ were simply not within the copyright. It might require "subtile and refined, and, sometimes, almost evanescent" distinctions to separate a permissible abridgment, like quotation for the purpose of criticism from "piracy";²⁶ but there is no suggestion of "would be but for." Story had, in fact, applied just the same analysis in another case two years before *Folsom*, in which the straightforward dichotomy between infringing and noninfringing uses is even clearer.²⁷ In a case a few years after *Folsom*, in which the allegedly infringed work was Story's own *Commentaries on Equity Jurisprudence*, Justice McLean discussed the

20. See *Lawrence v. Dana*, 15 F. Cas. 26, 59 (C.C.D. Mass. 1869) (No. 8136); *Story v. Holcombe*, 23 F. Cas 171, 173-75 (C.C.D. Ohio 1847) (No. 13,497).

21. See *Wilkins v. Aikin*, 34 Eng. Rep. 163, 164 (Ch. 1810).

22. *Id.* at 165.

23. *Bell v. Whitehead*, 8 L.J.K.B. 141, 142 (Ch. 1839).

24. 9 F. Cas. 342 (C.C.D. Mass 1841) (No. 4901).

25. *Id.* at 345.

26. *Id.* at 344.

27. See *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728). The principal question discussed in the opinion was the availability of copyright for a compilation. Justice Story also considered, however, the distinction between infringement and what we now call fair use and referred to the same factors to which he referred in *Folsom*, which became the source of the four factors specified in § 107 of the Copyright Act. See *id.* at 1038-39.

problem of abridgments and observed that although an abridgment may injure the sales of the original work, it is lawful because it "requires the exercise of the mind, and . . . is not copying."²⁸ "A fair abridgment of any book," he said, "is considered a new work, as to write it requires labor and exercise of judgment."²⁹ Comparing an abridgment to a compilation, McLean emphasized the original contribution of the abridger, evoking the contemporary distinction between idea and expression, the former being outside the protection of copyright.³⁰

American treatise writers in the nineteenth century took the same view. In George Curtis's 1847 treatise, for example, the Index contains no entry for fair use.³¹ Instead, the subject is discussed in the chapter on *Infringement of Copyright*, in the first paragraph of which, Curtis observes:

[W]e must bear in mind that while the primary object of the law of copyright is protection to the product of all literary labor, the interests of knowledge demand a reasonable freedom in the use of all antecedent literature. To administer the law in such a manner as not to curtail the fair use of existing materials, in any department of letters, is one of the great tasks of jurisprudence.³²

Curtis goes on to discuss all the issues now cabined under the doctrine of fair use—the amount taken, the effect on the author's market, and so forth—as well as special categories of use, like criticism, abridgments, and translations, in the course of elaborating what is an infringement.³³

Eaton Drone's influential treatise was published in 1879.³⁴ His position was very favorable to author's rights and rejected the special treatment that had been given to abridgments and translations. He said of the decision in *Stowe v. Thomas*,³⁵ which held that the copyright of *Uncle Tom's Cabin* was not infringed by a German translation,³⁶ that there was no reported copyright decision in England or America "which is more clearly wrong, unjust, and absurd."³⁷ Like Curtis, Drone discussed fair uses of copyrighted works in the chapter on *Piracy*.³⁸ Also like Curtis, he explained the law's allowance of "a 'fair use'" as "essential to the growth of knowledge; as it would obvi-

28. *Story v. Holcombe*, 23 F. Cas. 171, 174 (C.C.D. Ohio 1847) (No. 13,497).

29. *Id.* at 173.

30. *See id.* at 174-75.

31. *See* George Ticknor Curtis, *A Treatise on the Law of Copyright* 437-50 (1847).

32. *Id.* at 236-37.

33. *See id.* at 241-305.

34. *See* Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (1879).

35. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

36. *See id.* at 208.

37. Drone, *supra* note 34, at 455 n.4.

38. *See id.* at 383-432. There is a separate chapter "Abridgments, Translations, and Dramatizations, Considered with Reference to Piracy." *Id.* at 433.

ously be a hindrance to learning if every work were a sealed book to all subsequent authors."³⁹

Reading these early cases and the treatises, one is impressed by the fluidity of the analysis. As in so many other contexts, a reference to "fairness" as a (or the) criterion does not confine the ground of decision but opens it to an array of more or less disparate factors, from which a court might choose those that seem especially relevant to the facts at hand. In the eighteenth century and for much of the nineteenth century, the question that the courts ask is simply "What, after all, is copyright?" Their answer is derived initially from, and for a very long while presented as, not doctrine—certainly not a doctrine of fair use—but rather a very general sense of what ought, as a matter of right and sound public policy, to be protected. The extent of the original author's effort was relevant because, as Locke had so persuasively (if, in the end, incoherently) argued, a person is entitled to the fruits of his labor.⁴⁰ By the same token, the second comer's intent was relevant; if his intent was to capture the fruits of another author's labor for himself, that was as good as theft or piracy, as it was called. Both those factors might be subsumed within a consideration of the effect of the copying—if that is what it was—on the market for the original work. But that approach, unhinged from the matter of the copier's intention, threatened to be circular, for all might depend on how the market was defined. A German translation of *Uncle Tom's Cabin* would not likely affect the market for the book in English; but if the relevant market were for the book in any language, an effect is easy to suppose. Whether the effect was conceived to be large or small, another way of noticing it was that one of the purposes of copyright, to promote the dissemination of authorial works, was served. A reader's or other user's choice of the allegedly infringing work over the original was presumably based on some feature, very likely a lower price, that made it more attractive and, hence, encouraged the use.

The courts' open, undoctrinaire approach was greatly encouraged by the fact that the plaintiff typically asked for an injunction, an equitable remedy that directed the court's attention to the particularities of the case rather than formulation of a general rule.⁴¹ The force of that is strikingly illustrated in an early English case, *Burnett v. Chetwood*,⁴² decided in 1720. The original work, written in Latin, was

39. *Id.* at 386.

40. See John Locke, *Two Treatises of Government* 303-20 (Peter Laslett ed., Cambridge Univ. Press 1970) (1698). For a discussion of Locke's theory in the context of copyright, see Weinreb, *supra* note 11, at 1222-29.

41. It is true that fair use, as a response to the question whether a work infringed the copyright, was an issue of law. See Patry, *supra* note 5, at 3-5; Leval, *Toward a Fair Use Standard*, *supra* note 6, at 1127. Nevertheless, passing by the vexing question of the respective jurisdictions of law and equity, the injunctive remedy gave the proceedings an equitable cast, as the reported opinions strongly indicate.

42. 35 Eng. Rep. 1008 (Ch. 1720).

called *Archaeologia Philosophica*. The defendants were preparing to publish an English translation of that book (as well as another unpublished Latin manuscript of Burnett, then deceased).⁴³ The Lord Chancellor's view was that although a translation might not be within the author's copyright, he ought nevertheless to grant an injunction, because the book "to his knowledge (having read it in his study), contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it."⁴⁴ Similarly, in *Folsom v. Marsh*, Justice Story observed that he granted the injunction "not without some regret, that it may interfere, in some measure, with the very meritorious labors of the defendants," and expressed the hope "that some means may be found, to produce an amicable settlement of this unhappy controversy."⁴⁵

In the American courts, over time, various aspects of this fluid, not to say effervescent, mix were precipitated out and lodged elsewhere within the law of copyright. Some, for example, were cabined in the distinction between idea and expression, the former being associated with the kind of use that was outside the scope of the copyright.⁴⁶ Similarly, the gradual transition in the latter part of the nineteenth century from asking, as the test of infringement, how much the copier had added to asking how much he had taken⁴⁷ was very much a reflection of the narrowing perception of what uses are "fair"—that is, outside the copyright—abridgments and translations being prime examples.

The general significance of these developments is plain. Copyright was transformed from an exclusive right to make copies, quite narrowly construed, to an exclusive right to significant reproductive use of the work in any form, not at all restricted to that in which it was embodied by the owner of the copyright. That transformation was signaled notably in the Copyright Act of 1976, which replaced the numerous particular provisions describing the copyright owner's rights in the 1909 Act⁴⁸ with five brief, unqualified provisions that cover just about any use of a copyrighted work other than private edification or

43. *See id.* at 1009.

44. *Id.*

45. 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901). The defendants had published a "Life of [George] Washington" in the form of an autobiography, much of the content of which was quotations from Washington's letters, recently published, in which the plaintiffs held the copyright. *See id.* at 345.

46. *See, e.g.,* *Simms v. Stanton*, 75 F. 6, 10 (C.C.N.D. Cal. 1896) ("A copyright gives no exclusive property in the ideas of an author. These are public property, and any one may use them as such.").

47. *See* Benjamin Kaplan, *An Unhurried View of Copyright* 30-32 (1967); Weinreb, *supra* note 11, at 1243.

48. Copyright Act of 1909, ch. 320, §1, 35 Stat. 1075 (codified as amended at 17 U.S.C. § 106 (1994)).

enjoyment of it in the form in which it was published.⁴⁹ What had earlier been conceived as part of the burden to show that a use was within the copyright thus became a burden to show that it was not; fair use, along with other more specific provisions, became the exception rather than part of the rule.

Viewed from this historical perspective, the vagary of § 107, which looks on its face like a model of bad statutory drafting, is not, after all, so surprising. The apparent multiple indecisions—whether to rely on a general formula or to write a specification; whether, if the latter, to depend on examples or to provide criteria; whether the criteria that are provided are necessary, or sufficient, or just whatever happened to come to mind; whether, in the end, the statute has any independent prescriptive effect or merely confirms the past (and future) efforts of the courts—are exactly that. Copyright, having evolved from quite limited beginnings on the basis of little more than convention and largely unexamined, if plausible, assumptions about private right and public good, relies on fair use as the rubric by which those assumptions are put to the test. The sad truth for those who are doctrinarians is that there is nothing to unite the various perspectives of fair use except a suspicion that the assumptions on which copyright is based do not apply. Because those assumptions are neither well grounded nor coherently integrated, no more so are the factors and circumstances that may overcome them.

Perhaps the largest puzzle of § 107 is whether it is to be regarded as a compendium of categorical exceptions for *types* of use for which copyright is not appropriate but for which Congress neglected to provide a distinct exception—education, scholarship, criticism, news reporting, and so forth—or is rather an exception for exceptional cases that, for some reason special to the case, perhaps the bad faith or unclean hands of the copyright owner, are outside the usual rule. Because § 107 is followed by fourteen other sections providing categorical exceptions in considerable detail, it is tempting to conclude that the exceptions in § 107 are not categorical and are reserved for special circumstances. But the references in § 107, even if only exemplary, are too clearly to the contrary. Thus one is left with categorical exceptions *and* the list of four factors to consider. Are the uses mentioned in the statute, then, presumptively fair use, exceptions to the general copyright rule, unless so-called “factor analysis” indicates special circumstances warranting an exception to the exception, bringing them back within the rule? Or do those uses have to pass through the mesh of factor analysis on the same terms as other uses, with perhaps an extra cheer if they succeed?⁵⁰ Who knows? One can go on in that fashion

49. See 17 U.S.C. § 106 (1994). A sixth provision was added in 1995. See 17 U.S.C. § 106(6) (Supp. II 1996).

50. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), Justice O'Connor rejected the argument that the uses mentioned in § 107 are anything

for a long while, and it has been done more than once. The only generally valid conclusion is that one must not take the actual text of § 107 too seriously, a conclusion encouraged by the Supreme Court, which routinely applies to it Humpty-Dumpty's theory of language.⁵¹

In both *Sony Corp. of America v. Universal City Studios, Inc.*⁵² and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵³ the Court's analysis is cast almost entirely in terms of the four statutory factors. But the application, not to say the interpretation, of the factors is so tailored to the circumstances of the cases, that one is impelled to look beneath the surface of the opinions for the true ground of decision.⁵⁴ In *Campbell v. Acuff-Rose Music, Inc.*,⁵⁵ the Court discarded both of its prior recent efforts and came to the sensible but not very informative conclusion that "it all depends." The Court emphasized the fact-specific nature of the inquiry into fair use and sent the case back for further proceedings without much guidance to the court below, except that it should consider all the facts.⁵⁶ The remand came to naught, when the case was settled.

Efforts to impose order on this chaos are not wanting. In a widely discussed and cited article published in 1982, Professor Wendy Gordon argued that the fair use provision should be called into play only in a situation of "market failure," and even then, only if the uncompensated use is "socially desirable" and does not substantially diminish incentives to create the work in the first place.⁵⁷ Professor Gordon elaborated these conditions in considerable detail. The requirement of market failure is justified, she said, because the market is our usual mechanism for bringing about socially productive exchanges.⁵⁸ The other two conditions are simply a requirement that the exchange confer a net public good, with special emphasis on copy-

but examples of the kinds of use that might qualify. She rejected explicitly the suggestion that they are presumptively fair use. *See id.* at 561, 569. Her citations, however, refer only to a proposal of educational institutions that there be a specific provision declaring that educational uses are presumptively fair use. The proposal was indeed rejected. But that can hardly be deemed a rejection of the general implication of the specific mention of certain kinds of uses in the statute.

51. "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through the Looking-Glass* 75 (Folio Soc'y ed. 1962) (1872).

52. 464 U.S. 417 (1984).

53. 471 U.S. 539 (1985).

54. *See* Weinreb, *supra* note 6, at 1153-58. For a detailed criticism of the Court's analysis in *Sony* and *Harper & Row*, see Fisher, *supra* note 6, at 1664-95.

55. 510 U.S. 569 (1994).

56. *See id.* at 594.

57. *See* Gordon, *supra* note 6, at 1614-15.

58. *See id.*

right's particular public good of encouraging the creation of intellectual property.⁵⁹

Professor Gordon urged that her proposed test is valid both normatively and descriptively: normatively, because it reflects the policy of the copyright scheme as a whole, which relies generally on the market to achieve its goals and descriptively, because the test articulates and systematizes what the courts in the main try to do, albeit without the clarity of her analysis.⁶⁰ Although I believe that her discussion is a valuable contribution to our understanding of the issues, important questions remain. First, if market failure is regarded simply as a predictable failure of authors and would-be copiers to come to terms, it is plain that Congress did not regard market failure as a *sine qua non* of fair use. Most of the uses mentioned in the statute as potential examples of fair use are ones in which a market likely would develop in the absence of fair use and in fact commonly does develop if fair use is denied.⁶¹ Unless the option of using a work without charge is foreclosed, a potential user may have little incentive to strike a deal or to develop a satisfactory alternative to ad hoc negotiation, such as a standard licensing agreement. Market failure, after all, is not self-defining, as the Godfather's invocation of "an offer you can't refuse" reminds us.⁶² At some price, even the proudest author may strike a deal and soothe his authorial sensibilities on the way to the bank. On the other hand, up against the wall of copyright infringement, those who had claimed that the public interest required that they be allowed to copy without charge are likely to find other ways to serve that interest, incidentally serving their own interest at the same time.⁶³ Fair use is often no more than the path of least resistance or least expense—there may be no way to tell without calling the bluff of a hopeful free rider.

Although market friction or other factors may increase transaction costs, if that is all that is involved, at *some* level the interested parties will be brought together. Of course, at that price, there may be few

59. *See id.* at 1615-22.

60. *See id.* at 1627.

61. *See id.* at 1629.

62. *See* *The Godfather* (Paramount 1972).

63. *See, e.g.,* *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (finding that a profit-making university copy shop is not serving the public interest); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (stating that "[t]he greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the [court] will favor the copyright holder . . ."); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) (finding that Kinko's "purportedly altruistic motives" were insufficient to prove fair use). In *Basic Books*, having pressed the fair use argument as far as it could and lost, Kinko's published an advertisement that said, "At Kinko's it is our goal to work cooperatively with publishers and editors in putting quality educational materials in the hands of students," and affirmed the "strict new policies" to respect copyrights. *Publishers Wkly.*, Oct. 11, 1991, inside back cover.

users and the creation or dissemination of derivative works may suffer. But that only reminds us of the uncertainties of copyright itself. Do we, after all, by conferring a copyright and adding to the author's rewards, significantly encourage the production of authorial works, or do we only add an unnecessary incentive to create such works that limits access to them? The uses that are mentioned as examples of fair use in the statute are not so much distinctively subject to market failure as simply uses that, for one reason or another, we do not regard as clearly within the author's right.

Second, there are circumstances in which one may plausibly conclude that market failure as well as the other two conditions that Professor Gordon prescribed are satisfied, but in which fair use is plausibly rejected. The letters of a famous person, like J.D. Salinger, are an example. There may be market failure; there was evidently no offer that Salinger could not refuse.⁶⁴ The social good of allowing use of the letters may be considerable—Judge Leval found that was true of biographer Ian Hamilton's proposed use of Salinger's letters.⁶⁵ And, because letter writers rarely write with publication in mind, the incentive factor is not relevant. Yet, it is plausible to deny fair use, as indeed the court of appeals did.⁶⁶ Even though Salinger's interest in privacy is not one that copyright law takes explicitly into account, the notion of copyright as property is too strong to dismiss entirely the author's claim, "It's mine," whatever his reason for asserting it.

Third, Professor Gordon's test leaves no room for consideration of what is simply fair or unfair in the ordinary sense. Jerry Falwell's victory over Larry Flynt in *Hustler Magazine, Inc. v. Moral Majority, Inc.*⁶⁷ is best explained on that basis. The majority's factor analysis is wholly unconvincing; one cannot ignore, however, the force of the sentiment that Flynt "got what was coming to him." "Turn-about is fair play," or in this case, fair use. Similarly, if a would-be user had obtained access to unpublished material by improper means, his "unclean hands" might count strongly against fair use, even if there would be a public benefit were it allowed. In *Harper & Row*, for example, the manner in which the editor of *The Nation* acquired the Ford manuscript for publication was a factor in the Court's conclusion.⁶⁸ Like-

64. See *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 416 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987).

65. See *id.* at 426.

66. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 99-100 (2d Cir. 1987).

67. 796 F.2d 1148 (9th Cir. 1986). In this case, *Hustler Magazine* brought an action for copyright infringement against Jerry Falwell and his lobbying group for reproducing the magazine's Campari liquor advertisement in which Falwell was prominently featured. See *id.* at 1149-50. The court held that Falwell's copying of the parody constituted fair use. See *id.* at 1156.

68. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562-63 (1985). The Court's great emphasis on the fact that the manuscript was unpublished, see *id.* at 550-55, 564, and therefore unavailable through ordinary channels is not unconnected with this aspect of the case. Had the majority agreed with Justice Brennan

wise, in *Salinger v. Random House, Inc.*,⁶⁹ the district court considered whether Hamilton's possible violation of his agreement with the libraries where he found Salinger's letters was an "equitable factor" that should preclude his use of them as fair use.⁷⁰

Professor Gordon included among situations that may justify a finding of fair use ones in which an agreement might be reached, but the use or nonuse of the copyrighted work affords benefits to persons other than the copyright owner and would-be user or to the public generally.⁷¹ Because such benefits do not enter the parties' calculations, their agreement is not maximally efficient. Accordingly, although she cautioned that such a justification for fair use should be applied cautiously and sparingly, she regarded such situations as meeting the requirement of market failure.⁷² An expansive definition of this kind of market failure could embrace considerations of fairness insofar as they favor fair use; either fairness itself or the community's perception of fairness might be regarded as a social good.⁷³ So expanded, however, market failure loses its value as a test of fair use; it amounts to little more than a recommendation not to interfere with private arrangements if their outcome is satisfactory.

Professor Gordon noted the difficulty of the factual inquiries and the complex reasoning that a confident application of her test would require,⁷⁴ both likely to stretch the capacities of most courts to the breaking point. Although I believe that a conscientious court would use its time wisely to study her recommendations and to analyze the facts along the lines that she suggested, I demur to the proposal that her recommendations be adopted as a "three-part test" of fair use.⁷⁵ Not only does the test leave little, if any, room for factors that are and, for aught that appears, ought to be considered. The likelihood is too great that it will, perforce, become a cover for hunch or an uneducated guess. Although we may sometimes be stuck with just that, we do better to face up to it than to pretend otherwise.

that the manner in which the manuscript was acquired was "standard journalistic practice," *id.* at 593 (Brennan, J., dissenting), if, for example, the manuscript had been found on the street, the case would very likely have been decided differently.

69. 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987).

70. *See* 650 F. Supp. at 426 (concluding that there was fair use).

71. *See* Gordon, *supra* note 6, at 1630-32.

72. Included among such situations, Professor Gordon says, are ones in which benefits of a use accrue to persons other than the user, in which the intended use is noncommercial, and in which the value of the use is "nonmonetizable." *See* Gordon, *supra* note 6, at 1631-32.

73. Contributions to "public knowledge, political debate, or human health" are examples of social goods the value of which is not easily calculated. *Id.* at 1631 (footnotes omitted).

74. *See id.* at 1620. Professor Gordon's analysis is far more rigorous and nuanced than my brief description here allows. If that makes its theoretical results more precise, it also greatly decreases the likelihood that its practical applications will satisfy the theory.

75. *Id.* at 1657.

Professor William Fisher also has provided a far-reaching discussion of fair use, in an article published in 1988.⁷⁶ He offered two reconstructive models, one that relies entirely on economic analysis to achieve an efficient allocation of resources, and another "utopian" analysis that adds to the goal of economic efficiency that of advancing "a substantive conception of a just and attractive intellectual culture," which conception is informed by "a vision of the good life and the sort of society that would facilitate its widespread realization."⁷⁷

Few will object to the goal of economic efficiency or, more comprehensively, to facilitating the good life. Professor Fisher adumbrated how the doctrine of fair use might serve these goals in many pages of careful, subtle analysis. As he recognized, however, it is scarcely conceivable that a judge will be able or willing to carry out a comparable analysis in an actual case, and for that reason, the practical pay-off is surprisingly limited.⁷⁸ The larger lesson to be drawn from his essay is somewhat different.

Professor Fisher observed that the principal objective of both of his models is "to develop a system for distinguishing permissible from impermissible uses of copyrighted materials."⁷⁹ So described, the models evoke the early cases, in which the question of fair use was an integral part of the question of what rights copyright confers. Professor Fisher's analysis might, therefore, be regarded as an effort to provide the rational underpinning for copyright itself. Because copyright generally as a social policy is beyond question and the doctrine of fair use is hardly anything except questions, one can well understand why he framed the discussion as he did. Nonetheless, powerful and convincing as they are, his models are, I think, largely academic.

Turning first to the economic model, Professor Fisher set forth the familiar problem of shaping copyright in a way that provides the optimal balance between encouraging the creation of authorial works and encouraging their dissemination.⁸⁰ He then illustrated its solution by applying it to a hypothetical, concrete case.⁸¹ Starting with publication of a book of stories, he used familiar economic analysis to measure net gains and losses if copyright were superseded by fair use for a variety of possible uses: distribution of photocopies to a college seminar, publication of a paperback edition, quotations in a critical review, and so forth.⁸² The case is, as Professor Fisher said, "highly stylized"⁸³ and the application assisted by "a large number of simplifying assump-

76. See Fisher, *supra* note 6.

77. *Id.* at 1744.

78. See *id.* at 1718-19, 1739-44 (providing an economic analysis); *id.* at 1746, 1766-83 (providing an utopian analysis).

79. *Id.* at 1698.

80. See *id.* at 1700-05.

81. See *id.* at 1705-06.

82. See *id.* at 1705-17.

83. *Id.* at 1718.

tions.”⁸⁴ Even so, and before introducing a set of seven “complications,”⁸⁵ he paused to let his readers catch their breath. Anticipating their response, he asked whether the analysis that he described is not “hopelessly impracticable,” whether it would not, indeed, be “ludicrous” to ask a judge to follow his example.⁸⁶ Later, having presented the complications, he observed that “[f]ew judges would be willing” to attempt such an analysis and, of those who are willing, “few would succeed.”⁸⁷ Even to gather the “extraordinary amount of information” on which such an analysis would be based would, he said, be very difficult and, in some respects, “probably be impossible.”⁸⁸ I agree.

In face of these difficulties, Professor Fisher apparently does not recommend that his economic model be applied full scale. Rather, the method that he described suggests various more particular ways in which courts could improve their performance,⁸⁹ and he criticized courts’ reasoning in a number of cases to make his point.⁹⁰ Although he criticized the “traditional ‘case-by-case’ approach” to fair use,⁹¹ it is difficult not to conclude that the upshot of his analysis is a contribution to that approach rather than a displacement of it. As he said, he has provided a “methodology,”⁹² not a practical method. The methodology is sophisticated economic analysis, different details of which may be applicable in the circumstances of particular cases. So understood, his economic model is valuable, not because it affords a comprehensive view of the whole landscape, but because it allows us to focus more accurately on one or another of the local points of interest.

The likelihood that a judge who, Professor Fisher speculated, “had time on his hands and extensive access to information, who knew that other courts would adhere to his rulings, and who fully shared the utopian vision”⁹³ that he described would reform fair use according to the second, utopian model is not greater. All of the difficulties of economic analysis still have to be faced, now coupled with a host of additional imponderable factual issues as well as an unrestricted inquiry into human nature, justice, and moral philosophy generally. How do we value the comparative worth of effort and achievement? How do we weigh individual satisfactions against aggregate satisfaction for the group? How do we assess strong but costly preferences in relation to weaker, less costly ones? What, after all, is “[t]he Good Life,” and

84. *Id.* at 1705.

85. *Id.* at 1719-39.

86. *Id.* at 1718.

87. *Id.* at 1739.

88. *Id.*

89. *See id.* at 1740.

90. *See id.* at 1740-44.

91. *Id.* at 1743.

92. *Id.* at 1744.

93. *Id.* at 1766.

what is “[t]he Good Society”?⁹⁴ Professor Fisher would have us answer all of those questions and a host of others like them.

Although Professor Fisher offered his own answers to such questions in brief compass, it scarcely needs to be said that they are controversial. Even framing the questions, which implicate directly profound issues of individual and social responsibility and the whole matter of human entitlement and desert, arouses disagreements for which there is no settled method of resolution. To concede that the vision is utopian is not enough, for the vision that Professor Fisher presented is only one utopian vision among a great many.⁹⁵ And, of course, all the difficulties of implementation remain. It is unsurprising that with his utopian vision on the table, he offered a rather limited set of prescriptions for judges confronting a claim of fair use. These prescriptions are generally not far from widely-shared conclusions reached on much narrower grounds.⁹⁶

Professor Fisher’s analysis is full of insights and provides a remarkably complete exploration of the border between copyright and what, for lack of another term, can be labeled simply fair use. His discussion maps with precision previously untraveled ground, on which we may all tread hereafter with a surer step. The destination, however, remains, I believe, wholly indeterminate. The larger lesson to be learned from his analysis is somewhat different.

The reason why it is, in Professor Fisher’s words, “hopelessly impracticable” to undertake a full analysis of factors dictating a fair use exemption from copyright is that the foundations of copyright itself are insecure. Those foundations, simply stated, are that the author of a work has a right to the copyright because he deserves to have the fruits of his labor, and that giving the copyright to the author serves the general good by encouraging persons to become authors.⁹⁷ Whatever may be the truth of those propositions in some cases, they are vulnerable as generalizations and are sustained by the convention

94. *Id.* at 1746, 1751.

95. Professor Fisher defends his proposal as providing “an integrated vision of the objectives of the [fair use] doctrine as a whole.” *Id.* at 1783. Although he associates his vision with “the Aristotelian tradition of moral philosophy,” *id.* at 1746, he does not elaborate its philosophical underpinnings and does no more than “set forth, in the form of postulates, those aspects of the vision that bear on the shape of intellectual property law” *Id.* The vision is “integrated,” therefore, only in the sense that it incorporates his preferred set of values. Although, as it happens, I share many of his preferences, he can hardly expect that others will not disagree and seek to substitute preferences of their own. From that perspective, the vision is not only integral but also arbitrary.

96. *See id.* at 1780-83. Professor Fisher stalks bigger game than fair use. He observes that “by engaging lawyers and judges in the project of applying and improving a vision of the good life and the good society,” his proposal “would enlist them in the campaign to reinfuse American legal argument and political discourse with substantive conceptions of the public interest.” *Id.* at 1783 (footnotes omitted).

97. *See id.* at 1700.

of copyright, rather than the other way around. The weight of the convention gives the propositions the appearance of common sense, which does not require elaborate reasoning. But because copyright is itself an intervention in an unconstructed market, it is far from clear why authors deserve this artificial protection any more than creators of other products that have limited "natural" trade value. And, although authors undoubtedly are glad to have an increase in their rewards, it does not follow that such increase is a necessary incentive to their labor. The effort to go beyond the common sense of convention leads directly to the complexities of Professor Fisher's account.

The four factors specified in the statute are themselves, individually and collectively, hardly more definite and certain than the broad principles that they purport to implement. The Court has said that the effect on the copyright owner's market is the most important of the statutory factors.⁹⁸ But as Professor Fisher's careful analysis makes plain, we simply do not know, and have no way of knowing, what market effect, or indeed whether any market effect, would significantly undermine this or that author's incentive to create. For aught that appears, "market effect" is just another way to view the positive good of dissemination. The "nature of the copyrighted work" and "the purpose and character of the use" are two other statutory factors.⁹⁹ Although no one doubts that both copyrighted works and their uses are various, what bearing has either factor, unless we can say with some assurance how, in light of the work's nature, allowing a copyright monopoly would affect the use in question? The remaining factor is the "amount and substantiality" of what has been taken as a portion of the copyrighted work.¹⁰⁰ No doubt this factor is relevant, but how? We are back to the quandary of the earliest cases, in which courts struggled with the distinction between merely copying and creating a new work that builds on an older one. The short answer to such conundrums is, "Do the best you can." In these circumstances, however, the best we can do is not nearly good enough. And there is a great danger, illustrated repeatedly in cases relying on the statutory factors, that the best we can do will be mistaken for good enough. Having acknowledged their uncertainty in the prologue, courts wax eloquent about their conclusions in the body of the piece.

Furthermore—and here I do depart from the proposals of Professors Gordon and Fisher—fair use depends on a calculus of incommensurables.¹⁰¹ In this instance, as in so many others, the appeal of social

98. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

99. See 17 U.S.C. § 107(1)–(2).

100. See *id.* § 107(3).

101. It follows that although Professor Fisher and I agree that the *Sony* and *Harper & Row* opinions are badly reasoned, see Fisher, *supra* note 6, at 1668; Weinreb, *supra* note 6, at 1153–58, I quite disagree with his assertion that the "fundamental problem" with the Court's approach is its "failure to identify and advance a coherent set of

utility (however it is defined) as the test is that it gives the comforting appearance of being measurable. Also in this instance, as in so many others, the appearance is empty. Not only do utilitarian values not lend themselves readily to quantification, neither copyright itself nor fair use especially is strictly a function of social utility. The author's claim of right is not so based, and it cannot easily be ignored. Much has been made, for example, of the relevance of "transformative use," as opposed to a nonproductive use, in the determination of whether a use is fair.¹⁰² Although a use that is itself an original creative work may well have more social value than a lazy copy that merely duplicates the original,¹⁰³ it is most doubtful that the preference for transformative use has to do entirely with the public good. Rather, as a glance at the early cases will confirm, it has to do in part, probably in large part, with an author's entitlement to the fruits of *his* work but not to the work of others.

Similarly, no calculation of social utility can measure the force of the public perception of the fairness (or unfairness) of an author's claim. In *Sony*, because there never was much doubt that home taping of television would be allowed on some basis and that whoever bore the direct cost, if there were one, would pass it on to consumers, the eventual public good was not much in issue. The *Sony* case was only a vivid example of a recurring puzzle: When the value of new technology is that it increases the value of a form of creativity, who gets what? The television producers were simply asking for their cut. Reference to the public good does not resolve that kind of distributive question. Rather, the overriding fact that dictated the result in *Sony* was that the public and the parties alike all regarded home taping as a proper use of one's television set, beyond any exclusive claim of the author of the program being taped. Who can say whether on balance the public good was served by recognizing the common sense of the matter? Was the result that fewer television shows were produced or that more television shows were watched? Whichever it was, was it a

values," Fisher, *supra* note 6, at 1664. As it happens, Professor Fisher believes that the Court probably reached the wrong result in both cases, *see id.* at 1784-94, while I believe that it reached the correct results, albeit for the wrong reasons, *see* Weinreb, *supra* note 6, at 1155-58.

102. *See, e.g.,* Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 *Cardozo Arts & Ent. L.J.* 19, 23 (1994) [hereinafter Leval, *Rescue of Fair Use*] (discussing the merits of "productive use"); Leval, *Toward a Fair Use Standard*, *supra* note 6, at 1111 (stating that the transformative use "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original"). The Supreme Court endorsed the relevance of transformative use in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

103. Even in that clear case, it is not certain where the greater social value lies. A lazy copy must have some attraction to consumers to find a market; if its attraction furthers dissemination of the work, its social value may exceed the value of a transformative use, whether because the intrinsic value of the latter is slight or because its dissemination is restricted. Often, the case is not so clear; "transformative" typically is a matter of more or less. *See* Weinreb, *supra* note 6, at 1142-43.

good thing or a bad thing? Who knows? Who cares? Justice Stevens's factor analysis is so unconvincing because it is a trumped-up effort to rationalize the result without mentioning the only thing that mattered in the actual circumstances of the case. Whether one regards such conventional understandings as independently relevant or as affecting the author's claim of right, they cannot be ignored.

Another incommensurable element of fair use is what is typically referred to as "unclean hands" but is, I think, more accurately described simply as fairness. That, I think, was the *élément gris[e]* that drove the factor analysis in *Harper & Row*. As the Court perceived the facts, the editor of *The Nation* was a chiseler, a category only a little removed from crook or, in the nineteenth century idiom, pirate—not so much because of the use itself but because of the manner in which he obtained the manuscript.¹⁰⁴ If that perception is unchallenged, the case is over; theft is not a fair use. In the *Hustler* case, the centrality of plain fairness is even more apparent.

None of these factors lends itself to nice calculation. In *Time, Inc. v. Bernard Geis Associates*,¹⁰⁵ for example, the would-be copier of the Zapruder film was also a crook, but the court found fair use nonetheless.¹⁰⁶ In *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹⁰⁷ Howard Hughes's claim that the copyright was his property was incontrovertible; but, disregarding the most ordinary significance of private property, the court overruled his claim because it did not like his motive for asserting it and thought he was behaving too much like a bully.¹⁰⁸ Of course, one need not accept the actual result in any of these cases. But they are at least plausible, and they seem to me sound. No reckoning of social utility explains those results, unless it is distorted.

104. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542-43, 562-63 (1985). The editor of *The Nation* received an unauthorized copy of President Ford's memoirs several weeks before *Time* magazine was to publish them. He "hastily put together what he believed was 'a real hot news story' composed of quotes, paraphrases, and facts drawn exclusively from the manuscript," and did not do any independent research or analysis because of the need to publish his story before *Time* did. *Id.* at 543. Justice O'Connor said that the conduct of the defendant is relevant, *see id.* at 562, but inexplicably folded it into the first statutory factor, "the purpose and character of the use," 17 U.S.C. § 107(1) (1994). It is most doubtful that is what "the . . . character of the use" was intended to include, as the examples in the statute—"whether such use is of a commercial nature or is for non-profit educational purposes"—strongly indicate. See H.R. Rep. No. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679. *But see* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1][d] (1998) (discussing the implications of the defendant's conduct). In any case, lodging the defendant's conduct within one of the statutory factors made it appear less important to the result than I believe it was.

105. 293 F. Supp. 130 (S.D.N.Y. 1968).

106. *See id.* at 146.

107. 366 F.2d 303 (2d Cir. 1966).

108. *See id.* at 311 (Lumbard, C.J., concurring).

The great objection to so open and uncontained an understanding of fair use is that it affords no predictability. It has been suggested that would-be authors and users alike may lose the incentive to create if they fear that their effort will or, as the case may be, will not qualify as fair use.¹⁰⁹ While that fear seems fanciful, I agree that unpredictability is costly, if for no other reason than that it engenders litigation. I greatly doubt, however, that cabining fair use within any formula is preferable. The result, I believe, well-illustrated by *Sony* and *Harper & Row*, will not be to eliminate factors outside the formula but rather to distort them and fit them, in however procrustean a fashion, within it.¹¹⁰ Analysis of that kind, good only for the day, serves the objective of predictability less than clear and open consideration of what is really at stake. The Court in *Campbell* seemed to recognize this; but having done so, it too evidently yielded to the lawyerly desire for rules and emphasized, too much in my view, the four statutory factors.¹¹¹

What, then, is to be done about fair use? In its inception, fair use was an effort to discern the sensible limits of copyright. Without legislative guidance and with little more to go on than the obvious facts that copyright benefited the author (or, more likely, the publisher) of a work and restricted its general use, courts sought to effect a workable compromise that also gave due weight to the author's right to the fruits of his labor. Today, we are encumbered by a surfeit of legislative and judicial pronouncements, but the state of play is not much changed. For most purposes, we are still in the dark about whether, as an initial matter, copyright is necessary at all and, if it is, what is its proper scope. That is not to say that copyright is an open question. For however infirm its foundations, it is now taken for granted; and with as little as we have to go on, it would be foolhardy to abandon it.¹¹² The same can be said about some more specific questions about the scope of copyright. Although much can be said for the earlier view that significant transformative use of a copyrighted work ought not be deemed an infringement even if it borrows extensively from the original,¹¹³ it is probably too late in the day to restore that principle wholesale. So also, whatever its theoretical weakness, the copyrightability of collections of fact, on the basis that their selection and ar-

109. See Fisher, *supra* note 6, at 1693-94, 1720, 1743-44; cf. Gordon, *supra* note 6, at 1619 (arguing that "fair use should be denied if it would leave the plaintiff copyright owner facing substantial injury to his incentives").

110. See Leval, *Rescue of Fair Use*, *supra* note 102, at 19-22.

111. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-94 (1994).

112. Compare the similar observation of Machlup at the conclusion of his study of the patent system. See Subcommittee on Patents, Trademarks, and Copyrights, Senate Comm. on the Judiciary, 85th Cong., 2d Sess., *An Economic Review of the Patent System* 80 (Comm. Print 1958).

113. See the suggestive arguments that "transformative" or "productive" uses should be deemed fair use, in Leval, *Toward a Fair Use Standard*, *supra* note 6, at 1111-16; Leval, *Rescue of Fair Use*, *supra* note 102, at 22-23.

rangement display authorship, is well established in practice.¹¹⁴ On the whole, the great difference between past and present is that copyright protection is now the conventional norm so that, instead of asking what copyright covers, we ask what it does not.

This seemingly inexorable encroachment of copyright has not occurred in a vacuum. Over time, especially perhaps in the last several decades, the perception of intellectual property as real property has grown. Scarcely anyone, I expect, is troubled anymore by the notion of intangible property or any of the notions that separate property as a concept from any quiddity. That perception favors the entitlement of the author as a matter of right, aside from any social utility. In the case of tangible property, at any rate, we have allowed the notion of property to prevail over all sorts of doubts about utility, or fairness, or even unclean hands. "It's mine" is ordinarily a sufficient answer to any of those objections. There is no doctrine of fair use with respect to my automobile, my typewriter, my desk. Is that only conventional, merely the accretion of centuries? Shall we in the long haul reach the same haven of certainty about intellectual property, authorial works in particular? Or is there something more fundamental? Is there some essential feature that tangible property has and intellectual property lacks? Despite our modern impatience with the essences of things, it seems to me that may be so, and that we should not dismiss the possibility out of hand.

Either way, we have special reason now, in a period that may prove to be a new *incunabulum*, when the swift pace of technology threatens to unhinge our most familiar and deep-seated concepts, to be cautious about foreclosing any avenue for argument that copyright is inapt in specific circumstances, if not in general. Although fair use should not be regarded as an opportunity to contest the question of copyright at large, we should be alert to features of a case that set it outside the conventional understanding. Because the justification of copyright is not firmly based on either the author's right or utilitarian considerations but sits uncertainly astraddle both, no opposing argument of either kind can be rigorously excluded. The factual predicate for an argument, furthermore, may be categorical—the *type* of work that is copyrighted and the *type* of use that is made of it—or idiosyncratic—the particular circumstances of the individual case—or something of both. The effort to restrict such arguments or to pin them down by imagining some public good and fortifying one's imagination by elegant, if altogether speculative, calculations can only cloud our vision. Fair use, that is to say, uncabined and inexact as it is, serves us well.

114. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363-64 (1991); Weinreb, *supra* note 11, at 1193-1203.