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CUSTOMARY USE AS "FAIR USE" IN COPYRIGHT LAW

HARRY N. ROSENFELD*

INTRODUCTION

This article explores a serious deficiency in the concept of "fair use" in copyright law that has been adopted by the Committees on the Judiciary of both the United States Senate and the House of Representatives in a proposed revision of the copyright law. That deficiency is the failure to recognize that, where applicable, custom is per se "fair use."

These long-standing comprehensive copyright revision proposals would, among other things, accord statutory status to the heretofore wholly judicial doctrine of "fair use." As a general proposition, this particular proposal is creative and in the public interest. However, the currently proposed formulation of statutory "fair use" could restrict and curtail current judicial doctrine on "fair use" and circumscribe its reasonable judicial development in the future. Such an occurrence would be to the serious detriment of non-profit users of copyrighted materials for non-commercial educational, research and scholarly purposes.

In particular, this article contests the proposed statute's principal reliance upon four specified criteria as being determinative of "fair use" in both commercial and non-commercial transactions. These criteria, derived almost wholly from litigation involving commercial competitors, erroneously and improperly ignore what is a threshold question for non-profit uses of copyrighted material for non-commercial purposes, *i.e.*, whether a given use is customary. The thesis here expounded is that, at least for non-profit uses of copyrighted material for non-commercial educational, research and scholarly purposes, a customary use is per se a "fair use" without regard to the copyright owner's consent and without resort to the criteria normally and properly applicable to commercial transactions.

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I. WHAT IS "FAIR USE"?

The Register of Copyrights has described "fair use" as follows:

Nothing is said in the statute as to the "fair use" of copyrighted works. The doctrine of "fair use," however, has been developed by the courts over a period of many years and is now firmly established as an implied limitation on the exclusive rights of copyright owners.

Copyright does not preclude anyone from using the ideas or information disclosed in a copyrighted work. Beyond that, the work itself is subject to "fair use." That term eludes precise definition; broadly speaking, it means 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

Whether any particular use of a copyrighted work constitutes a fair use rather than an infringement of copyright has been said to depend upon (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the copyright owner's potential market for his work. These criteria are interrelated and their relative significance may vary, but the fourth one—the competitive character of the use—is often the most decisive

Since the fair use doctrine may be applied in any number and variety of circumstances, it would be difficult to prescribe precise rules suitable for all situations. For example, the amount of work that may be properly used under the doctrine will vary according to the nature of the work, the essential character of the portion used, and the purpose and competitive effect of the use¹

What various commentators and courts have broadly stated to be a much larger number of such applicable factors have thus been reduced into these four criteria by the Register.² It is well to note that the fourth criterion ("the effect of the use on the copyright owner's potential market for his work"), described as "the competitive character of the use," was stated to be the most decisive. Nimmer agrees on the major importance of this competitive factor: "It is believed that the actual decisions bearing upon fair use, if not always their stated rationale, can best be explained by looking to the central question

1. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24-25 (Comm. Print 1961).

2. See, e.g., Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT LAW SYMPOSIUM 43, 53 (1955); Latman, *Fair Use of Copyrighted Works*, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY NO. 14 at 14-18 (1960).

whether the defendant's work tends to diminish or prejudice the potential sale of the plaintiff's work."³ "Fair use" is an affirmative defense which must be pleaded by the alleged infringer, and on which the user/alleged infringer bears the burden of proof.⁴

In the course of legislative hearings and court arguments, copyright owners often seek to denigrate "fair use" photocopying by an argument that rests on efficiency: Whatever may have been "fair use" at an earlier time, it is no longer so when you are faced with the efficiency of the cheap and easily available photocopiers.⁵ However, the very question seems to ignore the equally relevant counter question: Why should not the advantages of new technology be equally available to users and producers of copyrighted materials?⁶

In 1935, publishers and libraries reached a mutual agreement, since known as the "Gentlemen's Agreement," which among other things included the following written provision: "The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to 'copy' by hand, and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription."⁷

Although the photocopier was not contemplated in 1909, when the current act was enacted, or in 1935 when the agreement was reached, the "Gentlemen's Agreement" would prevent the copyright owner

3. 2 M. NIMMER, ON COPYRIGHT 646 (1974).

4. *Id.* at 645; SENATE JUDICIARY COMM., 93d CONG., 2d SESS., COPYRIGHT LAW REVISION, A REPORT TO ACCOMPANY S. 1361, REP. NO. 93-983, 115 (1974). This bill was passed by the Senate September 9, 1974, 120 CONG. REC. 16, 147-86 (daily ed. Sept. 9, 1974), but died for lack of House action.

5. "[A]lternative forms of exploitation in keeping with current technology come within the normal ambit of copyright owner's rights." Brief for Petitioner/Publisher at 8, *Williams & Wilkins Co. v. United States*, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975).

6. *See* *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists TV, Inc.*, 392 U.S. 390 (1968) (both on CATV as a new device); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (piano rolls as a new device).

7. Finding of Fact No. 41(a), *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 173-76 (1973) (emphasis added). On the "Gentlemen's Agreement" between the National Association of Book Publishers and the Joint Committee on Reproduction of Materials for Research, *see* Smith, *The Copying of Literary Property in Library Collections*, 46 L. LIB. J. 197 (1953), 47 L. LIB. J. 204 (1954); 1 J. DOCUMENTARY REPRODUCTION 29 (1939). In panel discussions before the Register of Copyrights in 1963, the American Book Publishers Council, Inc., stated: "The general practice of publishers tends to recognize certain 'fair uses'." HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION, PART 4, FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 251 (Comm. Print 1964).

from seeking a greater monopoly than he would have had with the earlier systems of reproducing copies. This same principle was adopted by the Supreme Court when it held that the Federal Communications Commission had jurisdiction over CATV although that system of transmission "was developed long after the enactment of the Communications Act of 1934."⁸

In an amicus curiae brief submitted to the Supreme Court, the United States Copyright Office argued that the method of reproduction has no effect on the copyrightability of a work:

Literary works which in an earlier era would perhaps have been reproduced by hand on illuminated parchment or in other single copies have not become less copyrightable by virtue of their present reproduction in thousands of copies by manufacturing techniques involving the use of movable types, plates, etc. Similarly, painting masterpieces once reproduced on canvas or as murals in single copies are now frequently reproduced in color plates for distribution in thousands of individual copies or in periodical or book form. *Neither the mechanical and manufacturing processes used in this reproduction, the number of copies . . . would appear to affect the copyrightability or essential nature of the work itself.*⁹

Sound reason requires the same logic to prevail in determining "fair use." Therefore, a reproduction or copy that was "fair use" under an earlier and less efficient form of duplication does not lose its "fair use" status merely because it is now copied by photoduplicators.¹⁰

II. COMMERCIAL VS. NON-COMMERCIAL USES

Discussion on "fair use" is often irrelevant because it fails to distinguish between (a) non-commercial uses by non-profit educational research and scholarly users, and (b) commercial uses by profit-seeking enterprises that use another's copyright by incorporating it in its own competing and commercially-vended product. The latter kind of cases, involving commercial plagiarism or piracy, among other activities,¹¹

8. *United States v. Midwest Video Corp.*, 406 U.S. 649, 650 (1972). *See also* the concurring opinion of Justice Burger, *id.* at 675.

9. Brief for United States Copyright Office as amicus curiae at 30-31 n.13, *Mazer v. Stein*, 347 U.S. 201 (1954) (emphasis added).

10. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975).

11. Consequently, the following often-cited cases are irrelevant: *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (use of copyrighted material in commercial biography); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (reproduced rearrangement of copyrighted choral work); *Public Affairs Associates Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960),

are largely irrelevant to the legal rights of non-profit users who do not commercially republish the copyrighted material but instead use it for personal study and research or for classroom teaching purposes.

Recognition of this distinction was a significant factor in the majority opinion of the U. S. Court of Claims in the leading case of *Williams & Wilkins Co. v. United States*:

[There was] no purpose to reduplicate them for sale or other general distribution On both sides—library and requester—scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research¹²

The court of claims distinguished between non-commercial access to copyrighted works, as in the instance of the customary use for non-profit educational, research and scholarly purposes, and commercial use of the copyrighted work by incorporation into a new and competitively vendable product.

Prior to *Williams & Wilkins*, the issue never arose as to the propriety of numerous instances of the single reproduction of a copyrighted work for an individual's use for education, research or scholarship. In its brief to the Supreme Court in that case, the United States stated, "We know of no decisions specifically considering whether such reproduction is a fair use; this may be because of a general assumption that it is."¹³ The brief of the United States also stated, in part, that certain amici briefs

argue persuasively that the Copyright Act was never intended to cover the copying of printed works for private use

This Court has implied it shares this view. See *Goldstein v. California*, 412 U.S. 546, 555:

To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works. An author

vacated for insufficient record, 369 U.S. 111 (1962), *dismissed*, 268 F. Supp. 444 (D.D.C. 1967) (commercial compilation of copyrighted speeches); *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. CBS, Inc. v. Loew's, Inc.*, 356 U.S. 43, *rehearing denied*, 356 U.S. 934 (1958) (parody); *Shapiro, Bernstein & Co., Inc. v. P.F. Collier & Son*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934) (publication of parts of previously copyrighted song); *Folsom v. Marsh*, 9 F. Cas. 343 (No. 4901) (C.C.D. Mass. 1841) (inclusion of previously copyrighted work in compilation).

12. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1354 (Ct. Cl. 1973), *aff'd by an equally divided court*, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975).

13. Brief for respondent United States at 16, *id.*

who possesses an unlimited copyright may preclude others from copying his creation *for commercial purposes* without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the *sale* or commercial use of copies of their works . . .¹⁴

And the Solicitor General of the United States added, "But the copying of material for private use may well be outside of the scope of the Copyright Act *ab initio*; at least, the fact that the copy is made for personal use and not for commercial benefit is strong support for the conclusion that it is a noninfringing fair use."¹⁵

The Congress itself recognized that copying of copyrighted works for purely personal non-commercial use is not a copyright infringement. In 1971, Congress enacted legislation to protect copyright owners from unauthorized duplication of sound recordings.¹⁶ In so doing, the House Judiciary Committee stated that it did not intend to limit the recognized and widespread practice of making private recordings from copyrighted ones

*where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.*¹⁷

Elsewhere, in the so-called "manufacturing clause" of the current Copyright Act, the Congress also distinguished between "individual use" and commercial sale.¹⁸

The valid and enforceable difference, under the copyright law, between personal and commercial use, was also clearly recognized by the U. S. District Court in *Loew's, Inc. v. CBS, Inc.*:

But the factor of use for commercial gain has been considered by the courts in connection with most, if not all, infringements of copyrighted material . . . Thus, in the field of science and the fine arts, we find a broad scope given to fair use. This doctrine permits a

14. *Id.* n.26 (emphasis added).

15. *Id.*

16. 85 Stat. 391-92 (1971) (codified in scattered sections of 17 U.S.C.).

17. H.R. REP. No. 487, 92d CONG., 1st SESS. 7 (1971) (emphasis added).

18. 17 U.S.C. § 107(d). The manufacturing clause forbids importation of unauthorized copies of a book during the validity of a United States copyright on such a book.

writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter. *Thompson v. Gernsback*, D.C. N.Y. 1950, 94 F. Supp. 453, 454. The writer of such works 'invites reviews, comments and criticism' [citing Yankwich, *What is Fair Use*, 22 U. of Chic. L. Rev. 203-209 (1954)] and we could add, the use of the books and portions and quotations therefrom for the purpose of the advancement of learning. He does not invite or consent to its use for commercial gain alone.¹⁹

As already indicated, in an important Report to the Congress, the Register of Copyrights specified four basic criteria for determination of a "fair use," the last of which was "the effect of the use on the copyright owner's potential market for his work." The Register then went on to state, "These criteria are interrelated and their significance may vary, but the fourth one—the competitive character of the use—is often the most decisive."²⁰ It would be difficult to state more clearly the commercial orientation of the normally applicable rules affecting "fair use."²¹

The United States Court of Appeals in *Williams & Wilkins* understood the inapplicability of normal commercially-oriented copyright principles to non-commercial personal uses:

Furthermore, it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use, and in the era before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files. These customary facts of copyright-life are given.²²

This distinction between personal and commercial use has also been noted by a leading commentator on "fair use" who argued that "[a]nyone may copy copyrighted materials for purposes of private study and review."²³

19. 131 F. Supp. 165, 175 (D.C. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. CBS, Inc. v. Loew's, Inc.*, 356 U.S. 43, *rehearing denied*, 356 U.S. 934 (1958).

20. REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 1, at 24.

21. *See* Latman, *supra* note 2, at 32, where Latman states, "the cases have dealt primarily with fringe uses by competitors . . ."

22. 487 F.2d at 1350.

23. Cohen, *supra* note 2, at 58. *See also* *Rosemount Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938). *But see* I. Karp's statement in HOUSE COMM. ON JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 2, DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF

Furthermore, this evident difference has been widely recognized in international discussions of reprographic reproduction of copyrighted materials. For example, the secretariats of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union prepared a report in 1965 which, among other things, suggested that reprographic reproduction without the copyright owner's permission should be allowed only for personal, private, non-commercial or similar purposes, for educational purposes or for the use of educational establishments, for research or for the preservation and dissemination of culture by libraries.²⁴ And in May 1973, a Working Group on Reprographic Reproduction of Works Protected by Copyright met in Paris under the joint auspices of UNESCO and the World Intellectual Property Organization. Its chairman, a Swedish judge, stated "as a proposition, that photocopying for personal use is free for all purposes and in all countries."²⁵ At the end of this meeting, the Working Group adopted the following recommendations:

Recommends that the following principles be taken into consideration in the national law on reprographic reproduction:

....

2. Individuals are free to make single copies of a single article from an issue of a periodical publication or a reasonable portion of any other copyright work for their personal use

3. Any reprographic reproduction permissible under paragraph 2 can be provided for an individual by a library or documentation center²⁶

Recognition of the distinction between commercial and non-commercial uses of copyrighted property meets the needs of a public interest broader than technical copyright doctrine and is therefore in-

COPYRIGHTS 315 (1963): "I would disagree with two of the examples of fair use, i.e., making a copy for personal use . . ." A similar view was expressed by H.S. Manges of the American Book Publishers Council, *id.* at 325, & P.B. Wattenberg, *id.* at 400.

24. The Photographic Reproduction of Protected Works by or on behalf of Libraries, Documentation Centres and Scientific Institutions, 19 UNESCO COPYRIGHT BULL. 63-89 (1966).

25. As reported in EXAMINATION OF THE FEASIBILITY OF PREPARING AN INTERNATIONAL INSTRUMENT CONCERNING THE REPROGRAPHIC REPRODUCTION OF WORKS PROTECTED BY COPYRIGHT, Annex at 5. The document is a joint publication of the Executive Committee of the International Union for the Protection of Literature and Artistic Works (Berne Union, B/EC/VI/2, and the International Copyright Committee, IGC/XII/2 (December 5-11, 1973, Paris)).

26. Annex A to ANNEX, *supra* note 25, at 2. It is also mentioned: "Instructors in educational establishments at all levels should be free to make a limited number of reprographic reproductions of copyrighted works for use solely for teaching under a blanket license negotiated between the educational authorities and a qualified organization representing the authors and publishers." *Id.* Where an author refuses to enter such

incorporated in the copyright law as a necessary limitation on the monopoly otherwise granted by law to the copyright proprietor.²⁷

III. LEGISLATIVE PROPOSALS

The Congress has been considering a comprehensive general revision of the copyright laws for many years. In April 1967, the House of Representatives passed H.R. 2512, section 107 of which provided for statutory recognition of "fair use" in the following terms:

§ 107. Limitations on exclusive rights: Fair Use. Notwithstanding the provisions of section 106, 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, 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;
- (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 upon the potential market for or value of the copyrighted work.²⁸

No further definitive action was taken by the Congress on the copyright revision bill until 1974 when the Senate passed S. 1361, in which section 107 was identical with the above-quoted language of section 107 of the 1967 House bill.²⁹ This Senate bill died for lack of final action by the House before adjournment of the 93rd Congress. The current bills, S. 22 and H.R. 2223, 94th Congress, First Session, again have identical section 107 provisions.

As previously noted, this proposed statutory recognition of "fair use" merits praise for creativity and wisdom, and generally speaking is in the public interest. Among the specifically helpful aspects, apart from its very inclusion, is the explicit acknowledgement given to the

system, the user may use the materials "without prior inquiry." *Id.* And where the organization does not represent all copyright owners, the blanket licensing system "could be supplemented by a compulsory licensing system." *Id.*

27. Latman, *supra* note 2, at 31.

28. H.R. 2512, 90th Cong., 1st Sess. (1967) was not enacted into law, since the Senate did not act on the bill. The accompanying report was H.R. REP. No. 83, 90th Cong., 1st Sess. (1967).

29. S. 1361, 93rd Cong., 2d Sess. (1973). *See also* note 4 *supra*.

right of reproduction and copying as part of "fair use" as well as the inclusion of teaching, scholarship and research as legitimate "fair uses." Also of distinct and resourceful help to all concerned was the effort by both Committees on the Judiciary to set forth in some detail what was and what was not "fair use" in terms of educational use.³⁰

But the crux of the difficulty lies elsewhere. Both Committee reports state in identical terms that, "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."³¹ The difficulty is that neither in its statutory criteria nor in the reports' extensive description "of what fair use is," is there any specific recognition of custom as "fair use." Neither the statutory language nor the Committee reports seem to recognize that customary use is "fair use" per se, at least as to non-profit uses for non-commercial educational, research and scholarly purposes. Thus, while the courts are given their head to "adapt the doctrine to particular situations on a case-by-case basis," there is neither statutory nor specific legislative intent for the necessary judicial recognition that customary use is "fair use" *without* application of the four specified criteria.

It is submitted that both Houses of the Congress unfortunately erred in ignoring the role of customary use as "fair use." Consequently, their statutory language and their committee reports are fraught with trouble in this connection. First, the legislative intent seems to be that all of the various judicial criteria for "fair use" "can be reduced to the four standards" (or criteria) set forth in the proposed section 107.³² Second, the stated legislative intent is to codify, not to change, the present judicial doctrine of "fair use."³³ Finally, neither the bill nor the Committee reports give specific recognition of the role of custom in "fair use." Consequently, unless this situation is rectified before the enactment of the proposed legislation, the courts may

30. H.R. REP. No. 83, *supra* note 28, at 29 et seq.; S. REP. No. 93-983, *supra* note 4, at 115 et seq.

31. H.R. REP. No. 83, *supra* note 28, at 32; S. REP. No. 93-983, *supra* note 4, at 116. Both reports also state endorsement of

the purpose and general scope of the judicial doctrine of fair use, as outlined earlier in this report, 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 the particular situation on a case-by-case basis.

Id.

32. H.R. REP. No. 83, *supra* note 28, at 29-30; S. REP. No. 93-983, *supra* note 4, at 115.

33. See note 31 *supra*.

hereafter be misled into changing the judicial doctrine of "fair use" so as to exclude any role for customary use or practice as "fair use."

IV. WILLIAMS & WILKINS CO. V. UNITED STATES

*Williams & Wilkins Co. v. United States*³⁴ illustrates the role and importance of customary use or practice in "fair use." In the instant case, suit was brought by a medical publisher against the United States for copyright infringement. The gravamen of the complaint was the established practice of the library of the National Institutes of Health and of the National Library of Medicine to furnish to their patrons, on written request, a single copy of an article from a journal owned by the library. The NIH library served principally its own employees; the NLM served other libraries. Both libraries had restrictions on abuse of the duplication practice and in neither case was the primary thrust directed toward current or generally available journals.

Both libraries had policies derived, at least in part, from an Interlibrary Loan Code of 1952.³⁵ That code was based on a 1935 "Gentlemen's Agreement"³⁶ between publishers and libraries, in which library photocopying was recognized as a legitimate method of filling requests for the loan of materials in journals. Testimony at the trial showed that library photocopying has been an established practice for at least 50 years.³⁷

34. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975).

35. The first Interlibrary Loan Code was adopted in 1917, *Code of Practice for Interlibrary Loans*, 11 AM. LIBRARY ASS'N BULL. 271 (1917). A second code was adopted in 1951, a third in 1952 and another in 1968. From its inception, the interlibrary loan system operated on the understanding that a library could use a photocopy instead of lending the original from its collection. The 1917 version contained the following: "When applying for a loan, if a photographic reproduction would be a satisfactory substitute, librarians should always state the fact." *Id.* at 272. The 1968 version states, in Section I, that "for the purposes of this code they [interlibrary loans] include the provision of copies as substitutes for loans of the original materials." S. THOMSON, INTERLIBRARY LOAN PROCEDURE MANUAL 1 (1970). Further, section V(1) states that any type of library material needed for the purpose of research may be requested on loan or in photocopy from another library. The lending library has the privilege of deciding in each case whether a particular item should or should not be provided, and whether the original or a copy should be sent. *Id.* at 3.

36. See note 7 *supra*: The "Gentlemen's Agreement" did not represent a new practice but rather a reaffirmation of an existing custom and practice accepted by all concerned.

37. Some authors of the very articles, the copying of which were the basis of the plaintiff's suit, favored the photocopying of their articles by the defendant libraries, on the ground that such photocopying was essential to the efficient conduct of medical research. Petitioner's Appendix (in Supreme Court) 23; Tr. 664, 669-671, 682, 713-15,

The United States Court of Claims, by a vote of 4 to 3, held that the practices involved were "fair use" and reversed a contrary recommendation of its trial judge. The majority specifically based its decision on the joint presence of "a multiplicity of factors," at least eight in number, in the case.³⁸

Although custom was only the third of eight factors that went into the decision, custom and practice constituted a continuous thread throughout the opinion. In particular, the majority opinion of Judge Oscar H. Davis stated:

We also think it significant, in assessing the recent and current practices of the two libraries, that library photocopying, though not of course to the extent of the modern development, has been going on ever since the 1909 Act was adopted. In Part II, *supra*, we have set forth the practice of the Library of Congress at that time and for many years thereafter. In fact, photocopying seems to have been done in the Library at least from the beginning of the century In 1935 there was a so-called "gentlemen's agreement" between the National Association of Book Publishers (since defunct) and the Joint Committee [I]t was regularly construed as allowing copying of articles. . . . [W]e cite it . . . as representing a very widely held view, almost 40 years ago, of what was permissible under the 1909 statute.

There is other evidence that, until quite recently, library photocopying was carried on with apparent general acceptance. Witnesses in this case testified that such photocopying has been done for at least fifty years and is well-established. . . . The General Interlibrary Loan Code (revised in 1956), see Part I, *supra*, is a similar indication of the extent of the practice, and of the general position of the libraries (at the least) that such copying is permissible.

The fact that photocopying by libraries of entire articles was done with hardly any (and at most very minor) complaint until about 10 or 15 years ago, goes a long way to show . . . that there was at least a time when photocopying, as then carried on, was "fair use."³⁹

Various findings of fact specify at length the history of such custom or long-standing practice.⁴⁰ The court also stated:

Furthermore, it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own

896, 901-02. Likewise one of the journals involved, by action of its Governing Board and Editorial Board, 64 *GASTROENTEROLOGY* 907, 1059 (1973) (letter to the editor).

38. 487 F.2d at 1353.

39. *Id.* at 1355-56.

40. Finding of Fact No. 23 (General Interlibrary Loan), 203 Ct. Cl. at 164-66; Finding of Fact No. 41(a) ("Gentlemen's Agreement"), 203 Ct. Cl. at 173-76; Finding of Fact No. 41(b) (practice of 50 years duration), 203 Ct. Cl. at 176; Finding of Fact No. 44 (practice of Library of Congress), 203 Ct. Cl. at 181.

use, and in the era before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files. These customary facts of copyright-life are among our givens.⁴¹

Judge Davis emphasized this point⁴² by noting that the practice of copying an article was based on "years of accepted practice"⁴³ and the "common" practice of copying copyrighted documents for court use.⁴⁴

The United States Court of Claims went to considerable pains to note that *Williams & Wilkins* was a case of novel impression⁴⁵ and that it felt "a strong need to obey the canon of judicial parsimony, being stingy rather than expansive in the reach of our holding."⁴⁶ Therefore, it was not a surprising exercise of careful judicial craftsmanship that the court bolstered its opinion by rhetoric describing eight legal justifications for its holding. What the court *did*—as contrasted with what it *said*—was to rule that a long-standing practice and custom was "fair use." Faced with a highly controversial "ground-breaking" case⁴⁷ in a divided court, the majority did not base its *opinion* wholly on the doctrine that a long-standing custom and practice constituted "fair use" per se. But in terms of the court's *action*, such was its guiding *leitmotif* as well as the operational result of Judge Davis' skillfully orchestrated judicial opinion. Thus, although the court did not quite come to grips rhetorically with the doctrine of customary use as "fair use", its action does. The decision is a long step forward toward unequivocal judicial recognition of that doctrine.⁴⁸

41. 487 F.2d at 1350.

42. *Id.* at 1351.

43. *Id.* at 1353. See LIBRARY OF CONGRESS, RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS (editions of 1908, 1913, 1918, 1921, 1929, 1932, 1939). The policy of the Library of Congress authorizing photocopying dates back at least until 1901. REPORT OF THE LIBRARIAN OF CONGRESS 208 (1901).

44. 487 F.2d at 1353.

45. In its decision, the court uses the following terms in describing the case: "ground-breaking," *id.* at 1346; "never before been mooted or determined by a court," *id.* at 1347; "the question is so difficult," *id.* at 1350; "no exact or detailed definition of the [fair use] doctrine," *id.* at 1352; "[t]here is no prior decision which is dispositive and hardly any that can be called even close," *id.* at 1353; "[t]he 1909 Act gives almost nothing in the way of directives," *id.* at 1363.

46. *Id.* at 1362.

47. *Id.* at 1346.

48. Some would go further, that copyright simply does not apply to such uses. See R. Shaw, *Publication and Distribution of Scientific Literature*, 17 COLLEGE & RESEARCH LIBRARIES 293, 301 (1956) ("[P]rivate use is completely outside the scope and intent of restriction by copyright."). See also Brief of the United States, *supra* note 13. For a more neutral stance, see Latman, *supra* note 2, at 12.

Would it have made a difference in the court's decision if there had been a showing that the library copying litigated in *Willaims & Wilkins* had in fact resulted in financial or economic harm to the publisher? The United States Court of Claims went to considerable detail to indicate that the publisher had failed to show economic damage,⁴⁹ and the minority disagreed.⁵⁰ However, the view here expressed, and later discussed in detail, is that financial damage to the copyright proprietor does not prevent an established customary use from becoming, per se, a "fair use".

V. CUSTOMARY USE IS "FAIR USE"

As common law doctrine, "fair use" can derive from customary use. A copyright use sanctioned by custom is per se "fair use." Once a "fair use" has been molded by custom, it operates without regard to the judicial criteria otherwise used by the courts in determining "fair use."⁵¹

A. Custom and the Common Law

"Fair use" is a common law doctrine, fashioned by the courts themselves, as a limitation upon the purportedly "exclusive" statutory rights of the copyright proprietor. The rationale was the same as that expressed recently in another context by the Supreme Court, namely, that action was justified by "common law tradition . . . and strong public-policy reasons."⁵²

In the history of Anglo-Saxon law, common law is thought largely to spring out of custom. Holmes, in the opening paragraph of his *The Common Law*⁵³ wrote, "The life of the law has not been logic: it has been experience."⁵⁴ Elsewhere, Holmes, in speaking of the law of bailments, reiterates this theme by pointing out that under the English legal system it is often the situation that "the custom of the realm and the common law are the same thing . . ."⁵⁵ Blackstone has likewise recognized this feature of English law:

This unwritten or Common Law is properly distinguishable

49. 487 F.2d at 1357-59.

50. *Id.* at 1367-70.

51. "[T]he function of the court is merely to declare the custom operative law." C. ALLEN, *LAW IN THE MAKING* 130 (7th ed. 1964).

52. *Wood v. Strickland*, 95 S. Ct. 992, 999 (1975).

53. O.W. HOLMES, *THE COMMON LAW* 5 (1881).

54. *Id.* at 1.

55. *Id.* at 190.

into three kinds: (1) General customs (2) Particular customs (3) Certain particular laws⁵⁶

Similarly, the congruity between custom and common law has been observed by many commentators on English law,⁵⁷ and has also become accepted doctrine in the courts here⁵⁸ and in recent legal literature.⁵⁹

B. Custom and "Fair Use"

In one of the earliest copyright cases before it, the Supreme Court clearly indicated that "custom or usage" is a valid basis of determining the common law of copyright.⁶⁰ Courts continued in later litigation to equate customary use with "fair use."⁶¹ The same position had been adopted by the very early English cases. In 1761, a court found justified the printing of one-tenth of a book by Samuel Johnson in a maga-

56. 1 BLACKSTONE, COMMENTARIES *67-8.

57. See 2 HALSBURY, LAWS OF ENGLAND 158 (3d ed. 1955) in which Halsbury stated,

Custom exists in every country It is known in England as "the common law"

Also see J. STORY, MISCELLANEOUS WRITINGS 442 (1852, reprint 1969); T.E. HOLLAND, THE ELEMENTS OF JURISPRUDENCE 59 (1910); J.H.B. BROWNE, THE LAW OF USAGES AND CUSTOMS 2, 7, 14 (1875).

58. See, e.g., *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 651 (1870), where the Supreme Court stated:

Customs have sprung from the necessities and convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions.

See also *United States v. Arrendondo*, 31 U.S. (6 Pet.) 691, 715 (1832), where it was stated,

A general custom is a general law The courts not only may, but are bound to notice and respect general customs and usage, as the law of the land, equally with the written law.

See also *Nicoll v. Pittsvein Coal Co.*, 269 F. 968, 971 (2d Cir. 1920), which said, "a lawful custom is itself part of the common law;" *United States Shipping Bd. Emergency Fleet Corp. v. Levensaler*, 290 F. 297, 300 (D.C. Cir. 1923), *cert. denied*, 266 U.S. 630 (1924), where it was put, "A lawful custom is part of the common law."

59. J.H. Levie, *Trade Usage & Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U.L. REV. 1101, 1102-03 (1965). Levie states, "Common Law 'custom' is an independent source of authority, a kind of lesser law used to supplement the common law, for it binds persons who have not consented to it." *Id.* See also Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192, 1205 (1955), which states, "A custom which becomes accepted throughout a jurisdiction and loses its uniqueness to a particular locale, in reality, becomes part of the common law."

60. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659 (1834).

61. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); see *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963); *Shapiro, Bernstein & Co. v. P.F. Collier & Son, Co.*, 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934).

zine by asserting that it was considered "upon the custom and usage."⁶² Another early English case, involving very substantial copying, denied an injunction because "[I]t is very important to observe that, for many years, such a course as I have stated has been pretty generally adopted . . ."⁶³

The legal commentators on copyright have also equated custom and "fair use," at least since Drone in 1879.⁶⁴ Weil has stated that "[f]air use' simply means a use which is legally permissive, either because of the scope of a copyright, the nature of a work, or by reason of the application of known commercial, social or professional usages, having the effect of custom, insofar as these do not expressly run contrary to the plain language of copyright legislation."⁶⁵ De Wolf described "fair use" as "a use . . . allowed as reasonable and customary,"⁶⁶ a formulation also followed by Ball⁶⁷ and Nicholson.⁶⁸

The term "reasonable," as it appears in these formulations has a meaning that approximates existence as such.⁶⁹ An early South Carolina case so described it:

Its reasonableness depended upon the proof of its general use, and indeed, I might say, upon its being established as a general custom. For, the proof of a general custom furnishes a strong reason why we should regard it as reasonable. . . . From proof of it . . . we are bound, at least prima facie, to conclude that it is reasonable.⁷⁰

62. *Dodsley v. Kinnersley*, 27 Eng. Rep. 270, 271 (Ch. 1761).

63. *Saunders v. Smith*, 40 Eng. Rep. 1100, 1107 (Ch. 1838), which has language reminiscent of the language of the Court of Claims in *Williams & Wilkins*. See text accompanying note 39 *supra*.

64. E.S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 389 (1879).

65. A.W. WEIL, AMERICAN COPYRIGHT LAW 429-30 (1917) (emphasis added).

66. R.C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925).

67. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944), cited with approval, *Loew's, Inc. v. CBS, Inc.*, 131 F. Supp. 165, 174 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. CBS, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

68. M. NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE FOR WRITERS, PUBLISHERS AND AGENTS 91 (2d ed. 1956). See also Comment, *The Effect of the Fair Use Doctrine in Textbook Publishing and Copying* (pt. II), 2 AKRON L. REV. 112 (1968); Comments & Notes, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L.J. 73, 88; Note, 15 S. CAL. L. REV. 249 (1942). See also Latman, *supra* note 2, at 7. For a failure to distinguish between custom as a basis of "fair use" where appropriate and custom as a requirement for all "fair use," see Cohen, *supra* note 2, at 52. "Although fair use has been defined as a use which is reasonable and customary, no court has said that a use must be customary in order to be fair." *Id.*

69. Holmes once assured Morris R. Cohen, the legal philosopher who lent him some books, "They shall be returned within a reasonable time—if I live so long." L.C. ROSENFELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 348 (1962).

70. *Cox, Maitland & Co. v. Charleston F. & M. Ins. Co.*, 3 Rich. 331, 333 (S.C. 1832).

Once a custom is proved and established, the burden of proof is on the one who contests its reasonableness,⁷¹ and such a custom is not affected by a change of circumstances to the disadvantage of those who contest it.⁷² "A custom is not unreasonable simply because it is injurious to private persons or interests, if it be for the public good."⁷³

"Fair use" does not depend upon the consent of the copyright owner, whether it derives from various criteria or from custom independently of other criteria:

Non-infringing uses are either "fair use" as recognized in the decided cases or uses which are sanctioned by custom in the trade or in the business to which they relate. It might be argued that uses which are sanctioned by custom are impliedly authorized. This is true. However, such an authorization springs not from the owner of the material or his representatives but from the overall framework of creation, licensing, and use in the field involved. Under such circumstances the authorization, express or implied, of the individual owner is not needed by the user.⁷⁴

It is recognized law that once established, custom is binding irrespective of any absence of assent by the parties concerned.⁷⁵

The absence of relevant cases prior to *Williams & Wilkins* has troubled some of the commentators. Nevertheless, Nimmer accepts the relevance of custom:

There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own use is an infringement or fair use. If such a case were to arise *the force of custom* might impel a court to rule for the defendant on the ground of fair use.⁷⁶

71. ALLEN, *supra* note 51, at 140.

72. "[T]he unreasonableness of a custom in modern circumstances will not affect its validity if the court is satisfied of a reasonable origin." *Id.* at 146.

73. J. LAWSON, *THE LAW OF USAGES AND CUSTOMS* 64 (1881); BROWNE, *supra* note 57, at 70. What is a reasonable custom has been defined as a "reasonable social necessity . . . an objective utility rather than a subjective logic." ALLEN, *supra* note 51, at 71.

74. McDonald, *Non-Infringing Uses*, 9 BULL. CR. SOC. 466 (1962) (emphasis added); Cohen, *supra* note 2, at 51.

75. WILLISTON ON CONTRACTS § 649 (3d ed. 1961).

76. NIMMER, *supra* note 3, § 145 at 656.3 (emphasis added). *Contra*, Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S.C.L. REV. 153, 154, 166 (1968). But the court in *Williams & Wilkins* flatly stated that a handwritten and even a typed copy for personal use was "fair use." See text accompanying note 41 *supra*.

Thus, "fair use" derives from two major sources, (1) customary use, and (2) other uses meeting certain criteria established by the courts. In both instances the courts have fashioned a common law doctrine independent of—and on its face contradictory with—the copyright statute. When such customary use is established, it becomes "fair use" independently of the criteria otherwise applicable in the absence of custom. This common law rule also reflects the realities of society of which courts must take cognizance. "Our concern is with realities, not nomenclature," said Mr. Justice McReynolds,⁷⁷ and Mr. Justice Brewer stated that "courts must recognize things as they are"⁷⁸ These "realities" and "things as they are" demand that customary use by non-profit users for non-commercial education, research and scholarship be considered "fair use."

Mr. Justice Douglas once said that "common sense often makes good law."⁷⁹ If the law fails to recognize and enforce that "common sense" point of view that customary use by non-profit users for non-commercial purposes is "fair use," the law adopts the ridiculous stance of insisting that a teacher, researcher or scholar may lawfully copy for his private, non-profit use only under conditions of maximum inefficiency in the use of technology, time and resources.⁸⁰ If this occurs, the law loses credibility with the public, and copyright law could go the way of prohibition as an outmoded and unlamented relic of a concept deteriorated by unacceptability and rendered inflexible by lack of wisdom in its application.

The judicial development of "fair use" to encompass customary use is an example of what the Supreme Court regarded as a long-recognized judicial fashioning of federal remedies to protect federal rights:

The remedy sought . . . is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as *Texas v. Pankey*, 441 F.2d, recently held.⁸¹

77. *Senior v. Braden*, 295 U.S. 422, 429 (1935).

78. *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 225 (1897).

79. *Peak v. United States*, 353 U.S. 43, 46 (1957).

80. *Shaw*, *supra* note 48, at 302.

81. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972).

In such instances, the Supreme Court held that "there are no fixed rules that govern," and the Court's discretion prevails.⁸² In such instances, the Supreme Court has said, "The range of judicial inventiveness will be determined by the nature of the problem."⁸³

The federal courts must not be denied the opportunity for inventiveness in the copyright field, a creativity demonstrated both by the very doctrine of "fair use" and by its extension to include customary use and practice. As a common law doctrine, "fair use" is not a static principle, but partakes of the common law's most characteristic trait, flexibility, and the sensitivity to changing developments, societal demands, and the public interest at any given time.

In converting judicial "fair use" into a statutory doctrine, the Congress must avoid the blunder of destroying or curtailing this "judicial inventiveness." Congress must therefore specify, either in the statute itself or in its legislative reports or other forms of legislative history, that an established customary use is per se "fair use" without need to comply with the criteria normally applicable in the absence of customary use or practice.

C. Customary Use Is Per Se "Fair Use"

The thesis here is that, at least for non-profit uses by non-commercial educational, research and scholarly purposes, a customary use is per se a "fair use" without regard either to the copyright owner's consent or to the criteria normally and properly applicable to commercial transactions. This means that customary use becomes "fair use" regardless of a negative financial effect on the copyright owner.

The result inheres in the fundamental difference in the conceptual framework of the two approaches in establishing "fair use." In the absence of custom, the criteria dictate an individualized approach whereby each individual case can result in a different legal conclusion as to copyright infringement, depending largely on the financial impact on the copyright. Custom, on the other hand, is one of those grand generalizations of the common law, an overall approach unrelated to the specific financial impact on the particular copyright proprietor. In becoming "fair use," customary use transcends particularized situations by subsuming all parties under a broader concept of the public in-

82. *Id.* at 107.

83. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

terest⁸⁴ and of its demands for reasonable access to copyrighted materials.⁸⁵

A major differentiating factor in the two approaches of custom and criteria, is stability. The doctrine of customary use as "fair use" protects the stability of relationships, so as to avoid upsetting established arrangements. This broad approach emphasizes stability of general patterns as against the uncertainty of individualized determinations. On the other hand, "fair use" derived from the criteria depends on individualized proofs for different copyright owners, for different works of the same copyright owner, and for different uses of the works of such owner, a situation which by its nature leads to uncertainty and to instability of relationships.⁸⁶

Custom's emphasis on stability of public relationships is attuned to the legal and legislative history of the copyright law. The Congress enacted the current 1909 law on the basis of a House Committee report which stated that the copyright law was enacted "not primarily for the benefit of the author, but primarily for the benefit of the public."⁸⁷ In a leading case, the Supreme Court wrote that "the copyright law . . . makes a reward to the owner of secondary consideration."⁸⁸ And in a major report to the Congress, the Register of Copyrights stated that

84. The copyright law contains many generalizations protecting the public interest rather than the financial interest of the copyright owner. For example, the 56 year term of copyright totally ignores the period which a specific copyright proprietor may need to recoup his investment. 17 U.S.C. § 24. And there are a whole series of exemptions from copyright for non-profit uses of copyrighted material: 17 U.S.C. § 1(c) (certain non-profit uses of lectures, sermons, addresses, and other non-dramatic literary works are exempted from copyright coverage); 17 U.S.C. § 1(e) (provides owners of musical compositions the right, in this connection, only "to perform the copyrighted work publicly for profit"). According to both the House and Senate Judiciary Committees, the current 1909 law gives an "outright exemption" for (and therefore no financial protection against) such non-profit uses of copyrighted materials. HOUSE COMM. ON JUDICIARY, 90TH CONG., 1ST SESS., REPORT ON COPYRIGHT LAW REVISION 26 (1967); SENATE COMM. ON JUDICIARY, 93RD CONG., 2ND SESS., REPORT ON COPYRIGHT LAW REVISION 112 (1974).

85. See Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CALIF. L. REV. 873 (1971). "Copyright and trademark law . . . have also experienced a marked shift toward wider public access." *Id.* at 893. See also Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (tilt of the Supreme Court toward public interest in libel and privacy cases).

86. The unpredictability of "fair use" derived from the criteria is widely recognized. See, e.g., *Hearings on S. 1006 Before the Subcomm. of Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 122-24 (1965).

87. H.R. REP. NO. 2222, 60th Cong., 2nd Sess. 7 (1909).

88. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *accord*, *United States v. Loew's Inc.*, 371 U.S. 38, 46 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail.⁸⁹

A government report stated that "[t]he rights of the copyright owner may often be limited because of a public policy quite apart from any questions of copyright."⁹⁰

Where "fair use" derives from customary use rather than from individualized application of the criteria, public interest in the stability of customary relationships takes priority over any possible economic loss of the copyright proprietor. In this sense, customary use is stabilized common sense, a recognition by society of a stabilized relationship between user and owner which it is in the public interest to continue. As Mr. Justice Frankfurter said, "words acquire scope and function from the history of events which they summarize."⁹¹

CONCLUSION

Normally, "fair use" litigation arises out of the crucible of commercial competition; an infringer seeks to make "a fast buck," without investment, by incorporating or using in his own competitive product the copyrighted work of another. "Fair use" developed as a doctrine of the marketplace,⁹² and was largely designed by the courts to cope with one commercial user's efforts to profit from another's financial investment or other commercial interest in a copyrighted work. In a sense, the doctrine of "fair use" operates something like an accounting principle, to aid in determining which of two commercial competitors shall bear the cost of a money-making property as part of its own revenue-producing business expenses.

Quite a different situation arises with a non-profit use for non-commercial educational, research or scholarly purposes. No financial incentives, no commercial competition, and no profit motive are involved. In this non-profit realm, the normal commercially-motivated rules for "fair use" go awry. And it is precisely in such non-profit circumstances that the doctrine of customary use as per se "fair use" becomes a sensible and reasonable alternative to the normal business standards for commercial "fair use" determinations.

89. HOUSE COMM. ON JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS 6 (Comm. Print 1961).

90. Latman, *supra* note 2, at 31.

91. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186 (1941).

92. See Goldstein, *The Private Consumption of Public Goods: A Comment on Williams & Wilkins Co. v. U.S.*, 21 BULL. CR. SOC. 204, 212 (1974).

The customary-use-as-"fair use" doctrine represents the genius of the common law in adapting a commercial law principle, by means of reasonable and sensible modifications, to non-commercial transactions. To the extent that it is factually applicable, customary use in the non-profit realm is a substitute for the profit-oriented criteria normally applied to referee "fair use" between commercial competitors.

Under the common law, today, "the judicial doctrine of 'fair use' is amorphous and open-ended . . ." ⁹³ The proposed copyright revision bill before the Congress would close this "open-end" by eliminating non-profit customary use as per se "fair use," unless appropriate changes are made in the bill and in the legislative reports. ⁹⁴ In its present treatment of "fair use," the proposed copyright revision bills would legislate an unwise and unwarranted reversal of common law doctrine that customary non-profit use of copyrighted materials for non-commercial education, research and scholarship is per se "fair use."

93. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1363 (Ct. Cl. 1973), *aff'd by equally divided court*, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975).

94. *Cf.* Note, *supra* note 59, at 1209, which reads "[C]ommon law custom can serve as a source of law where the legislature has not spoken . . ."