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# COPYRIGHT, CUSTOM, AND LESSONS FROM THE COMMON LAW

Jennifer E. Rothman*

One of the foundational features of early English common law was its use of custom to set legal rules. At that time, the common law used the term "custom" to encompass the practices and norms both of the entire kingdom and of particular communities. Prior to an organized legal system, practices and norms regulated local behavior and facilitated the resolution of disputes. As legal systems in England began to develop, custom shaped, guided, and often defined the law. The incorporation of custom by courts served an important role in getting communities to support the authority of the growing judiciary. Today, custom—particularly in the form of industry practices and social norms—remains an important tool in common law adjudication.

One might think that because of the dominance of statutory frameworks governing today's intellectual property laws, custom would have a limited or even a non-existent role in determining the scope of intellectual property rights. Perhaps because of this initial impression scholars have often overlooked or dismissed the impact of custom on intellectual property law. Elsewhere I have refuted this common misperception and documented the frequent consideration and incorporation of custom into intellectual property law.[1] Custom shapes the scope of privileges afforded to intellectual property owners, and the access and use rights of the public. When courts have considered custom in the context of intellectual property, they often have used industry practices to limit use and access rights. These courts, however, have not engaged with the important question of whether these particular customs are worthy of consideration and even if they are, whether they should rise to the level of a dispositive legal rule. I contend that custom should rarely be determinative of a particular legal inquiry, but it can (if appropriately cabined) provide some meaningful evidence for a number of inquiries in intellectual property cases.[2]

In this essay, I focus on one important facet of the subject of what role custom should play in intellectual property law—how longstanding common law principles should inform our understanding of custom. The common law provides a number of lessons on how to appropriately limit the consideration of custom in intellectual property law and elsewhere. In this discussion, I will use copyright law and its fair use doctrine as the primary lens through which to consider custom. Copyright is a particularly important example of the incorporation of custom not only because it is representative of the treatment of custom in intellectual property more broadly, but also because a number of recent efforts to expand the scope of permissible uses of others' copyrighted works have relied on custom.

I begin by considering the traditional role of custom in the common law. I then consider several of the ways that courts have incorporated custom into copyright law, particularly in the context of determining fair use. I also discuss recent efforts to use custom to ameliorate both the uncertainty of fair use and copyright's ever-expanding boundaries. I next critique the unreflected reliance on custom and consider appropriate limits on custom's role, taking into consideration the traditional common law limits on the use of custom. Finally, I suggest a number of useful insights (other than the provision of legal rules) that custom provides for copyright law.

## THE TRADITIONAL ROLE OF CUSTOM AT COMMON LAW

Under common law dating at least to the late 1400s in England, "general customs" formed the basis of the law itself. William Blackstone, one of the foremost commentators on early common law, writing in the 1700s, defined the common law as "[t]hat ancient collection of

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unwritten maxims and customs [that] had subsisted immemorially."[3] The two main advantages of using longstanding community (either local or kingdom-wide) customs were that they were thought to be "universally known" and were viewed as originating with the communities and people rather than being imposed by the King.[4] Accordingly, communities were more willing to defer to these custom-based legal rules that largely reflected their prior understanding of appropriate conduct.

Blackstone distinguished these *general* customs from those that were *particular* to a specific locality or community. Local or particular customs could sometimes trump general custom or the common law—which governed kingdom-wide—when applied within the relevant community. Much of the Blackstonian discussion of particular customs focused on their role in defining the scope of public use and access rights to private land. In contrast to property doctrines like prescription, custom permitted access and use not by a particular person but by the broader public.

There are numerous examples of the public obtaining access and use rights to private property on the basis of custom; for example, English courts held—on the basis of customary use—that the public could hold annual dances, conduct horse races, play cricket, fish, gather wood, and graze animals on various private lands.[5] Carol Rose has described many of these customary uses as "recreational" in nature and preferred because they support social engagement and connections in a community.[6] Many of the uses were also of a subsistence nature. During the enclosure movement in England beginning in the sixteenth and seventeenth centuries, landowners increasingly excluded citizens from land that they had previously relied on for food and fuel.[7] The English historian E.P. Thompson describes custom during this period as a response to this enclosure of land. The customary use arguments challenged efforts by property owners to move property in the direction of a virtually absolute right.[8] The concept of property providing an absolute right to exclude others now dominates property discourse, but at the time of the enclosure movement this understanding of property was still very much contested.

Having briefly considered the traditional role of custom at common law, I will next consider custom in a very different context and era—copyright law and particularly more recent evaluations of the fair use defense by American courts. Although I agree with those scholars who have criticized analogies between intellectual property and real property,[9] the commonalities of the customary use discussions are significant. To the extent that they are different, the non-rivalrous nature of copyrighted works weighs in favor of more liberal rather than more restrictive customary use rights. This is so because uses of intellectual property do not deplete the resource or diminish the property itself. If unchecked, such uses may reduce the value of the intellectual property or perhaps interfere with its distribution, but greater latitude may be appropriate given the ability of multiple parties to use the same intangible work at the same time.

## THE INCORPORATION OF CUSTOM INTO COPYRIGHT LAW

Although custom does not have the same hallowed status as it once did, custom continues to play an important role in American jurisprudence. Rather than being the preferred starting point for any legal rule, the status of custom is now contested and debated. Different areas of law (and different inquiries within those areas) treat custom differently. In tort law, for example, there have been ongoing debates about whether the development of customary safety precautions by a particular industry should be an absolute defense to tort liability, no defense at all, or simply some evidence of negligence or lack thereof. The dominant contemporary principle—though



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with a few notable exceptions—is that custom should be some evidence of reasonable care, but not its measure.[10] In property law, courts and scholars continue to debate whether the public's longstanding use of land can form the basis of a right to access and use private property. This issue has often arisen in the context of public access to beaches that are privately owned.[11] In contract law, scholars and courts have disagreed about whether industry practices should be read into contracts as implied terms and also, less controversially, whether such practices should inform the interpretation of existing contract terms.[12]

Despite longstanding discussions of custom in other areas of the law, only recently have intellectual property scholars begun to consider in any depth the role of custom in the field. Yet, intellectual property rules, both as a de facto and de jure matter, incorporate many practices and norms that shape the scope of intellectual property rights. In copyright law, custom has affected determinations of authorship, ownership, copyrightability (such as whether something is original), and whether a use is infringing—especially whether something is an idea or expression, or a scènes à faire. Custom has most frequently been considered in evaluating whether a particular use of a copyrighted work is a fair use and therefore not infringing. I will primarily focus here on the fair use doctrine and the role of custom in defining its parameters.

If a use of a copyrighted work is fair, then a person or entity can use a copyrighted work without permission or payment. There are no bright-line rules, however, for determining when a use is fair. Instead, Congress has set forth a four-factor analysis to assist courts in evaluating fair uses. The four factors consider the purpose and character of the use (in particular, whether it is commercial or for nonprofit educational use); the nature of the underlying work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and finally, the effect on the potential market for or value of the copyrighted work.[13] The preamble of the statutory fair use section states that uses of copyrighted works for "criticism, comment, news, reporting, teaching[,] scholarship and research, [are] not an infringement of copyright."[14] The terms of the fair use statute largely grew out of the common law development of a fair use defense.[15] The codification of fair use was intended to incorporate the common law, but still leave open room for the continued development of the doctrine by the courts.[16]

Custom most often arises in fair use analysis in two ways. First, under the codified fair use factors, courts look to custom to evaluate the market effects of a particular use of a copyrighted work. Courts often consider failure to pay the "customary price" of a work as dispositive of the fair use determination. This focus on customary pricing in copyright decisions stems in part from the Supreme Court's 1985 decision in *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*[17] In *Harper & Row*, the Court looked at customary practices to determine whether a use was commercial in the context of the first fair use factor: "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the *customary price*."[18]

The "customary price" analysis, although ostensibly a factor-one inquiry, fits more appropriately into the logic of factor four which evaluates harm to the actual and potential markets for a work. When there is a custom to license a copyrighted work or a genre of works, courts often hold that failure to pay that price amounts to market harm even when the uses would otherwise be good candidates for fair use. In *Ringgold v. Black Entertainment Television*, for example, the producers of a television sitcom used a poster of the plaintiff's artwork in the background of a set without permission. The poster was visible for less than thirty seconds, was never the focal point of any shot, was not referred to in the dialogue, and was lawfully



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purchased.[19] Nevertheless, the court rejected a fair use defense in the case because the producers had not followed the television and film industry practice of licensing copyrighted works used as set dressing. The defendants had therefore failed to pay the "customary price," and could not benefit from the fair use defense. Other courts, including the district court in *Ringgold,* that have not considered custom in their analyses have held to the contrary and concluded that such uses of copyrighted works in the background of television and film sets are either de minimis or fair.[20] Unsurprisingly, when courts put consideration of custom into the mix outside of the context of set dressing, we also see the frequent rejection of fair use defenses if defendants fail to conform to industry licensing norms; for example, short samples of music, the incidental display of sunglasses in an advertisement, course packets for classes at universities, and copies of articles for private researchers have all been judged infringing in large part because licensing such uses is the dominant practice in each instance.[21]

A second way that courts consider custom in the fair use context is to treat custom as reflective of what is "fair" in a more colloquial, gut-check sense of the word. When defendants do not follow industry practices or community or self-developed norms, they are viewed as wrong-doers not deserving of a fair use (or First Amendment) defense to their copying. In *Roy Export Co. Establishment of Vaduz v. CBS, Inc.*, for example, both a district court and the Second Circuit held that failing to license film clips when it was industry custom to do so was unethical and a basis for rejecting both fair use and First Amendment defenses to copyright infringement.[22] In *Roy Export*, CBS aired a retrospective on the great film actor and director Charlie Chaplin soon after his death. CBS incorporated footage from both Chaplin's copyrighted and uncopyrighted films in its broadcast without licensing the footage. In upholding a substantial jury verdict, the district court rejected a fair use defense on the grounds that "CBS's conduct violated not only its own guidelines but also industry standards of ethical behavior." The district court pointed to the industry's licensing practices as evidence of harm to the potential market for the plaintiffs' copyrighted works and of "bad faith."[23] In affirming the district court, the Second Circuit pointed to the same lack of conformity with in-house guidelines and industry practices as evidence of "commercial immorality," and as a basis for rejecting CBS's First Amendment defense.[24]

Similarly, nonconformity with more formal industry practices, such as use guidelines, has also been viewed as unfair. Most notably, the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, usually shortened to the "Classroom Guidelines," has been very influential in determining the scope of fair use in the context of classroom use of copyrighted materials.[25] The Classroom Guidelines were developed during the drafting of the 1976 Copyright Act at the behest of Congress. The Guidelines were developed and negotiated primarily by large publishers and a few author organizations with minimal to no input from educators and students. The Classroom Guidelines set forth recommended principles for determining when it is "fair" or lawful to use another's copyrighted work in an educational setting. These guidelines, which were never adopted by statute, restrict how copyrighted works are used by educators and greatly influence courts when they analyze fair use claims. The extreme specificity of the Classroom Guidelines stands in stark contrast to the open-ended nature of the statutory and common law fair use criteria, greatly restricting the possible uses of copyrighted works. Although the Classroom Guidelines purport to set forth the "minimum" allowable uses, they have come to set a ceiling on allowable educational uses of materials. Not only is there vast conformity with the standards, but courts have routinely rejected fair use and found infringement when a party has not conformed to the purported floor of the Guidelines.[26]



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This is true both because the nonconformity with the Guidelines is viewed as ethically unfair, and also because it demonstrates that the defendant is not paying the customary price.

Despite being problematic, it is not surprising that custom has been influential in the context of fair use determinations. The fair use doctrine is challenging for courts to apply. Fair use analysis has been termed "muddled," "troublesome," and "ad hoc."[27] As courts seek guidance through the fair use "thicket,"[28] they sometimes turn to custom. A similar dynamic played out in the courts over the challenging determination of what is negligent conduct. Custom is an attractive proxy, but it is ultimately not a fully satisfying basis for determining negligence or fair use. Just as custom in the context of torts may allow obsolete and dangerous practices to remain in place in the face of technological innovations, overreliance on custom in the copyright context could write fair use out of the law.

Another reason courts turn to custom in the copyright context is that at common law courts referred to fair uses as those that were both "reasonable and customary."[29] Considering whether uses are customary has therefore long been a part of fair use analysis even though the statute no longer refers to this standard. The common law inquiry, however, was not solely about whether a use was customary. Instead, it had the additional component that required courts to also consider whether the practice was *reasonable*, regardless of whether it was customary. Many courts have ignored this independent reasonableness inquiry and treat what is customary as definitional of what is reasonable.

In sum, courts routinely consider industry practices and guidelines to evaluate fair use. This reliance on custom presents a number of significant concerns: First, the quality and reasonableness of the customs are not considered and therefore their incorporation risks the legal adoption of suboptimal and inappropriate practices and norms. Second, because of the dominance of a clearance culture—in which risk-averse licensing practices dominate – consideration of custom risks making fair use obsolete. Finally, the incorporation of custom in many contexts has been one-sided—with courts often pointing to non-conformity with practices to reject fair use, but dismissing conformity with norms or practices as a basis to accept a fair use defense.

## THE PROMISE OF CUSTOM AND FAIR USE PROBLEM-SOLVING

Scholars and various use communities have recently sought out custom as a basis to delineate and establish fair uses. This interest in custom is not only driven by efforts to persuade courts to accept defenses in individual cases, but also by efforts to convince and empower individuals, organizations and companies to assert fair use rather than to conform with the dominant, risk-averse clearance culture. Just as the enclosure movement in England sparked arguments in favor of granting customary use rights to the public in the walled-off land, concerns over the increased propertization of intangible works that can form crucial pieces of our identities and culture has generated efforts to articulate justifications for public use of these works. The same tensions exist now as did then between those who worry about the tragedy of the commons—if land or IP is not exclusively owned—and those who worry about the opposite problem, the tragedy of the anti-commons—if everything is owned. Thus, it is unsurprising to see similar arguments about customary uses percolating up at this juncture in history.

The burgeoning best practices movement is a prime example of this. Most notably, the best practices statements developed by Peter Jaszi, Patricia Aufderheide, and others at American University and its Center for Social Media seek to establish what should be considered fair use in



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particular communities based on the purported practices in those communities, as well as community-generated guidelines. The Center for Social Media continues to produce more and more of these best practices statements—most recently ones for the poetry community and academic and research libraries. Harvard's Berkman Center for the Internet and Society, the American Library Association, and the Electronic Frontier Foundation also have endorsed the use of best practices statements to facilitate the assertion and support of fair use.

The most well-known of the best practices statements is the *Documentary Filmmakers' Statement of Best Practices in Fair Use*. The *Filmmakers' Statement* presents four categories of uses of others' copyrighted works that are likely fair in the context of documentary films. The privileged categories are critique or commentary, illustrative quoting, incidental uses, and use in historical sequences. Each of these categories contains a number of "limitations." Such limitations include, for example, that illustrative quoting or copying should be properly attributed, derived from different sources, "no longer than necessary to achieve the intended effect," and not used to avoid "the cost or inconvenience of shooting equivalent footage."[30]

Elsewhere I have critiqued the best practices statements on a variety of grounds, including that they exhibit some wishful thinking about fair use and contain some problematic limitations that exceed those required by fair use law.[31] Here, however, I want to focus on the aspects of the statements that relate to custom. Proponents of the best practices statements and other forms of fair use guidelines have both explicitly—and sometimes implicitly—adopted a model of copyright law that incorporates custom as law. The *Filmmakers' Statement*, for example, declares that "[f]air use is shaped in part, by the *practice* of the professional communities that employ it. . . . [F]or any particular field of critical or creative activity, such as documentary filmmaking, lawyers and judges consider professional expectations and practice in assessing what is 'fair' within the field."[32] This statement oversells the impact of industry practices in determining fair use, while at the same time also underselling the incorporation of industry practices to limit the scope of permissible uses. Because the best practices statements expressly endorse the role of custom in determining the scope of fair use, they risk becoming ceilings rather than floors on fair use. Alternatively, they might simply be dismissed as outlying practices or even non-practices that are more akin to wishful thinking by piratical users. Instead, courts are likely to embrace the more dominant clearance culture practices. Rather than challenging the validity of incorporating such restrictive practices, the statements endorse a world view that accepts the value of such practices as determinative of fair use.

The risk that the best practices statements will come, like the Classroom Guidelines, to stand for ceilings rather than floors on uses is particularly concerning since some of the limitations are unwarranted and severe. For example, the *Filmmakers' Statement* limits incidental uses of music captured on film so that an editor and director cannot cut or edit a scene or sequence to the beat of the captured music or allow the music to spillover to another scene. Cutting to the rhythm of the music is an integral part of the craft of filmmaking and allowing music from one scene to spillover during a scene is an important technique. The *Filmmakers' Statement* also concludes that documentary films cannot be designed around copyrighted works. Documentaries about war movies, the rock n' roll star Elvis Presley, or the portrayal of gays and lesbians in film and television are all legitimate projects, yet the *Filmmakers' Statement* throws them all into fair use purgatory or worse yet, infringement hell simply because they are designed to comment on copyrighted material. Such a conclusion is out of sync with the needs of filmmakers and the public. Other best practices statements similarly constrain users—for example, the OpenCourseWare Code restricts uses of copyrighted works by educators to single



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examples and requires educators to remove incidentally captured copyrighted works. Moreover, the statements suggest a preference for licensing when material easily can be licensed at reasonable rates. This preference for licensing makes all unlicensed uses suspect and calls into question whether the movement's goals of encouraging fair use are furthered or in fact undermined by these statements.

Recent legal scholarship has also sought to use custom to support fair use. In Michael Madison's analysis of fair use he contends that fair use can be made more predictable if it is understood as protecting uses that fall within certain social and cultural patterns. He suggests that conformity with community practices in one of these given patterns should insulate users from liability for copyright infringement. For example, if a use is allegedly journalistic, then the norms and practices of the journalistic community should be used to assess first if the use is in fact journalistic in nature, and second, if it is, whether the use conforms with existing journalistic practice. One of the main motivations for Madison's analysis was to suggest that at least some peer-to-peer file-sharing fits within an existing social and cultural pattern (of personal uses) and therefore is fair.[33]

Pamela Samuelson's recent work on fair use similarly suggests that customary uses, at least those by authors, merit fair use protection. She points to note-taking, quotations, close paraphrasing, photocopying, and sketches as examples of activities that all promote authorship and have long been considered fair when engaged in by those creating new works.[34] Samuelson declares that "whether a second author's use is reasonable and customary in the authorial community in which he or she creates" is something courts should consider when evaluating fair use.[35] Professor Samuelson views custom as an appropriate factor to consider, but she has agreed with me that custom should not be the sole measure of fair use.[36]

Although some on the copyleft see custom's potential to support fair use, the realities of the courts' treatment of custom suggests that these advocates may be walking into a minefield. Not only are there dangers that such projects will backfire, but reliance on such practices and norms to shape fair use rests on normative and theoretical thin ice.

## QUESTIONABLE JUSTIFICATIONS FOR USING CUSTOM AS A PROXY FOR FAIR USE

The recent efforts to advocate for the expansion of fair use on the basis of custom have some appeal, but given the reality that courts have often used industry practices to narrow the scope of fair use, one has reason to pause before advocating greater reliance on custom as a basis for expanding or protecting uses of copyrighted works. Not only have courts looked to custom to cabin rather than to expand fair use, but the public use and access rights to land rooted in custom have largely become disfavored in the United States—our legal system has favored strong private property rights even when they limit longstanding public uses of that property. It thus is quite a stretch to think that customary use is the way back from the abyss of the anti-commons. Even if we take a step back from this healthy dose of legal realism, there are reasons to question the usefulness and appropriateness of custom as a proxy for what uses should be deemed fair.

The common law preferred custom not because it was superior, but because there was little else in its place as a starting point. As James Carter Coolidge observed: "Custom [] is the only law we discover at the beginning of society . . . ."[37] Now that we have a developed legal system, custom should rarely be the measure of the law. Three of the primary justifications advanced today for relying on custom in various contexts suggest that consideration of custom is less justifiable in the copyright context than in many other circumstances. The first major



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justification for relying on custom to establish legal rules is that custom may best reflect optimal rules in a given market. In common law terms this might be framed as "the community knows best." In the context of copyright transactions this would mean that custom would reflect the optimal development of copyrighted works and a balance between the exclusionary owners' rights and the public's use and access rights to those works. In the context of copyright markets, there are reasons to doubt the optimality of industry practices because they are often generated by efforts to avoid litigation or preserve relationships. Licensing material or removing material from new works is common not because it is optimal, but because the outcome of fair use litigation is unpredictable and litigation itself is so expensive. Moreover, guessing wrong about the likely success of a fair use defense comes with a severe downside—high statutory damages and possible criminal liability. Such a risk makes it rare that parties who can obtain permission for a reasonable (or even unreasonable) licensing fee will risk litigating fair use. This rational choice by individual actors is not an optimal or preferred choice for society.

Another reason that copyright markets are less likely to generate welfare-maximizing practices is that they are not particularly close-knit and have fewer repeat transactions between the same parties, thereby contrasting with other industries and communities in which norms and practices have been celebrated as preferential to externally imposed laws. The different economic power of players in copyright markets also suggests that customs will likely skew toward the interests of the most powerful owners of copyrighted content at the expense of others.

Despite such concerns, some, such as Richard Epstein, have argued in response to my work that negotiated licenses and other clearance culture practices actually reflect optimal private ordering based on mutually agreed to pricing.[38] There are a number of flaws with such a conclusion. First, negotiating licensing agreements is challenging, especially for smaller players or when a potential user has a limited amount of time to obtain permission for the use. Content owners sometimes cannot be located or do not respond at all or in a timely manner to requests for permission to license works. These challenges lead to significant transaction costs that warp the market for these licenses. Second, content owners sometimes refuse to license at any price or charge a prohibitively high or simply unreasonable fee for use. Third, because fair use works in conjunction with the exclusive rights of copyright holders to promote the overall public interest in generating more works and more knowledge, we cannot simply look at an individual transaction and evaluate the optimality between the owner and user, as compared to litigation costs——we must also consider the costs to society more broadly. Optimality in the sense of maximizing wealth is not the only consideration at issue here. We must also maximize creativity, knowledge, and liberty. Fair use is more than simply a mechanism for optimizing the production of creative works; it prevents copyright law from unreasonably interfering with the free speech and liberty rights of others. Given copyright's status as a government entitlement such concerns are particularly appropriate counterweights.

A second justification for incorporating custom is that even if suboptimal, the resulting legal rules are fair because they satisfy parties' expectations.[39] In the copyright context, however, expectations often do not track the relevant customs, and even when they do, it may not be appropriate to determine the scope of copyright law on the basis of such expectations given the countervailing public interests at stake. For example, the New York Times recently hired a talent agency to assist with licensing its news stories for use in television shows and movies. The New York Times's expectation that it can extract compensation for news that is in the public domain or an industry practice of licensing such stories should not alter copyright law's exclusion of facts from its reach. Not only can expectations push the law in ways contrary to public policy,



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but expectations can also lock-in existing property regimes even when they are unjust and even when the parties themselves might prefer a different arrangement. Such expectations may simply reflect resignation rather than preferred rules.

The final common justification for incorporating custom is the furtherance of autonomy interests. Early justifications for the common law expressed a preference for communities being governed by their own customary laws that had evolved over a period of time. These laws not only furthered parties' expectations of how given behavior would be treated, but also injected a degree of community self-governance and autonomy in what would otherwise be a suspect rulemaking process handed down from a monarchy. Today, the democratic process allows communities to contribute in a more orderly fashion to the creation of governing laws, and accordingly, the appeal of the common law has faded. But even in contemporary legal debates, the issue of whether laws should be driven by the private or public sphere continues to fuel many discussions. Given copyright's public-regarding goals, deference to private ordering is less appropriate than in other business contexts.

Moreover, there are conflicting autonomy interests at stake. As I have discussed elsewhere, non-owners have liberty and autonomy-based interests in using copyrighted works.[40] Copyright is a statutory grant of a limited property right in exchange for the public disclosure of a work. There is a bargain worked by the legal protection that requires some relinquishment of autonomy interests when one makes one's copyrighted work public. Although a work is copyrighted upon fixation regardless of whether it is published, infringement actions require demonstration of access to the work, which usually requires having made it public. Additionally, to the extent that a party wishes to monetize the copyrighted work it must be made public—— something it is assumed that authors and copyright holders will want to do. Thus, the autonomy interests of an author must yield to those of her audience.

## COMMON LAW LIMITS ON CUSTOM

Despite this critique of the wholesale incorporation of custom, custom continues to provide some pertinent and meaningful information, including for evaluations of fair use. But before considering the value of any particular custom, we need a system to distinguish the practices and norms worthy of consideration from those that should be dismissed. The common law provides some guidance on how to make such assessments.

Early common law scholars and courts had a much more moderated view of custom than contemporary scholars sometimes recognize. William Blackstone and Matthew Hale in England, and Oliver Wendell Holmes Jr. in America, recognized that not all customs made for appropriate legal rules. Practices and norms sometimes developed in a haphazard manner that created rules that defied logic or that became obsolete given societal or technological changes.[41] The common law therefore limited the use of custom in a number of important ways. Before being considered worthy of legal recognition, a custom needed to be deemed both legal and good.[42] To meet this standard, a custom had to pass a number of hurdles. Blackstone's work provides the most famous delineation of these common law limits on custom. Blackstone provides seven express limits on custom; to be both legal and good customs must be "immemorial," "continued," "peaceable," "reasonable," "certain," "compulsory," and "consistent."[43] For purposes of this discussion I will largely track Blackstone's enumeration of these limits, but I will synthesize these limits into four broad conceptual categories that best reveal these limits' continued relevance. The four conceptual categories that I use are first, limits that relate to the *certainty* of the custom; second,



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limits that demonstrate the *consent* of the people to the custom; third, the absence of *conflicts* between the custom and other laws and customs; and finally, the fourth limit, that the custom itself must be *reasonable*.

### *Certainty*

There are a variety of common law limits on custom that each addresses the *certainty* of the custom. Before deserving judicial consideration, a custom must be proven to exist, and its contours need to be clearly identifiable, definite, sufficiently detailed, and agreed upon.[44]

### *Consent*

Consent was the key justification for custom at common law, and many of the limits on custom are at their root about whether the community agreed to the alleged practice or norm. The *continuity* of the custom, its longevity and agreement about its contours, demonstrated a consensus by a community with regard to the practice that suggested likely consent.[45] The requirement that a custom must have been so longstanding or *immemorial* that no one could remember a time without that custom being in place also reflected a community's likely consent to that custom.[46] Other evidence of consent was that the custom be *peaceable*. Peaceability required demonstration that a custom was undisputed. This was an important component because disagreements over a custom's validity called into question the community's consent to that custom. The custom also needed to be *compulsory* in the sense that everyone in the relevant community needed to follow that custom rather than having obedience to the custom be at the "option of every man[.]"[47]

### *Absence of Conflicts*

Even if a custom were universally accepted, understood, and followed in a given community, it might still violate a superior governing rule. Common law courts would therefore analyze whether the given custom conflicted with any other custom or law.[48] This requirement was sometimes referred to as requiring *consistency*.[49] Custom could not contradict laws set forth by the King or by Parliament or other common law rules or customs in the same community.[50]

### *Reasonableness*

The courts would also consider whether the custom was *reasonable*, regardless of its acceptance or duration.[51] The fact that something has been accepted and practiced for a long time might reflect its wisdom, but more is meant by the reasonableness inquiry than mere deference to the custom as a proxy for what is reasonable. Determination of whether a custom is reasonable has long been a challenging inquiry. Blackstone noted that because of this courts often considered a slightly different and easier inquiry—evaluating whether the custom was "unreasonable."[52] J.H. Balfour Browne writing in 1875 suggested that if there was no reason to the contrary, one might defer to custom, but if there was reason to question whether the custom was good, courts could reject the practice or norm. In particular, Browne focused on whether the practice benefited the people. "A custom [] which is injurious to the public, which is prejudicial to a class, and beneficial only to a particular individual, is repugnant to the law of reason. No



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such custom could be capable of becoming law which is a rule for the benefit of all."[53] As Jeremy Bentham observed: "To prove the existence of a practise is one thing, to prove the expediency of establishing it by force of law is another."[54] Bentham points to Lord Bacon's advice that one should "*Let Reason be pregnant*, *Custom barren*" to highlight his skepticism that customary practices and norms are likely to reflect a preferred legal rule.[55] Similarly, the great justice Benjamin Cardozo suggested that "social needs" justify "sacrific[ing] custom in the pursuit of other and larger ends."[56] Cardozo noted that while "history and custom have their place," "[e]thical considerations" and the "welfare of society" must rule the day.[57] Although Cardozo observed that social welfare was difficult to determine and ethical considerations could be contested, he pointed to fundamental underpinnings of our constitutional democracy that could not be sacrificed in the name of custom or common law.[58]

Despite these longstanding limits on custom, when courts and scholars consider the use of custom in copyright law these limits have rarely been considered. Courts have simply not scrutinized the quality and value of particular practices and norms in the copyright context.

## RETHINKING THE ROLE OF CUSTOM THROUGH A CONTEMPORARY COPYRIGHT LENS

The ignorance of common law limits may be driven in part by a lack of awareness that courts are engaged with the analysis of custom; but, if custom is to have any influence in intellectual property law, then a more thoughtful and nuanced view of it must be adopted. It is therefore worth considering how one should evaluate custom today. Without limits on the incorporation of custom we risk not only incorporating bad rules, but also shoring up a feedback loop in which the law reinforces problematic practices and then further entrenches them into the law.[59] We have seen this problem with particular prominence in the context of licensing markets for copyrighted works.

The common law's focus on certainty, consent, lack of conflicts and reasonableness are all relevant today. As I have elaborated elsewhere, I do not think that custom should be incorporated wholesale into determinations of fair use. Nevertheless, custom may provide some guidance into what is reasonable or appropriate in a particular context, and thereby likely fair. In the past, I have developed six vectors that should be evaluated when considering whether practices or norms are useful indicators of fairness in the context of intellectual property.[60] Here I will condense these into four primary areas of evaluation: (1) the certainty of the custom; (2) the motivation for the custom; (3) the representativeness of the custom; and (4) the implications of adopting the custom. I will briefly elaborate on each of these considerations and their connections to the traditional common law limits on custom. As part of this analysis I will consider a few relevant examples, especially the recently propounded best practices statement for documentary filmmakers, and evaluate them in the context of fair use.

### *Certainty of the Custom*

To have any value, a custom must be identifiable, in terms of what constitutes the practice itself, and the practice must also be widely accepted and followed. This analysis tracks that of Blackstone's requirement that practices be certain before meriting judicial consideration. Several considerations help to evaluate how certain a particular custom is. First, if there is unanimity as to the contours of the custom among diverse parties it is more likely to exist and have clearly definable boundaries. Such agreement confirms the likely consent of the community. Second,



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customs that are longstanding are more stable and hence more certain because they have weathered the test of time.

Because the best practices statements are more wishful than descriptive and have fuzzy boundaries, they are not particularly certain. Although the best practices statements purport to set forth the practices of the relevant communities, they instead set forth what the drafters think the community should be doing. In the context of the *Filmmakers' Statement*, for example, the report leading up to the statement and the statement itself both reveal that the dominant practice was to license or cut out copyrighted materials from documentaries. If courts take seriously the call to incorporate customary practices, then such clearance practices may narrow rather than expand fair use. Second, under the guidelines of the *Filmmakers' Statement* evaluations must be made of whether the "extent of the use is appropriate," quotes are no "longer than necessary" and attribution was "reasonably possible." These inquiries do not provide certain guidelines worthy of deference as custom. Instead, they leave the same ambiguities of the existing fair use system, but add an additional layer of complexity to the already convoluted fair use analysis.

In other instances, we see conflicting customs at work. For example, in the *Roy Export* case described earlier—in which a court rejected fair use and First Amendment defenses for the use of clips of Charlie Chaplin films in a news obituary of Chaplin—the court rejected fair use on the basis that the defendant did not conform to custom. The court failed to consider, however, that there was more than one custom at work. Clips were not usually licensed for obituaries even though they were often licensed in other contexts for projects with more lead time or scripted series. Such conflicting customs suggest either that the court needed to more carefully scrutinize which custom was applicable or that there was no single, dominant, and widely-accepted custom worthy of consideration.

### *Motivation for Custom*

Motivation was not a common law limit on custom; however, sitting underneath the understanding that custom was valuable was a belief that custom reflected the preferences of a particular community. In other words, if the community had been asked to sit around and agree to what the rule should be this is likely the rule they would have come up with—or at least if such a rule had been suggested to them they would have agreed to it. In the context of copyright then, the practices and norms that will be the most valuable will be those that reflect preferred allocations between copyright holders' and users' interests rather than customs driven by litigation avoidance. Litigation-avoidance norms arise when laws are uncertain or the expense of litigation discourages resort to the legal system. Such norms do not reflect a preferred or aspirational allocation between the exclusive rights of copyright owners and the ability of others to use those works. Both the licensing practices exemplified in the *Ringgold* decision and the use guidelines, like the Classroom Guidelines, are examples of such litigation-avoidance customs. These *reactive customs*—developed to address the shortcomings of the legal regime—are not the sort of aspirational, independently developed customs that others, such as Robert Ellickson, have appreciated in other contexts.[61] When customs have developed with aspirational motivations behind them they are better indications of what is appropriate. In the context of fair use, practices and norms should primarily be relevant only to the extent that they are indicative of what is actually deemed "fair" by the relevant community rather than what that community thinks is colorable or safe under the law.



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As part of considering the motivation for a particular custom, courts should particularly try to engage with whether the custom was intended to provide an appropriate balance between competing interests. As a check on this analysis, courts should independently evaluate whether reasonable people would agree to such rules if they knew neither whether they would be powerful or minor players in the market nor whether they would own or wish to use the relevant content.

### *Representativeness*

The common law focus on the importance of custom reflecting the will and consent of the people is instructive. Customs that represent only one party's or one group's interests are suspect. By contrast, when a custom develops with input and participation of both copyright owners and users and large and small players, it is more valuable. The best practices statements are highly unrepresentative and therefore of limited value. Like the Classroom Guidelines (which the authors of the best practices statements criticize for being one-sided), none of the best practices statements included representation by the most affected parties—the content providers whose work is most likely to be appropriated. The fact that some of the users are also authors does not remedy this one-sidedness. After all, almost everyone—if not absolutely everyone—is an author of copyrighted work. Although the proponents of the statements are likely correct that if they had invited larger content owners to the table very little would have been agreed upon, the fact that the parties could not have agreed to any common principles should raise serious flags about using the articulated practices to affect entitlements outside of that community. Not only were the copyright holders that were most likely to be injured by the uses not invited to the table, but the public at large was not included even though the statements potentially limit the types of uses that we can make.

Although not an explicit consideration at common law, the application of custom was limited to the community that had developed the particular custom at issue. Customs were never supposed to be applied outside the relevant community. Doing so would fly in the face of the primary limit on custom—that it must demonstrate the consent of those governed by the practice or norm.[62] It therefore is particularly inappropriate in the context of copyright law to apply custom outside the community in which it developed.

### *Implications*

Another way of thinking about the common law requirement that customs must be independently evaluated to determine if they are reasonable is to consider the likely implications of adopting such practices, not just in the immediate case but more broadly. Courts must independently scrutinize the implications of adopting any customary practice or norm as a legal rule. When evaluating the worth of a particular custom, a court must consider what the end result of incorporating that custom would be. If followed to its logical conclusion, will the custom result in a slippery slope, such that no uses will be allowed, or, alternatively, that too many uses will be allowed? In either scenario, courts should reject customary practices. Consider, for example, two extremes. If it is customary to license everything, then no fair uses remain. On the flipside, consider the heyday of free peer-to-peer file-sharing in which the custom was *not* to pay for any music downloaded from the web. Such a custom could destroy the entire market for music online.



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In the best practices statement related to user-generated content ("UGC") (in the context of online video) virtually any use is deemed fair because the commentary and critique category is read very broadly. For example, in the report supporting the Online Video Code, the drafters suggest that a mash-up titled Clint Eastwood's "The Office"—which mixed together clips from the television series *The Office* with the movie *Evan Almightly* to show what it would be like if Clint Eastwood directed an episode of *The Office*—falls within the favored category of negative or critical commentary. This category and its exemplars suggest that all mash-ups are fair use. This means that there can be no market for licensing such mash-ups; a conclusion that pulls the rug out from under a possible new media market and makes copyright law virtually irrelevant in the context of UGC.

In sum, if custom is certain, representative, motivated by aspirational purposes, and would result in a reasonable allocation of use and ownership rights, then that custom will likely provide meaningful guidance for evaluating fair use in that particular context. Otherwise, such practices and norms should be met with great skepticism and little deference.

## RECONCEPTUALIZING THE ROLE OF CUSTOM IN COPYRIGHT

Despite the many reasons discussed to be cautious about jumping on the custom bandwagon, custom provides a number of broader lessons for copyright policy. First, massive disobedience of copyright law in given categories can signal market failure or overreaching by copyright holders. The copyright system needs some public buy-in to work. Public support requires people to think that on some level copyright law is fair. When copyright law is wildly out of sync with community practices there may be value in interpreting copyright to conform to those understandings or better yet amending the copyright act to reflect some of those norms.

Second, customary uses may demonstrate a consensus about preferred rights that may not be appropriately recognized under the law. For example, many norms in the copyright world favor giving attribution to authors when their work is used, but the law does not generally recognize such a right. Such locations of commonality suggest promising areas for advocating for legal change and the express adoption of commonly accepted principles.

Third, custom may demonstrate areas of need by users and creators that must be accommodated either through a reasonable market mechanism or through fair use. There are a number of categories of uses of copyrighted works that some scholars and courts have treated as prima facie fair because they are "customary." Although courts have mostly used custom to reject fair use defenses, on several occasions courts have pointed to "years of accepted practice" as a basis to establish fair use. In *William & Wilkins Co v. United States*, for example, the Court of Claims held that the practice of making copies for research purposes was a customary fair use.[63] Many of these "customary uses" are simply uses that have been established at common law and now exist because they are uncontroversial legal precedents. Over time, these precedents form categories of uses that are likely (and predictably) fair—but this is a very different understanding than that they are fair *because* they are customary. In other words, one way of thinking about customary uses is simply as precedents.

Additionally, the normative underpinnings of these decisions are much more important than their customary nature. Consider, for example, the "customary" use of copyrighted works in biographies.[64] As with personal copies for research, we have seen practices in the context of biographical works shift over time toward a permission-only culture. Instead of adopting customary uses or industry practices wholesale then, we should evaluate the specific practices



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that have developed and consider whether they are appropriate. Permitting some uses of copyrighted works in biographical works is necessary. The fact that such uses have been permitted over time may signal the importance of such uses, but it should not be dispositive. Similarly, if such uses cease to occur because of risk-averse publishing houses, the reasonable use of copyrighted works in biographies should nevertheless remain fair.

A fourth insight from custom and the common law comes from the common law requirement that a custom must be consented to by the relevant community. This requirement of consent suggests an important avenue for counteracting the incorporation of the clearance culture—active, vocal and public dissent from these restrictive practices. I have previously advocated for such dissent from the dominant and restrictive practices in intellectual property markets.[65] One of the purported values of using custom to set the law is that it reflects a "shared sense of its reasonableness and historical appropriateness."[66] When it does not, the custom is neither legal nor good.

Finally, the common law provides at least one other important insight. The acceptance of some customary uses of private lands was limited to those uses that were rooted either in subsistence or communal recreation. Similarly, public use of copyrighted works is appropriate when the uses are for subsistence rather than exploitation, and sometimes also when uses facilitate community-building. What does subsistence mean in the context of copyright? From the perspective of users, certain copyrighted works cannot be substituted for and form an important part of both personal and cultural identity and expression—accordingly there must be some ability to use such works without permission or payment.[67] With this in mind, compare two different types of uses: first, the use of limited film clips for illustrative and historical purposes in a documentary (or even fiction film); second, unlicensed peer-to-peer filesharing that reflects the need to access music in digital formats quickly. The former might be an appropriate fair use even if there is a licensing market, whereas the latter might only be fair until an alternative market mechanism forms. The enumerated Section 107 categories also signal areas where subsistence rather than exploitation usually rules. For example, one must be able to quote from copyrighted works to provide meaningful scholarly commentary, reporting or review of such works.

## A CODA: OVERLAPPING STATUTES AND THE COMMON LAW

There has long been disagreement among legal scholars about whether legislation—passed by a representative government—or judge-made (or judge-declared) law purportedly interpreting or incorporating community practice is more reflective of the will of the people. Today, arguments about public choice and legislative capture suggest that even if one prefers legislative rulemaking to incorporating custom, one should be concerned about whether the public interest is being served in today's legislative bodies, especially in the context of intellectual property law. Custom is an attractive counterpoint to such dangers, but it is also fraught with its own risks. The United States and particularly copyright law has veered toward legislation over custom, but the interpretation and application of that legislation has long been informed by practices and norms. As Justice Cardozo wrote in the 1920s with regard to the United States legal system: "[W]e look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation."[68] Custom can provide valuable information, but its usefulness depends on independently evaluating the worthiness of the custom and particularly scrutinizing its



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reasonableness and its likely reflection of a community's consent to the relevant practice or norm. The common law has told us this for hundreds of years, now all we need to do is listen.

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∗ © 2012 Jennifer E. Rothman. Professor of Law and Joseph Scott Fellow, Loyola Law School, Loyola Marymount University (Los Angeles). This forthcoming book chapter was prepared for a conference at the University of Pennsylvania on *Intellectual Property and the Common Law*.

[1] Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

[2] For a more developed critique of the use of custom in intellectual property cases, see *id.*

[3] 1 WILLIAM BLACKSTONE, COMMENTARIES *17.

[4] *Id.* at*17, *45; *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 1–10 (4th ed. 2002); GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 3–4 (2004 reprint) (1986).

[5] 2 WILLIAM BLACKSTONE, COMMENTARIES, *33–36, *263, *422; Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 740–41, 758–59 (1986) (citing exemplary cases).

[6] Rose, *supra* note 5, 723, 767–70, 779–81.

[7] E.P. THOMPSON, CUSTOMS IN COMMON 106–84 (1991).

[8] *Id.* at 161–84.

[9] *See, e.g.*, Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH U. L.Q. 417 (2005); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138-67 (Stephen R. Munzer ed., 2001).

[10] *See, e.g.*, The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

[11] *See, e.g.*, Thornton v. Hay, 462 P.2d 671, 676–78 (Or. 1969); Trepanier v. County of Volusia, 965 So.2d 276, 286–293 (Fla. App. 2007); Rose, *supra* note 5, at 713–14.

[12] *See, e.g.*, Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 CHI. L. REV. 710 (1999); Richard A. Epstein, *Confusion About Custom: Disentangling Informal Customs from Standard Contractual Provisions*, 66 U. CHI. L. REV. 821 (1999).

[13] 17 U.S.C. § 107.

[14] Despite these specific categories, there have been rejections of fair use in each of these contexts.

[15] H.R. Rep. No. 94-1476, at 65-66 (1976); Folsom v. Marsh, 9 F. Cas. 342, 344–45 (D. Mass. 1841).

[16] H.R. Rep. No. 94-1476, *supra* note 15, at 65–66.



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[17] 471 U.S. 539 (1985).

[18] *Id.* at 562.

[19] Ringgold v. Black Entm't Television, 126 F.3d 70, 72–73, 81 (2d Cir. 1997).

[20] *See, e.g.*, Ringgold v. Black Entm't Television, 40 U.S.P.Q. 2d 1299, 1302 (S.D.N.Y. 1996); *see also* Sandoval v. New Line Corp., 147 F.3d 215, 216, 218 (2d Cir. 1998); Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044, 1046, 1050 (S.D.N.Y. 1994).

[21] *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801–02, 804 & n.19 (6th Cir. 2005); Davis v. Gap, Inc., 246 F.3d 152, 166–68 (2d Cir. 2001); *see also* Rothman, *supra* note 1, at 1932–33 & n.120.

[22] Roy Export Co. Establishment of Vaduz v. CBS, Inc., 672 F.2d 1095, 1100, 1105 (2d Cir. 1982); Roy Export Co. Establishment of Vaduz v. CBS, Inc., 503 F. Supp. 1137, 1146–47 (S.D.N.Y. 1980).

[23] *Roy Exp. Co.*, 503 F. Supp. at 1146–47.

[24] *Roy Exp. Co.*, 672 F.2d at 1105.

[25] *See* Rothman, *supra* note 1, at 1922.

[26] *See, e.g.*, Basic Books v. Kinko's Graphics, 758 F. Supp. 1522 (S.D.N.Y. 1991). Much of the de facto compliance comes in the form of university and school policies. Individual instructors may ignore these policies, but they often do so at the express risk of losing any indemnification or legal representation from their educational institutions.

[27] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138–40 (1990).

[28] Weinreb, *supra* note 27, at 1138, 1158.

[29] Shapiro, Bernstein & Co. v. P.F. Collier & Son Co., 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934); RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925). The English defense of fair abridgement, which is a precursor to our fair use standard, also considered adherence to "custom and usage" as evidence of what was fair. Such customs and usages, however, were never conclusive of the inquiry. Dodsley v. Kinnersley, 27 Eng. Rep. 270, 270–71 (1761).

[30] *Documentary Filmmakers' Statement of Best Practices in Fair Use* 4–5 (2005), available at http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf.

[31] Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y 371 (2010).

[32] *Documentary Filmmakers' Statement*, *supra* note 30, at 1 (emphasis added).



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[33] Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1530, 1672–77, 1687–90 (2004).

[34] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2576–77 (2009).

[35] *Id.* at 2578.

[36] *Id.* at 2578 & n.288.

[37] JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 19 (1907).

[38] Richard A. Epstein, *Some Reflections on Custom in the IP Universe*, 93 VA. L. REV. IN BRIEF 223 (2008). For a more developed reply to his comments, see Jennifer E. Rothman, *Why Custom Cannot Save Copyright's Fair Use Defense*, 93 VA. L. REV. IN BRIEF 243 (2008).

[39] *See* CARTER, *supra* note 37, at 18–19, 80–81, 124; Rothman, *supra* note 1, at 1946, 1961–65. Even the ardent critic of Blackstone and of custom, Jeremy Bentham, noted that custom has the most value when it furthers parties' expectations. *See* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES OF THE LAWS OF ENGLAND 233 (Charles Warren Everett ed., 1928).

[40] Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010).

[41] OLIVER WENDELL HOLMES JR., THE COMMON LAW 5 (1881).

[42] 1 WILLIAM BLACKSTONE, COMMENTARIES *76.

[43] 1 WILLIAM BLACKSTONE, COMMENTARIES *76–78.

[44] 1WILLIAM BLACKSTONE, COMMENTARIES *78; J.H. BALFOUR BROWNE, THE LAW OF USAGES AND CUSTOMS 21–22 (1875); JOHN D. LAWSON, THE LAW OF USAGES AND CUSTOMS WITH ILLUSTRATIVE CASES 32–36 (1881).

[45] BROWNE, *supra* note 44, at 15–16.

[46] 1 WILLIAM BLACKSTONE, COMMENTARIES *67. *See also* BROWNE, *supra* note 44, at 15. The requirement of immemoriality was liberally interpreted. BENTHAM, *supra* note 39, at 221–24. By the late 1800s there was a recognition that twenty to thirty years was sufficient to meet the standard even if some recalled the start of the practice. BENTHAM, *supra* note 39, at 218, n.†. The historian E.P. Thompson suggests that the legal incorporation of customary uses in the sixteenth through eighteenth centuries was largely the incorporation of *recent*—rather than ancient—practices. THOMPSON, *supra* note 7, at 1. In the United States, the immemoriality requirement was largely dismissed for obvious reasons. As John Lawson in his treatise on usages and customs explained in 1881, custom in America could by definition not be since time immemorial. Instead, customs simply needed to have been "established." LAWSON, *supra* note 44, at 28–30.

[47] 1 WILLIAM BLACKSTONE, COMMENTARIES *78.



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[48] *Id*.

[49] *Id.*; BROWNE, *supra* note 44, at 25–27.

[50] *Id.*; 1 WILLIAM BLACKSTONE, COMMENTARIES *78–79, 89–90.

[51] POSTEMA, *supra* note 4, at 5–8.

[52] 1 WILLIAM BLACKSTONE, COMMENTARIES *77; BROWNE, *supra* note 44, at 19–21.

[53] BROWNE, *supra* note 44, at 20.

[54] BENTHAM, *supra* note 39, at 218.

[55] *Id.* at 219.

[56] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1922).

[57] *Id.* at 66.

[58] *Id.* at 65–77.

[59] James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007); Rothman, *supra* note 1, 1933–37, 1950–56.

[60] *See* Rothman, *supra* note 1, at 1967–80.

[61] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[62] I note that Henry Smith's recent consideration of the role of custom in property law using an information costs analysis further supports limiting the application of custom to the community that is most familiar with the relevant customary practices. *See* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES IN LAW 5 (2009).

[63] William & Wilkins Co v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd without opinion by a divided court*, Williams & Wilkins, 420 U.S. 376 (1975).

[64] *See, e.g.*, New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152, 157 (2d Cir. 1990); Rosemont Enters. v. Random House, Inc. 366 F.2d 303, 307 (2d Cir. 1966).

[65] Rothman, *supra* note 1, at 1980–81.

[66] POSTEMA, *supra* note 4, at 8.

[67] Rothman, *supra* note 40, *passim*; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

[68] CARDOZO, *supra* note 56, at 60. Cardozo noted that Blackstone and his "[followers] likely exaggerated" the role of custom even at the time that Blackstone wrote. *Id.* at 59–60.



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