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God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine

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NOTE

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INTRODUCTION

> *Yes, yes, our program just insinuated that George Pataki had a big, gay experience on the Staten Island Ferry. This is the beauty of fair use.*[1]

Fair use plays a vital but misunderstood role in copyright law. The central dilemma for fair use jurisprudence is that without the flexibility of fair use, copyright would become unwieldy and oppressive; but if fair use allows too much freedom from copyright, it risks undermining the incentives that the creators of copyrighted works rely on. Typically, scholars express concern about one or the other half of this problem as determined by their policy preferences. This article puts aside outcome driven analysis and examines the larger role fair use serves within copyright law. It identifies two structural purposes embodied by fair use, one determining the shifting balance of copyright law, the other determining policy making authority over copyright law. First, fair use bounds copyright rights, but in doing so it enables an expansive definition of those rights within those bounds. Second, fair use has allowed Congress to delegate to the courts a number difficult policy decisions as to the details of copyright owners' rights.

Many scholars have warned, with increasing urgency, that we are approaching the "tyranny of copyright."[2] This dark vision of a "permission culture" argues that our "creative ecosystem" is under threat because of certain legal and technological changes that have increased the rights of copyright owners.[3] The potential tyranny of copyright stems from the combination of (1) our reliance on access to and use of existing

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1. *The Daily Show with Jon Stewart* (Comedy Central television broadcast, Aug. 3, 2004). *The Daily Show with Jon Stewart* (Comedy Central television broadcast, Aug. 3, 2004). During the August 3, 2004, episode of the "The Daily Show," Jon Stewart played a clip of New York Governor Pataki's speech from the reopening ceremony for the Statute of Liberty. Stewart then feigned the rest of the speech. Pataki began, "You know, when I come here I can't help but think of about ten years ago, when I was taking the Staten Island Ferry, and I was taking it at night . . ." *Web takes you to the Garden*, TIMES UNION, Aug. 30, 2004, at B3, *available at* http://www.timesunion.com/AspStories/storyprint.asp?StoryID=281012. Jon Stewart then cut in, "Anyway, to make a long story short, um Rodrigo, if you're out there—call me." *Id.* Stewart followed this ad lib with the quote that begins this article. *See id.*

2. Robert S. Boynton, *The Tyranny of Copyright?*, N.Y TIMES, Jan. 25, 2004, § 6 (Magazine) at 40; *see also*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003), *available at* http://www.law.duke.edu/journals/66LCPBoyle; Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

3. LESSIG, FREE CULTURE, *supra* note 2, at 130.

works and (2) the increasingly pervasive "ownership" claimed with respect to those works. Consumers and creators rely on access to existing works, not just in artistic fields but in countless areas of social, political, cultural and economic activity. Most of the fabric of our cultural and intellectual lives is owned in some fashion by someone else.[4]

These concerns are not without foundation, but they are overstated because one person's claim of ownership with respect to a work says very little about what others can in fact do with that work. Significantly, copyright ownership claims are contingent upon the application of fair use. Reliance on owned works does not necessarily preordain a life of intellectual servitude. The alleged tyranny of copyright is mitigated in part because copyright claims are limited by fair use. In the landmark *Sony* decision, the Supreme Court held that home video taping of broadcast television programs was not an infringement of copyright.[5] Ownership of the copyright in the subject broadcasts was undisputed; what was disputed were the implications of that ownership. By a five to four majority the Court held that time-shifting by consumers was fair use and thus not copyright infringement.[6] The majority reached this conclusion in spite of the fact that consumers were copying entire programs without the permission of the copyright owners. The majority also held that Sony, the maker of the VCR, was not liable for contributory infringement because time-shifting constituted a substantial noninfringing use for the product.[7] Copyright ownership did not make copying by end users unlawful, and it did not make the VCR an unlawful device.

Sony has become the poster-child decision for both consumers who believe they have a right to copy and for businesses that provide tools or services related to consumer copying. However, recent attempts by internet music pioneers Napster and MP3.com to extend *Sony* into the internet age both failed.[8] These cases, and many others, highlight the uncertainty of fair use, especially in the context of new technology. Under the current state of the law, consumers, entrepreneurs, academics, journalists and copyright owners often cannot know with certainty what will, and what will not, be deemed fair use without all the joy and expense of federal litigation.

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4. Editorial, *Free Mickey Mouse*, WASH. POST, Feb. 21, 2003, at A16. "The copyright system, though constitutional, is broken. It effectively and perpetually protects nearly all material that anyone would want to cite or use. That's not what the framers envisioned, and it's not in the public interest." *Id.*

5. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

6. *Id.*

7. *Id.*

8. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); UMG Recordings v. MP3.Com Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

The uncertain scope of fair use undermines its ability to effectively guard the public interest in legitimate access to, and use of, copyrighted works. For example, without fair use, some documentaries would never be produced.[9] Even with the fair use doctrine, the chilling effect of potential litigation may discourage many who could otherwise rely on the doctrine.

Recognition of the structural role of fair use has the potential to mitigate some of the uncertainty of current fair use jurisprudence. The statutory framework for fair use both mitigates and causes uncertainty. It mitigates uncertainty by providing a consistent framework of analysis—the four statutory factors. However, when judges apply the statutory factors without articulating or justifying their own assumptions, they increase uncertainty. The statutory factors mean nothing without certain *a priori* assumptions as to the scope of the copyright owner's rights. A more stable and predictable fair use jurisprudence would begin to emerge if those assumptions were made more transparently and coherently. This is the focus of Part I of this article.

Part II describes the changes in copyright law brought about by the Copyright Act of 1976. Copyright skeptics regard the 1976 Act as an unwarranted expansion of copyright rights, constituting a triumph of special interest politics over the public good and common sense. Part II argues that, whatever the politics might have been, the shift to a dynamic system of copyright rights was a justified response to the combined problems of legislative gridlock and the expectation of continued technological and social change.

Part III, the heart of this article, examines the structural role of fair use in the context of an evolving copyright system. Those who see fair use as stemming the tide of expansive copyright rights are bound to be disappointed. Rather, it is argued that fair use is a structural tool that allows copyright to adapt to changing circumstances. This article establishes this argument in two stages. First, it recognizes that the structural role of fair use is to enable broader more flexible rights to be vested in the copyright owner. Second, it shows that in order to preserve copyright's ability to adapt to new technology, fair use must remain a somewhat open-ended standard developed by the judiciary through the imperfect process of common law adjudication.

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9. ROBERT GREENWALD'S UNCOVERED: THE WHOLE TRUTH ABOUT THE IRAQ WAR (2004), and OUTFOXED: RUPERT MURDOCH'S WAR ON JOURNALISM (2004) (both rely on fair use); *see* Lawrence Lessig, *Copyrighting The President*, 12.08 WIRED, Aug. 2004, *available at* http://www.wired.com/wired/archive/12.08/view.html?pg=5.

Ultimately, the assumptions as to the proper scope of the copyright owner's rights can only be developed by deriving fundamental principles from copyright law itself. Exactly what those fundamental principles might be is obviously a matter of debate. However, it is much narrower debate than that which is required by reference to normative conceptions of the good in general, and it is much more likely to result in stability and predictability in fair use jurisprudence than any of the cost-benefit approaches advocated in the literature. The Supreme Court's emphasis on transformativeness in its most recent fair use decision, *Campbell v. Acuff-Rose*,[10] is an important step toward a more coherent fair use doctrine. Nevertheless, there are additional steps to be taken and other fundamental principles within copyright law beyond its preference for transformative uses. This recommendation is the subject of Part IV.

There are three principles of copyright law over and above transformativeness that judges can apply to give substance to the structural role of fair use. The first is the well-established principle of the idea expression distinction. Recent case law suggests two other principles are emerging, but have yet to be articulated. These are the principles of consumer autonomy and medium neutrality. This article identifies these trends and their potential to provide a more principled and consistent basis for fair use analysis.

Part I—The Limits of Statutory Guidance on Fair Use

The difficulty of adjudicating fair use cases is well established. Almost every comment on the subject notes that fair use is "one of the most troublesome [doctrines] in the whole law of copyright."[11] One of the central difficulties of fair use jurisprudence is the indeterminacy of the statutory factors. The statutory codification of the fair use doctrine requires courts to consider four factors in determining whether a use is fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.[12]

The statutory factors provide a useful framework for analysis, but their limitations must be explicitly recognized. The core limitation of the factors is that in order to determine their application one must make an *a priori* assumption as to the scope of the rights of the copyright owner.

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10. 510 U.S. 569 (1994).
11. Dellar v Samuel Goldwyn, Inc., 104 F.2d 661 (2d Cir. 1939).
12. 17 U.S.C. § 107 (2000).

The challenge for fair use jurisprudence is to find a rational and consistent basis for those assumptions. The first step in that process is to admit that assumptions are being made. The current practice of most courts, treating the factors as outcome-determinative as opposed to question-framing, masks *a priori* assumptions and distorts judicial reasoning.

Some commentators question whether the factors are relevant at all. David Nimmer's study of the relevance of the four factors concludes that they are not outcome-determinative, either individually or collectively.[13] Nimmer surveyed the application of each of the four factors in 60 fair use cases decided between 1994 and 2003.[14] According to Nimmer's (admittedly subjective) assessment, the factors corresponded with the ultimate finding in only 55%, 42%, 57% and 50% of cases respectively.[15] Even in the few cases in which all four factors appeared to line up in the same direction, either fair or unfair, they still had no predictive value.[16] From Nimmer's perspective, the four factors uniformly pointed to one conclusion in eleven of the sixty cases, yet that clean sweep only corresponded with the actual result in six of those cases, i.e. in 54% of cases. "Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same."[17]

Nimmer's findings must be treated with some caution because litigated cases may not tell us anything about the broader universe of fair use disputes.[18] Nonetheless, Nimmer's findings provide rudimentary support for this article's contention that the four statutory factors are largely incapable of determining the outcome of fair use cases in any objective sense. The next four subsections briefly review the statutory factors to demonstrate that they are not outcome-determinative and that significant assumptions must be made before the factors can be applied.

A. *Purpose and Character of the Use*

The first factor as to whether a use of a work is a fair use is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[19] The law

13. David Nimmer, *"Fairest of Them All" And Other Fairytales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003).
14. *Id.* at 268.
15. *Id.* at 280.
16. *Id.* 282–284.
17. *Id.* at 280.
18. *See* George L. Priest & Benjamin Klein, *The Selection Of Disputes For Litigation*, 13 JOURNAL OF LEGAL STUDIES 1 (1984).
19. 17 U.S.C. § 107(1) (2000).

with respect to this factor has weaved a curious path. Commercial uses have been held fair,[20] educational uses have not.[21] The Supreme Court's comment that there are no bright line rules for applying the fair use doctrine,[22] appears, if anything, to be an understatement.

In 1984, the Supreme Court majority in *Sony* declared that "every commercial use of copyrighted material is presumptively an unfair exploitation"[23] Nevertheless, in 1994 when the Court was asked to adjudicate the fairness of 2 Live Crew's indisputably commercial parody of an old Roy Orbison song in *Campbell v. Acuff-Rose*, the Court held that there was no presumption that commercial use was unfair. As the Court observed, "[any such presumption] would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities . . . are generally conducted for profit."[24]

The *Campbell* decision also marked another more subtle departure from *Sony* concerning the purpose and character of the use. In *Sony*, the majority categorically reversed the Ninth Circuit's ruling that the absence of a productive use precluded the application of fair use.[25] "Productive use" in this context means that the use leads to the creation of a new work which results "in some added benefit to the public beyond that produced by the first author's work."[26] According to the Ninth Circuit decision, convenience, entertainment and increased access were not purposes within the general scope of fair use.[27] In *Sony*, the majority of the Supreme Court held that the productive/unproductive distinction could never be determinative of fair use.[28]

Ten years later, the Supreme Court in *Campbell* substantially reintroduced the productivity requirement under another name—the key question now being whether the allegedly infringing use is "transformative." Justice Souter, delivering the opinion of the Court,

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20. Campbell v. Acuff-Rose Music, 510 U.S. 569, 571 (1994).

21. Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996) (unauthorized reproduction of copyrighted works in university course packs not fair use); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (same). *Madey v. Duke* also illustrates the uncertain privileges of educational institutions in the context of patent law's experimental use doctrine; *see* Madey v. Duke Univ., 307 F.3d 1351 (Fed. Cir. 2002).

22. *Campbell*, 510 U.S. at 577.

23. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

24. *Campbell*, 510 U.S. at 584.

25. Universal City Studios v. Sony Corp. of Am., 659 F.2d 963, 971–972 (9th Cir. 1981).

26. *Sony*, 464 U.S. at 478 (Blackmun dissent).

27. *Universal*, 659 F.2d at 970.

28. *Sony*, 464 U.S. at 455.

explained that the central purpose of the fair use investigation was to determine:

> whether the new work merely supersedes the objects of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.[29]

For Justice Souter, transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."[30] Accordingly, while unproductive or untransformative uses are not to be presumptively denied fair use protection, the heart of the doctrine is reserved for "transformative" uses. The dominance of the transformativeness test makes the actual statutory language regarding non-commercial and educational uses largely irrelevant.[31]

Also, "transformativeness" is clearly a meta-factor: the extent to which a use transforms the work cannot be determined without reference to the other factors, such as the nature of the original work, the quantitative and qualitative similarity between the works and the effect of the use on the value of the original work. The merits and limitations of transformativeness are discussed in Part IV below. The salient point for present purposes is that assessing the transformativeness of any given use is a subjective determination that will be heavily influenced by judicial precedent. Bright-line distinctions, such as commercial/non-commercial and educational/non-educational, have been superceded by a much more ambiguous notion, transformativeness.

B. *Nature of the Copyrighted Work*

The second factor considered by the courts in applying the fair use standard is "the nature of the copyrighted work."[32] Two aspects of the nature of the work are important to consider: whether the work is factual as opposed to creative; and whether the work is published or unpublished.

In principle, the more creative the original work is, the more justification is required to establish a fair use in relation to it.[33] Anecdotally,

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29. *Campbell*, 510 U.S. at 579 (internal quotes and citations omitted); *see also*, Pierre Leval, *Towards A Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).
30. *Campbell*, 510 U.S. at 579.
31. Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381, 1395 (6th Cir. 1996) (Circuit Judge Merritt, dissenting).
32. 17 U.S.C. § 107(2) (2000).
33. *Campbell*, 510 U.S. at 586.

this aspect of the nature of the work tends not to be regarded as significant.[34] The Supreme Court did not consider the creative nature of television programs or musical compositions to be an obstacle to a finding of fair use in *Sony* or *Campbell*. At the other end of the spectrum, the Second Circuit has held that the copying of one factual work by a rival was not protected by fair use.[35] The second factor is especially unhelpful in cases involving parody, because parody is predicated on the existence of an antecedent creative work. As the Supreme Court noted in *Campbell*, in the context of parody, the second factor "is not much help . . . in separating the fair use sheep from the infringing goats."[36]

After the Supreme Court's majority decision in *Harper & Row v. Nation Enterprises*,[37] it briefly appeared that use of an unpublished work could almost never qualify as fair use.[38] The Nation had published a 300 to 400-word extract of the soon-to-be published memoirs of President Gerald Ford concerning the Nixon pardon, preempting an article that was scheduled to appear in Time magazine. Time had agreed to purchase the exclusive right to print pre-publication excerpts of President Ford's memoir; but as a result of the defendant's article, Time canceled its agreement. The majority held that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[39]

Two cases from the Second Circuit followed and enlarged this ruling. In *Salinger v Random House*,[40] the Second Circuit held that a literary biographer of reclusive author J.D. Salinger was not permitted to quote from a selection of Salinger's unpublished letters and drafts. In *New Era v Holt*,[41] the same court held that the quotation of unpublished material to establish a variety of critical assertions with respect to L. Ron Hubbard, the founder of Scientology, was equally unavailing on fair use grounds.[42] In both cases the court held that unpublished works normally enjoy "complete protection against copying any protected expression."[43]

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34. According to Nimmer's analysis, it actually has a negative correlation with the outcome. Nimmer, *Fairest Of Them All*, *supra* note 13, at 280.

35. Financial Information, Inc v. Moody's Investors Service, Inc., 751 F.2d 501 (2d Cir. 1984).

36. *Campbell*, 510 U.S. at 586.

37. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

38. *Id.* at 555.

39. *Id.* at 555.

40. Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987).

41. New Era Publications v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989).

42. *Id.*

43. *Salinger*, 811 F.2d 90; *New Era Publications*, 873 F.2d at 583; *see also* Leval, *supra* note 29, at 1113.

In 1992 Congress revised Section 107 and made it clear that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."[44] In light of Congress' clarification of Section 107, the Supreme Court's decision in *Harper & Row* is easier to reconcile as deriving from the fact that the work in question was soon-to-be published, not that it was unpublished.[45] The nature of the copyrighted work, while fairly objective, nonetheless remains unhelpful in assessing whether an activity is protected by fair use or not because it is overwhelmed by the other factors.

C. *Amount And Substantiality of the Portion Used*

The third factor to be considered in adjudicating fair use is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[46] The need for both a quantitative and a qualitative inquiry harks back to Justice Story's original formulation of the fair use doctrine in *Folsom v. Marsh*.[47] In that case, Justice Story was concerned to protect the "chief value of the original work" against the extraction of its "essential parts" through the mere "facile use of scissors" or its intellectual equivalent.[48] In theory, the greater the portion of a work that is copied, the less inclined a court will be to find in favor of fair use. In practice, however, several cases confound this basic proposition, relying instead on subjective qualitative impressions or suppositions as to the value of the work.

In *Harper & Row*, the defendant copied a mere 300 words from a 200,000-word manuscript, yet the Supreme Court held that this constituted a substantial taking under the third factor.[49] This extraordinary conclusion only makes sense in context of the Court's manifest disapproval of the conduct of the defendant, particularly the manner in which it obtained access to an advance copy of the biography and its scoop of the Time magazine story. In *Sony,* the majority of the Supreme Court found that home videotaping entire programs for later viewing was fair

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44. Amended 10/24/92 by Pub. L. No. 102-492, 106 Stat. 3145.

45. Leval, *supra* note 29, at 1120. Note that Judge Leval authored both the *Salinger* and *New Era* opinions overturned by the Second Circuit: *Salinger v. Random House*, 650 F. Supp. 413, (S.D.N.Y. 1986) *rev'd & rem'd* 811 F.2d 90, (2d Cir. 1987) and *New Era Publications International, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y., 1988) *aff'd on other grounds* 873 F.2d 576 (2d Cir. 1989).

46. 17 U.S.C. § 107(3) (2000).

47. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

48. *Id.* at 345.

49. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 565 (1985). The words were not even entirely sequential, see EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 155 (2000), *available at* http://www.edwardsamuels.com/illustratedstory/.

use.[50] In *Campbell*, the Supreme Court held that even though rap musicians 2 Live Crew had copied the heart of the original Roy Orbison song—the first line of lyrics and characteristic opening bass riff—nonetheless, the defendant's appropriation could be protected by fair use.[51] The Court reasoned that copying the heart of the song was excusable because it is the heart which most readily conjures up the song for parody, and also because it is the heart at which parody generally takes aim.[52]

The point to be understood is not that the amount of the work used is never significant, but rather that while the third factor provides a convenient platform for bolstering existing conclusions, it provides little *ex ante* guidance. The question of qualitative significance is inextricably tied with the fourth factor because each requires the court to assess the "value" of the original work. The third factor does not rely on mechanical quantification of the amount of the original work used; it asks courts to asses how much of the *value* of the original work is present in the later use. Similarly, the fourth factor asks what effect the later use will have on the value of the original work. Thus both the third and forth factors require the determination of the antecedent question—the value of the work. In each case, the value of the original can only be determined with reference to scope of the copyright owner's rights of exclusion; treating the statutory factors as outcome-determinative, as opposed to question-framing, ask us to believe the opposite is true.

D. *Market Effect*

The fourth statutory factor in fair use analysis is "the effect of the use upon the potential market for or value of the copyrighted work."[53] In short, the fourth factor asks "what is the market effect of the unauthorized use?" It is worth exploring this factor in some detail, first because it is sometimes said to be the most important factor,[54] and second because questions of market effect dominate academic literature. Assessing the market effect of an unauthorized use confronts judges with a potential

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50. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984).

51. Campbell v. Acuff-Rose Music, 510 U.S. 569, 588 (1994).

52. *Id.*

53. 17 U.S.C. § 107(4) (2000).

54. The Supreme Court's most recent decision on fair use warns that the statutory factors are not to be treated in isolation, rather "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578; *but see Harper & Row*, 471 U.S. at 566 (fourth factor undoubtedly single most important element of fair use); Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996) (factors not created equal, fourth factor at least *primus inter pares*).

circularity: while their ultimate ruling defines the scope of the market, they are supposed to examine the market effect in making that ruling. In other words, they must make a ruling based on a finding that is contingent on their ruling. This theoretical circularity is mitigated by the reality that judges begin with a view as to the proper scope of the copyright owner's rights and then apply the statutory factors in a manner that transforms those priors into conclusions.

As a preliminary matter, it is clear that analysis of market effect must include the effect on the copyright owner's continued exploitation of existing markets and her potential exploitation of markets she is yet to enter.[55] If unexploited markets were left to fair users by default, copyright owners would find themselves in a race to exploit their works in as many markets as possible to preserve their future rights. The author of a novel would rush to make some token exploitation in every context imaginable, from the plausible (sequels, screen-plays, and television series) to the unlikely (soft toys, action figures, and private-label credit cards).

Although considering potential and derivative markets is clearly necessary, it raises the problem that copyright owners can claim that almost any new use of their work is part of an unexplored derivative market. For example, although it had shown no interest in licensing a derivative of "Pretty Woman" in the rap genre before its lawsuit against 2 Live Crew, Acuff-Rose (Roy Orbison's publisher) argued that 2 Live Crew's parody diminished its potential to do so. The Supreme Court lent credence to these kinds of argument by remanding the case in *Campbell* to the district court to determine whether the 2 Live Crew parody had dampened the potential demand for non-parody derivatives of the original song in the rap genre, a market hitherto unexplored by the copyright owner.[56]

The uncertainty of the original work's potential market necessitates defining the limits of that market in order to ascertain whether the allegedly infringing use has any effect on it. As noted above, this encourages a kind of circular reasoning: findings of fair use are premised on narrow market definitions, while denials of fair use are premised on expansive market definitions. The reasoning is circular because although the fair use question determines the extent of the market, the extent of the market also determines the outcome of the fair use question.

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55. *Campbell*, 510 U.S. at 593–594.

56. *Id.* The Court remanded the case back to the district court to hear evidence as to the likely effect on the market for a non-parody, rap version of original song. It is puzzling to consider what evidence the Court thought would be produced. *See* 4 MELVILLE B NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2005).

Two cases concerning photocopying illustrate the potential circularity of examining the effect of the use upon the potential market for the copyrighted work. In both *Williams & Wilkins Co. v. United States*,[57] and *American Geophysical Union v. Texaco Inc.*,[58] academic journal publishers alleged that their copyrights were infringed by defendants making unauthorized photocopies of journal articles for medical and scientific research. The two cases, decided almost 20 years apart, are barely distinguishable on their core facts, and yet reach entirely opposite conclusions.

The difference between the cases lies in the latter court's willingness to find that the publisher suffered an adverse market effect. The Court of Claims in *Williams & Wilkins* held that the evidence on the record failed to show that the defendant's photocopying practices caused a significant detriment to the plaintiff. In *American Geophysical*, the Second Circuit also concluded that, based on potential sales of additional journal subscriptions, back issues, and back volumes alone, the evidence of an adverse market effect was weak.[59] However, the majority of the Second Circuit concluded that the plaintiff prevailed on the fourth factor because of the availability of licensing facilitated through the Copyright Clearance Center ("CCC").[60] The majority found that through this collection organization, the publishers had created "a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying."[61] In the opinion of the majority, the potential licensing revenues that would be forgone by publishers if a finding of fair use was made *itself* constituted an adverse market effect under the fourth factor.

Any copyright owner who loses an infringement action because of a finding of fair use has also lost at least one potential licensee, although in some cases the prospects of a license are more theoretical than real.[62] The majority in *American Geophysical* argued its reliance on potential licensing revenues was not circular because "[o]nly an impact on potential licensing revenues for *traditional, reasonable, or likely* to be

57. 203 Ct. Cl. 74 (1973) *aff'd by equally divided Court*, 420 U.S. 376 (1975).
58. 60 F.3d 913 (2d Cir. 1994).
59. *Id.* at 928.
60. *Id.* at 929.
61. *Id.* at 930.
62. In several prominent cases it appears that the plaintiffs were unwilling to license at any price, whereas, after the Supreme Court's decision in *Campbell* a settlement including an ongoing license was in fact negotiated. *See, e.g.*, Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000); New Era Publications v. Henry Holt & Co., 873 F.2d 576, 583 (2d Cir. 1989); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987); and Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

developed markets should be legally cognizable when evaluating a secondary use's effect upon the potential market for or value of the copyrighted work."[63]

However, the addition of the "traditional, reasonable, or likely" requirement does not entirely mitigate the problem of circular reasoning. Determining whether a market is "traditional, reasonable, or likely" is indistinguishable from determining the scope of the copyright holder's rights: both require courts to make an *a priori* assumption and then compare that assumption to the conduct of the defendant. The Second Circuit comes close to transparency in *American Geophysical* by at least identifying the assumption that it is making—that journal photocopying falls within the traditional, reasonable, and likely to be developed market of the copyright owner—but it does little to actually justify this assumption.

Such assumptions should be carefully considered, especially in the context of market effect, because of the danger that courts will reason backwards from the fact of marketability to the construct of property.[64] The CCC was established in 1977 to license photocopying after the decision in *Williams & Wilkins*.[65] This begs the question: if a centralized clearinghouse was established to license parody, review or reference to a class of works, would it establish the existence of a "traditional," "reasonable," or "likely" market for such activities?[66] In *Campbell*, the Court held that there is no protectable derivative market for criticism, including parody because:

> [t]he market for potential derivative uses includes only those that creators of original works *would in general develop or license others to develop*. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own

63. *American Geophysical Union*, 60 F.3d at 930 (2d Cir. 1994) (emphasis added).

64. Julie Cohen makes this criticism in relation to the *INS* case in which the Supreme Court found a quasi-property right in news based on a misappropriation theory. Julie E. Cohen, *Lochner In Cyberspace: The New Economic Orthodoxy Of "Rights Management,"* 97 MICH. L. REV. 462, 507–508 (1998–99); *see also* Int'l News Serv. v. Assoc. Press, 248 U.S. 215 (1918).

65. It is tempting to speculate that had the CCC existed earlier, the decision in *Williams & Wilkins* would have been the same as *American Geophysical*. However, this seems unlikely. The Court of Claims considered and rejected the possibility of licensing schemes. In his dissenting opinion in *American Geophysical*, Justice Jacobs argued that the CCC scheme was "neither traditional nor reasonable; and its development into a real market is subject to substantial impediments." *American Geophysical Union*, 60 F.3d at 937 (Jacobs J. dissent).

66. *American Geophysical Union*, 60 F.3d at 937 (Jacobs J. dissent); *see also* Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 38–39 (1997).

productions removes such uses from the very notion of a potential licensing market.[67]

If the members of the MPAA established a rights clearing center for reviews and parodies of, and references to their movies, would unauthorized review, reference and parody suddenly cease to be fair use? There may be good reasons to not give copyright owners to expand control over certain uses of their works, even if they are offering to license those uses.

As with the third factor, the fourth factor is conceptually important but incomplete. In order to determine market effect, a court must first form some idea as to what the market is, as emphasized by the Second Circuit's holding in *American Geophysical* that the market in question must be traditional, reasonable or likely to develop. The problem with the fourth factor, and with the first and third factors to some extent, is that they focus on second order questions and invite courts to gloss over the real basis for their rulings—how they came to define the boundaries of the copyright owner's rights in the first place.[68] To answer this antecedent question, courts must look beyond the statutory guidance in Section 107 and confront theoretical questions about the nature of copyright.

E. *The Search For Reasons*

The four statutory factors that courts must consider in deciding fair use cases provide a useful framework for analysis but they are far from complete. By mandating that all decisions in this area at least consider the factors, the statute generates more fine-grained points of comparison. All other things being equal, this should make fair use decisions more consistent. However, judges need to recognize that the factors only provide a framework for their analysis by raising certain second order questions. Applying the factors still requires making first order assumptions as to the scope and value of the copyright owner's rights. This is particularly true of the third and fourth factors, which require courts to first define the value of the copyrighted work, in order to determine how much of the value of the work was used by the defendant, and also to determine how the value of the work was affected by the defendant's

67. Campbell v. Acuff-Rose Music, 510 U.S. 569, 592 (1994) (emphasis added).

68. Lloyd Weinreb argues that although the Supreme Court cast its analysis in *Sony* and *Harper & Row* almost entirely in terms of the statutory factors, "the application, not to say the interpretation, of the factors is so tailored to the circumstances of the cases, that one is impelled to look beneath the surface of the opinions for the true ground of decision." Lloyd L. Weinreb, *The 1998 Donald C. Brace Memorial Lecture, Fair Use*, 67 FORDHAM L. REV. 1291, 1299 (1999).

use. Neither of these questions can be answered without first deciding what the value of the work is in the abstract, or how far the copyright owner's rights in relation to it should extend.

Courts inevitably fall back on assumptions as to what the legitimate scope of the copyright owners' rights should be. More precise articulation and more coherent justification of those assumptions should lead to more predictable fair use decisions over time because, to the extent that judges agree on these first order considerations, clearer rules will emerge. Even where judges initially disagree, such disagreements will be resolved by the usual considerations of precedent.

The remainder of this paper considers what kind of assumptions courts should be making in fair use cases. As Parts II and III elaborate, the fundamental starting point for the assumptions that fill the gaps in the statutory factors is an understanding of the dynamic nature of modern copyright law and the structural role of fair use. Part IV examines the jurisprudential implications of the structural analysis of fair use and recommends that judges justify their assumptions as to the proper scope of the copyright owner's rights in terms of fundamental principles derived from copyright law itself. This bounded normative inquiry is more likely to result in stability and predictability than either a simple cost-benefit analysis or unrestricted reference to normative conceptions of the good in general.

Part II—Copyright as an Evolving System

Understanding the structural role of fair use in copyright law is the first step towards developing a more coherent fair use doctrine. This part examines the overall structure of modern copyright law as the context for understanding the structural role of fair use. As noted in the previous part, the statutory formulation of the fair use doctrine raises significantly more questions than it answers. The indeterminacy of the statutory factors stems from congressional recognition of the desirability of judicial policy making. Fair use is the mechanism by which Congress transferred significant policy making power to judges in order to allow copyright to adapt to ongoing social and technological change more effectively than a purely legislative response would allow. Doctrinal recommendations that do not take account of this structural role of fair use are necessarily limited in their descriptive or prescriptive analysis. Some of these attempts and their weaknesses are considered in Part IV, below.

The Copyright Act of 1976 can be seen as the culmination of the transformation of American copyright law, from the regulation of literal reproduction to a system of general rights protecting a more abstract

notion of the value of creative and intellectual works.[69] This transformation has greatly expanded the number of works covered by copyright, and the political and economic significance of the rights that copyright vests in authors and their assignees. Copyright's transformation and associated expansion have been viewed with alarm by many in the academic community because of the perceived threat to free speech, innovation and creativity.[70] The expansion of copyright has also been criticized as a victory for special interests—publishers, broadcasters, the recording industry and movie studios—over the generalized public interest in the free exchange of information.[71]

Without necessarily disputing any of these claims, this article tells another story about the significance of the changes in the structure of American copyright law. The effects of copyright law are prone to technological disruption. Even preceding the digital age, new technology such as the juke-box and the photocopier conflicted with peoples' settled expectations of the rights of copyright owners and the freedoms of the public. In 1976, Congress decided to alter the structure of copyright law to make it more responsive to technological change. Congress replaced potentially limited and technologically specific rights with rights that were more broadly expressed, in order to allow copyright law to be more flexible in its treatment of new technologies.

The 1976 Act was a significant departure from its predecessor in a number of respects. Three changes greatly increased the number of works subject to copyright and the duration of copyright protection for those works. First, the new Act changed the default rule for the application of copyright, from opt-in to opt-out. Under the 1909 Act, an eligible work received no federal copyright protection until its publication, and even then only if certain formalities were observed.[72] In contrast, the 1976 Act applies to all eligible works from the moment of their creation, although until 1989 it was still the case that a work published without the proper form of copyright notice would instantly become part of the

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69. Oren Bracha, From Privilege To Print To Ownership Of Works: The Transformation Of American Copyright Law 1790–1909 (2004) (unpublished Ph.D. dissertation, Harvard University Law School) (on file with author).

70. *See, e.g.*, LESSIG, FREE CULTURE, *supra* note 2; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173 (2003); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

71. JESSICA LITMAN, DIGITAL COPYRIGHT 53 (2001); Pamela Samuelson, *The Copyright Grab*, 4.01 WIRED, Jan. 1996, *available at* http://www.wired.com/wired/archive/4.01/white.paper_pr.html.

72. The 1909 Act expressly allowed the state common law copyright to protect unpublished works.

public domain.[73] Second, the new Act increased the maximum duration of copyright protection from 56 years from the date of publication, to the life of the author plus 50 years for most natural persons and 75 years from the year of first publication for anonymous works, pseudonymous works and works made for hire.[74] Third, the new Act jettisoned the requirement of copyright renewal, thus extending copyright protection even more significantly for the vast majority of owners who failed to renew their terms after the initial 28 year period.[75] The cumulative effect of these extensions was that more works were protected by copyright and that copyright protection lasted considerably longer.

Although these changes are significant, there was a much more fundamental change to the nature of copyright itself: the broadening of the copyright owner's exclusive rights. The 1976 Act significantly increased the scope of copyright owner's rights by rephrasing them in considerably more general terms.

The contrast in drafting styles between the two Acts is significant. The new Act gave copyright owners five "fundamental rights" to be offset against subsequent exceptions.[76]

> The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118," and must be read in conjunction with those provisions.[77]

In comparison, the 1909 Act granted rights that were static in nature and had to be constantly retrofitted by Congress.[78]

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73. Jessica Litman, *Sharing And Stealing*, 27 HASTINGS COMM/ENT. L.J. 1, 15 (2004); *see, e.g.*, J. A. Richards, Inc. v. New York Post, Inc., 23 F. Supp. 619 (S.D.N.Y. 1938) (copyright void for failure to comply with formalities).

74. 17 U.S.C. § 302 (2000). Extended to the life of the author plus 70 years and 95 years respectively by the Sonny Bono Copyright Term Extension Act of 1998.

75. According to Lessig, renewal rates were so low in 1973 that the average term of copyright protection in was only 32.2 years. LESSIG, FREE CULTURE, *supra* note 2, at 135.

76. The exclusive rights are reproduction, adaptation, publication, performance, and display. *See* H.R. REP. No. 94-1476 (1976); 17 U.S.C. §§ 106 (1)–(5) (2000). In 1995 Congress added the digital audio transmission right specifically reserved for sound recordings, 17 U.S.C. § 106(6), Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in scattered sections of 17 U.S.C.).

77. H.R. REP. No. 94-1476 (1976).

78. The 1976 Act gives the copyright owner the exclusive right to: "(1) reproduce the copyrighted work in copies or phonorecords; [and] (2) prepare derivative works based upon the copyrighted work." In contrast to this general and technologically neutral language, the comparable section of the 1909 Act vests the following exclusive rights in copyright owners: "(a) To print, reprint, publish, copy, and vend the copyrighted work; (b) To translate the copy-

Public choice theory predicts that legislative outcomes will be the product of interest group competition in a political market place.[79] In that political marketplace, small groups with concentrated interests will mobilize more effectively than large groups with diffuse interests. The application of public choice theory to the 1976 Act is fairly obvious: well represented copyright holders, such as the media, received a significant increase in both the scope and duration of protection; well represented copyright users such as libraries received special treatment by way of exemptions. The unrepresented public discovered that their residual freedoms, and the public domain, had decreased accordingly.[80]

In her book, Digital Copyright, Jessica Litman provides a compelling and detailed account of the decades of protracted negotiation that that led to the passage of the 1976 Act.[81] Two related features stand out in this account: (1) revising the Copyright Act has proved difficult and time consuming, (2) special interest group representatives have had an unusually direct influence in drafting the new Copyright Act.

The first major revision of the Copyright Act in the Twentieth Century was completed in 1909, it took until 1976 to achieve another one. The intervening period witnessed the Depression, two world wars, and the invention of a variety of devices that would come to transform copyright, including: talking motion pictures, the radio tuner, television, the juke-box, the photocopier, the computer, videotape recorders and musical synthesizers. During this period, there were almost continual but unsuccessful efforts by both Congress and various interest groups to revise the 1909 Act in light of these developments.

Litman offers a standard public choice explanation for the revised structure of the Copyright Act that was eventually passed in 1976: conflicts between represented interests were solved by increasing the surplus to be divided (by expanding copyright) at the expense of the greater public.[82] The public choice account is convincing in its own terms, but it overlooks the considerable merit of adopting a dynamic copyright structure. To understand why this is so, and to understand its

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righted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art."

79. *See generally*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (4th ed. 1974).

80. LITMAN, DIGITAL COPYRIGHT, *supra* note 71. Peter Drahos tells the same story on a global scale concerning the 1994 Uruguay Round of trade negotiations and the adoption of the TRIPS agreement. PETER DRAHOS, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002).

81. LITMAN, DIGITAL COPYRIGHT, *supra* note 71.

82. *Id.*

significance for fair use, it is helpful to consider some of the literature on the choice between rules and standards.

In an ideal world, copyright law would accommodate at least three different constraints: incentive optimization, administrative efficiency and adaptability. First, the law would create sufficient incentives to encourage and sustain the production of society's optimal level and quality of intellectual and creative output. Second, the rights established by that law would be sufficiently certain to allow them to be observed and enforced with minimal administrative and transaction costs. Finally, the law would adapt to social and technological change so that it continued to comply with the optimization and administrative efficiency criteria.

Obviously no such law exists. In fact, there is an inherent tension between the administrative efficiency criteria and adaptability criteria. In theory, laws that are more specific have a lower cost of administration, but that same specificity makes them more likely to produce undesirable or paradoxical results in response to unforeseen situations. In other words, specific laws are prone to obsolescence.

At least three considerations govern the legislative choice to make laws more or less specific. First, although rules are associated with lower compliance costs, they are typically harder to write in the first place. In contrast, a legislative standard is easier to write but shifts costs from the law making body to those who must comply with the law because of both information costs and uncertainty.[83]

The second consideration in choosing between rules and standards is determining how the law should change in response to new circumstances. Laws which are dramatically affected by social and technological change must be regularly adapted to new circumstances. Received wisdom tells us that standards are easier to keep up-to-date than rules.[84] Standards do not require continual legislative intervention to adapt to changing circumstances because they are only given content through their application to particular situations. Accordingly, in spite of their increased compliance costs, standards may be preferable where the opportunities for legislative resolution are limited. This observation leads directly to the third consideration, public choice theory.

As noted above, public choice theory holds that interest group competition affects legislative outcomes. An important extension of simple public choice theory also suggests that interest group competition in a multiple veto-point political system affects legislative style as well as

83. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

84. *Id.* at 617.

policy direction.[85] The active involvement of a number of interest groups with non-aligned or only partially aligned interests makes finding a specific compromise on any particular issue difficult. The more interest groups, the more difficult that prospect will be. In the U.S., building consensus is even more difficult because the complexity of the legislative process results in multiple veto points.[86] The passage of legislation requires a majority in the relevant committees, the House, the Senate and Presidential approval. The more specific a bill is, the more difficult it is likely to be to secure all the required majorities.

Obstacles to more specific legislation may have a compounding effect in an environment that is known to be prone to external shocks. The parties involved should anticipate that if legislation was difficult to pass initially, it will also be difficult to amend in response to unforeseen circumstances. A risk-averse interest group might prefer incomplete legislation which transfers the forum of conflict from a one-shot legislative solution to an ongoing judicial process. Consistent with this theory, Attiyah and Summers have commented that Congress adopts incomplete policy instruments and relies on case law to determine the content of the law more than other comparable nations.[87]

Incomplete legislation does not lead to anarchy: where Congress fails to act, courts fill the void, completing incomplete policies in a process that is only nominally interpretive.[88] In spite of frequent references to 'activist judges' in political rhetoric, judicial policy making may arise as much from legislative abdication as from judicial usurpation. Indeed, there is a view that Congress routinely passes the task of resolving unpleasant political issues to the courts.[89] For example, Congress could have resolved the issue of home video taping through legislative action before the Supreme Court was forced reach the issue in *Sony*, but the "chance to do nothing and blame it on another branch of government was predictably hard for Congress to resist."[90]

In sum, where Congress knows that a specific policy provision would be initially difficult to draft, would be rapidly made obsolete by

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85. Tonja Jacobi, Explaining American Litigiousness, A Product Of Politics, Not Just Law (2004) (working paper, on file with author).

86. *Id.*

87. P.S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law (1987), from 298.

88. *Id.* at 308; *see also* Richard A. Posner, The Federal Courts: Crisis and Reform 19 (1985).

89. *See, e.g.*, Frank J. Macchiarola, *The Courts in the Political Process: Judicial Activism or Timid Local Government?* 9 St. John's J. L. Comm. 703, 704 (1994).

90. Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox 121 (*rev'd ed.*, Stanford University Press 2003) (1994).

external changes, and would be difficult to rewrite in response to those changes, it may rationally (or expediently) choose to enact an incomplete policy, leaving it to the courts to add content to that standard by applying it to particular situations as they arise. Congress' broad definition of the rights of copyright owners and its incomplete codification of the fair use doctrine both fit neatly with this description.[91]

Congress' intention in recasting the exclusive rights in such broad language in the 1976 Act was to change the way copyright law dealt with new technology. Previously, courts had typically resisted extending copyright protection to new technologies without explicit legislative guidance.[92] The adoption of broadly stated exclusive rights in the new Act was intended to "change the old pattern and enact a statute that would cover new technologies, as well as old."[93]

The legislative history shows that Congress was aware of the extent to which the existing balance of copyright protection had been disrupted by past technologies, such as the player piano and the photocopier.[94] The congressional record also indicates that Congress realized that it was not in a position to anticipate the implications of social and technological changes yet to occur.[95] Just as Congress was aware of the difficulty, *ex ante*, of specifying the application of copyright to technological developments, it was also aware of the unlikelihood that it would be able to respond *ex post* in a manner that was either timely or effective.[96] In short, Congress appears to have understood that any new copyright law would have to be broadly expressed to allow it to respond dynamically to unforeseen events because the politics of copyright reform were such that its own ability to respond would be limited. The shift to a dynamic copyright regime, implemented in the 1976 Act, may have been the product

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91. In contrast, the detailed provisions of the Digital Millennium Copyright Act (1998) indicate the presence of a different political dynamic. This article does not suggest that every major policy decision in copyright has been ceded to the courts; rather, it highlights the doctrinal significance of those which have.

92. *See, e.g.*, Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908); Williams & Wilkins Co. v. United States, 203 Ct. Cl. 74, 487 F.2d 1345 (1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

93. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 457–458 (1984).

94. The revision effort leading up to the 1976 Act was "[s]purred by the recognition that significant developments in technology and communications had rendered the 1909 Act inadequate." *Sony*, 464 U.S. at 463 (1984); *see also* S. REP. No. 94-473, at 47 (1975) (statement regarding genesis of revisions to copyright law).

95. H.R. REP. No. 94-1476 (1976); S. REP. No. 94-473 (1975).

96. *Id.*

of special interest politics, but it was also sound public policy in light of copyright's susceptibility to technological change.

One of the first technologies to put the 1976 Act to the test was the VCR. In 1984, the Supreme Court held that the manufacturer of the VCR, Sony, was not liable for selling a machine that could lead to widespread reproduction of copyrighted materials.[97] This ruling indicated to some that the courts would be unable or unwilling to adapt copyright to embrace new technology as Congress intended. Indeed, Justice Blackmun's dissent criticized the majority on just that basis:

> It is no answer, of course, to refer to and stress, . . . this Court's "consistent deference to Congress" whenever "major technological innovations" appear. Perhaps a better and more accurate description is that the Court has tended to evade the hard issues when they arise in the area of copyright law. I see no reason for the Court to be particularly pleased with this tradition or to continue it. Indeed, it is fairly clear from the legislative history of the 1976 Act that Congress meant to change the old pattern and enact a statute that would cover new technologies, as well as old.[98]

The majority stressed the importance of allowing Congress to determine the appropriate response to new technology throughout its decision:

> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.
>
> . . .
>
> One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.[99]

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97. *Sony*, 464 U.S. (1984).

98. *Id.* at 457–458.

99. *Id.* at 429, 456; *see also id.* at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.")

However, the rhetoric of deference employed by the majority must be carefully assessed in light of its actual ruling. The majority did not find the Copyright Act inapplicable to the video cassette recorders, nor did it hold that new technology always required new legislation. What it did say was that under the current law, although other forms of reproduction using a VCR may have been infringing, non-commercial time-shifting constituted a fair use of the new technology. The majority did apply the new Act to the VCR as Congress intended. Whether that application was the same as the one Congress might have made is another question altogether.

Part III—Fair Use in the Context of an Evolving Copyright System

One of the criticisms of the new copyright regime implemented in 1976 is that the interaction of broadly expressed exclusive rights with narrowly crafted exceptions has a ratcheting effect on copyright protection. The rights of copyright owners adapt to technological challenges, whereas users' rights are diminished or marginalized. This concern is particularly pronounced with respect to the possible effects of restrictive licensing and technological measures, such as digital rights management. The expectation that fair use should preserve the balance of copyright assumes there is one unique and identifiable balance to be preserved. It also assumes that the past is a better reflection of that balance than the present. If the function of fair use is to preserve users' rights, or maintain the status quo, it would appear to be failing dismally.

On the other hand, if the success of fair use is measured by the extent to which has enabled copyright law to smoothly adapt to new challenges, fair use is doing pretty well. Understanding fair use from a structural perspective tells us something more about fair use than is revealed by the observation of individual cases. The structure of the Copyright Act and the history of copyright law indicate that the true function of fair use is to enable copyright law to evolve in response to new challenges without necessitating legislative intervention. As this section elaborates, fair use is fundamentally different from the majority of other exceptions that limit the rights of copyright owners because it is both dynamic (unlike most exceptions) and contextual (unlike the idea expression distinction). Significantly, like the idea expression distinction, fair use may also be a constitutionally required feature of copyright law. All of this makes fair use very significant. In addition, a structural analysis of fair use indicates that the doctrine is meant to be used as a flexible standard through which the judiciary can determine the application of

copyright in response to social and technological changes—fair use was never intended to preserve the status quo in the face of change.

A. *The Nature of Fair Use*

Unlike the most other exceptions to the copyright owner's exclusive rights, fair use is a dynamic standard. As a statement of legislative policy, the fair use doctrine is undeniably vague. Section 107 of the Copyright Act states that "the fair use of a copyrighted work is not an infringement of copyright."[100] Section 107 also provides a non-exclusive list of six examples of fair use (criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research) and four non-exclusive factors for courts to consider in applying the doctrine.[101] The vagueness of the fair use provision stands in marked contrast to the specificity of many other sections of the Act, and it begs the question of why Congress adopted rules in some places and standards in others.

The narrowness of the static exemptions is easily illustrated. The Act creates a statutory exemption allowing libraries to copy an existing published work to a new format if the existing format has become obsolete.[102] There is no privilege to upgrade to a format that is merely superior or more convenient, and persons other than libraries have no such express right at all. Many other exemptions follow a similar pattern, applying only to a particular special interest and only with respect to a limited class of conduct.

The Audio Home Recording Act ("AHRA") of 1992 demonstrates the limitations of the Act's many static exemptions. The AHRA reflects a deal between music industry interests and device manufacturers. Under that deal, device manufactures agreed to pay royalties for, and include technological limitations in, digital audio recording devices.[103] In return for these royalties and technological restrictions, music industry interests consented to a provision in the Copyright Act which immunizes non-commercial copying using a digital audio recording device or a digital audio recording medium.[104]

The AHRA was a static and narrow solution to a particular problem: Congress could have legislated as to the legality of consumer home audio copying more generally, but failed to do so. The AHRA has no

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100. 17 U.S.C. § 107 (2000).
101. 17 U.S.C. § 107 (2000).
102. 17 U.S.C. § 108(c) (2000).
103. GOLDSTEIN, *supra* note 90, at 132.
104. The provision does not make this conduct non-infringing per se, rather it cannot form the basis of an action for copyright infringement. 17 U.S.C. § 1008 (2000).

application to a consumer who converts CDs to MP3 files, nor do the royalty provisions apply to MP3 players.[105] Consequently, the AHRA amendments to the Copyright Act have been entirely inconsequential in the public furor that has surrounded MP3s, file-sharing and webcasting in the past few years. As the AHRA illustrates, in a fast-changing environment, even detailed rules that perfectly address a group's concerns tend to ultimately fail in that aim.

Unlike the idea expression distinction, fair use is contextual. This difference has important implications. The idea expression distinction is dynamic and universal in its application. The idea expression distinction, which holds that "no author may copyright his ideas or the facts he narrates,"[106] is one of the fundamental axioms of copyright law. Copyright does not preclude others from using the ideas or information contained in an author's work; it merely protects the expression of those ideas and information.[107] The idea expression distinction is not an exemption from copyright. Rather, it is statement of one of its inherent limitations in scope.[108]

In spite of its conceded importance, the idea expression distinction is not the appropriate vehicle to resolve every tension in copyright, because it does not contextualize. For example, the idea expression distinction does not provide a means to distinguish between the partial copying of a work for an academic or critical purpose and the same conduct for some less-favored purpose. Nor can it be used to take account of the difference between private use and non-private use. The idea expression distinction focuses solely on the alleged copying in question; it does not take into account the circumstances, effects and motivations surrounding that copying.[109] Thus the idea expression distinction protects a computer programmer who copies an application protocol interface ("API") to enable her program to interface with the original, but it does not protect the copying of the entire program that was part of the reverse engineering

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105. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. 1999).

106. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985); 17 U.S.C. § 102(b) (2000).

107. Eldred v. Ashcroft, 537 U.S. 186, 218–219 (2003).

108. 17 U.S.C. § 102(b) (2000). Section 102 of the Copyright Act sets out the subject matter of copyright and also states that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.*

109. This follows under either the ordinary observer test, or a more structured inquiry. Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930) (observer test for substantial similarity); Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992) (abstraction, filtration comparison test for substantial similarity).

process that uncovered the API in the first place.[110] However, reverse engineering is protected by fair use.[111]

The difference between the idea expression distinction and fair use is particularly important to understand because the two are so often confused.[112] An example of the confusion between the idea expression distinction and fair use is the mode of criticism directed at a series of admittedly problematic cases. In *Paramount Pictures Corp. v. Carol Publishing Group, Inc.*, a district court held that *The Joy of Trek*, a guidebook for the *Star Trek* uninitiated, infringed the copyright in the original series.[113] In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the Second Circuit held that *The Seinfeld Aptitude Test*, literally a sequence of hundreds of trivia questions and answers relating to the *Seinfeld* series, also infringed the copyright in the original series.[114] In each case the amount of expression from any individual broadcast or the series in total was slight and fragmentary, but remarkably the courts had little trouble characterizing the guide book and the aptitude test as substantially similar to the plaintiff's copyrighted work. A number of scholars, such as Matthew Bunker,[115] have characterized these decisions as misapplications of the fair use doctrine. These decisions are extraordinary, but not primarily by virtue of their failure to find fair use.

In these cases, courts appear to have mischaracterized as derivative works those that simply reference but do not reproduce the plaintiffs' copyrighted material. If we suspend disbelief and assume that, the work of the defendants in these cases was indeed substantially similar to that of the plaintiffs and that the extent of that similarity was significantly more than was required for their analysis or criticism of the original then the courts were correct to find in favor of the plaintiffs. The courts in

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110. *See* Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 603 (9th Cir. 2000).

111. *Id.* at 608 (Defendant's intermediate copying during the course of its reverse engineering held a fair use as a matter of law.)

112. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (2005) (defense of fair use often invoked without reference to the particular use employed by the defendant, and merely as an alternative label for similarity that is not infringing because it is not substantial).

113. Paramount Pictures Corp. v. Carol Publ'g Group, Inc., 11 F. Supp. 2d 329, 334 (S.D.N.Y. 1998).

114. Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 141 (2d Cir. 1998).

115. Matthew Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After* Campbell, 7 COMM. L. & POL'Y 1, 10–16 (2002). Bunker also criticizes the Ninth Circuit's *Dr. Seuss* opinion on the same grounds. *Id.* But that case may have been soundly decided based on the similarities between the defendant's back cover illustration and the plaintiff's book, as opposed to "similarities in typeface, poetic meter, whimsical style or visual style." *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

Paramount and *Castle Rock* appear to have confused potential profit for protectable interest. The mere fact that the defendant was attempting to profit by catering to the significant public interest in Seinfeld and Star Trek does not establish any protectable similarity between books discussing the television programs and the programs themselves.

Fair use is structurally unique among all the limitations and exception to copyright rights, because it is both dynamic and contextual. Fair use has a significant structural role in copyright, relying on fair use to make up for erroneous decisions on whether there was presumptively actionable copying in the first place can only further distort and confuse fair use analysis. The structural role of fair use does not include playing catcher every time a judge misses the ball on some other issue.

B. *The Roles of Fair Use*

Given the 1976 Act's grant of expansive and pervasive copyright rights, fair use has a role to play in maintaining a constitutionally acceptable balance between copyright and freedom of speech. This role warrants brief description but is well understood. What is less recognized but equally important is fair use's structural role within copyright.

The First Amendment provides that in part that Congress "shall make no law . . . abridging the freedom of speech."[116] As a consequence, government restrictions on speech, such as laws against flag burning,[117] and private law actions that effect speech, such as libel,[118] are greatly restricted by the First Amendment. Copyright is a federal law that restricts speech by creating an exclusive property right in original expression contained in a tangible medium, albeit for a limited time. The possibility that copyright has a harmful effect on freedom of speech has increased because of the expansion of copyright ownership as discussed in the previous section. Nonetheless, the Supreme Court has consistently held that copyright does not present a danger to freedom of speech because of the idea expression distinction and the fair use doctrine, copyright's "own speech-protective purposes and safeguards."[119]

Fair use serves an important constitutional role in maintaining a balance between establishing incentives for the creation of works and guaranteeing sufficient access to those works to preserve a constitutionally acceptable level of freedom of speech. However, as Rebecca Tushnet

116. U.S. CONST. amend. I.
117. Texas v. Johnson, 491 U.S. 397 (1989).
118. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
119. Eldred v. Ashcroft, 537 U.S. 186, 218–219 (2003); *see also* Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556–558 (1985).

observes, it would be a mistake to simply equate the scope of fair use with the scope of freedom of speech required by the constitution—the two concepts are interrelated but they are not coterminous.[120] More is required of fair use than simply satisfying the requirements of the First Amendment.

Fair use turns out to be the final arbiter of the rights of the copyright owner in a broad range of situations. Current and recently decided fair use cases have asked courts in various jurisdictions to determine whether and to what extent:

- a defendant was entitled to base a test preparation on a copyrighted reference book;[121]
- a large computer hardware manufacturer was entitled to copy illustrations and phrases from a guide to computer injury prevention for use in its own from safety guide;[122]
- a city police department was entitled to display a criminal defendant's photographs in the course of its investigation;[123]
- a hip-hop magazine was entitled to copy and distribute the early unpublished works of a prominent recording artist to expose his alleged racism;[124]
- a public interest group was entitled to publish a private company's internal emails relating to its electronic voting machines, to inform the public about alleged problems associated with those electronic voting machines;[125] and
- a defendant was entitled to publish a book containing its own photographs of the plaintiff's copyrighted Beanie Babies.[126]

It seems unlikely that any consistent theme will emerge from the ultimate disposition or settlement of these cases. Nonetheless, these cases are conceptually linked. In each case the broad statement of the rights of the copyright owner set out in the Copyright Act is incomplete—it does

120. Rebecca Tushnet, Essay, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004). Tushnet argues that fair use alone may not be enough to clear copyright of all First Amendment concerns.

121. Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004).

122. Compaq Computer Corp. v. Ergonome Inc., 387 F.3d 403 (5th Cir. 2004).

123. Shell v. City of Radford, 2005 U.S. Dist. LEXIS 190 (W.D. Va. 2005).

124. Shady Records, Inc. v. Source Enter., 2004 U.S. Dist. LEXIS 26143 (S.D.N.Y. 2004).

125. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004).

126. Ty, Inc. v. Publ'ns Int'l, Ltd., 333 F. Supp. 2d 705, 707 (N.D. Ill. 2004).

not by itself determine the ability of the copyright owner to control the use of his or her work.

While others have suggested that fair use should be seen as more than "a grudgingly tolerated exception to the copyright owner's rights of private property,"[127] typically these explanations stop short with the observation that the exclusive rights can not be absolute.[128] Once that point is conceded, it still remains to be answered why fair use is necessary in addition to the specific statutory exemptions, compulsory licenses and the idea expression distinction.

Indeed, fair use is not a necessary or inevitable feature of copyright law in the abstract. It is nonetheless a fundamental principle of our copyright law today. In theory, the role played by fair use in limiting the rights of copyright owners could be performed by specific statutory exemptions, compulsory licenses, or a more concrete statement of rights in the first place. Alternatively or in addition, we could rely on high enforcement costs, private ordering solutions and norms of forbearance and reciprocity to moderate any adverse effects of overbroad copyright protection.

In spite of the theoretical possibility of copyright without fair use, copyright law has in fact developed a fundamental role for the doctrine. From its inception, the fair use doctrine has facilitated the expansion of copyright by providing a flexible limiting principle that defines the outer limits of the copyright owners' rights.[129] As discussed in the previous section, in 1976 Congress again significantly expanded the rights of copyright owners by rephrasing their exclusive rights in broad technologically neutral terms. At the same time, Congress transferred significant policy making responsibility to the courts by incorporating fair use as a flexible standard in the 1976 Act. It is not a coincidence that Congress chose to codify fair use as a standard at the same time that it radically expanded copyright rights in the 1976 Act.

On an operational level, findings of fair use establish both limits on the rights of copyright owners and affirmative rights in the hands of users. However, it would be a mistake to view the function of fair use as restraining copyright owners or empowering users for its own sake. Structurally, fair use transfers significant policy making responsibility to the judiciary, allowing judges to develop the law in response to external changes. This structural role of fair use is significant because of the perceived inability of the legislative process to keep pace with the demands

127. Leval, *supra* note 29, at 1135–1136.
128. *Id.* at 1136.
129. Sub-section C.1. explains the origins of fair use in more detail.

of rapid technological and social changes. A flexible, forward-looking set of owner's rights, combined with a flexible fair use doctrine, allows Congress to legislate less frequently and entrust significant policy responsibility to the judiciary.

Judicial policy making may trouble those bound up in literalist theories of democracy, but it is not without precedent. Courts exert a significant policy making role in other areas, such as antitrust law. The fair use doctrine requires courts to determine the limits of the copyright monopoly and adapt copyright law in response to both incremental changes and external shocks.[130] The role of fair use is especially significant given the impact of new technology on copyright.[131]

This is not meant to convey the impression that Congress has somehow limited its capacity to provide legislative solutions to the questions raised by new technology. On the contrary, Congress can and should continue to play an active role in the development of copyright law.[132] What it does mean is that Congress does not need to rush to legislative solutions, and that it need not fear that its inaction will bring the system to a grinding halt.

There are two aspects to the structural role of fair use. First, fair use provides the flexible and dynamic boundary on copyright rights that makes their expansive and flexible definition feasible. Second, a flexible and dynamic copyright system necessitates giving judges significant policy making power over both the application of copyright rights and the fair use doctrine. Congress could have relied on specific codified exceptions to the exclusive rights instead of a dynamic fair use standard. However, specific exceptions face the same problems as specific owner's rights—they require constant revision in the face of social and technological changes affecting copyright. The rationale for broad and dynamic exclusive rights is equally applicable to fair use. Flexibility requires delegation. Realistically, Congress is institutionally incapable of legislating on copyright with the frequency that would be demanded under a system with more specific rights and exemptions due

130. Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994). ("The fair use doctrine thus permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.") (internal quotations omitted).

131. In the words of the House Report, "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis." H.R. REP. No. 94-1476 (1976); S. REP. No. 94-473 (1975) at 66.

132. Indeed, Congress has enacted detailed rules regarding the copyright liability of internet service providers, the circumvention of encryption and related matters in the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

to the daily changes in the environment in which those rights are exercised.

Structurally, fair use is both a point of flexibility within copyright and a mechanism of delegation. Copyright protection has lengthened, broadened and deepened as a result of the 1976 Act. Fair use cannot be expected to counteract these reforms, its role is to adapt the law Congress has made to society's changing needs.

C. *The Effect of the Structural Role of Fair Use on Copyright Owners*

Fair use has been characterized as a "tax" on copyright owners, a "subsidy" in favor of particular groups,[133] and a fundamental right of the public in relation to copyrighted works.[134] All of these characterizations miss the mark because of their focus on the case-by-case operation of the fair use doctrine, as opposed to its overall structural function.

Fair use is more than sum total of winners and losers of particular cases. From a structural perspective, fair use provides a point of flexibility in copyright law that facilitates adjustment to unforeseen changes. One implication of fair use's structural role is that that it advantages copyright owners as a class. The claim that fair use systemically advantages copyright owners is not susceptible to empirical proof: it relies on comparison with a non-existent world in there was no fair use doctrine as we know it today. In order to make the case that fair use advantages copyright owners, I examine the origins of the doctrine in the Nineteenth century and the application of fair use today in the debate over private sphere uses of copyrighted works.

1. The Origins of Fair Use

The fair use doctrine emerged as part of copyright's shift in focus in the Nineteenth century from an economic privilege of the printing industry to a system of rights centered around an abstract notion of authorship.[135] In the late 18th and early 19th centuries, copyright in both England and the U.S. was confined to "the sole right and liberty of printing, reprinting, publishing and vending" protected works such as books,

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133. Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997), *available at* http://www.law.berkeley.edu/journals/btlj/articles/vol12/Merges/html/reader.html; *see* Cohen, *supra* note 64, at footnote 5 for other similar references.

134. DanThu Thi Phan, Note, *Will Fair Use Function On The Internet?*, 98 COLUM. L. REV. 169, 212 (1998).

135. Bracha, *supra* note 69.

maps and charts.[136] In spite of the nominal switch from printer's monopoly to author's right achieved by the Statute of Anne in 1710, copyright remained firmly rooted in the practices and technology of printing until the mid-1800s.[137] In the early 1800s, copyright infringement was limited to verbatim reproduction, or replication with only colorable changes made merely to evade the copyright owner's rights.[138]

In 1839 in *Gray v. Russell,* Justice Story signaled his view that copyright infringement should extend well beyond verbatim and evasive reproduction, in order to protect the "quintessence" of the work and its economic value, not just the owner's interest in printing.[139] Justice Story began this expansion in *Gray v. Russell* by qualifying the previously understood position that an abridgment of an existing work did not constitute infringement, a proposition that in Justice Story's words "must be received with many qualifications."[140]

Two years later in the case of *Folsom v. Marsh,*[141] Justice Story was able to further articulate the substance of those qualifications, giving rise to what would become known as the fair use doctrine. Justice Story ruled that to determine whether a selection from a copyrighted work constituted copyright infringement courts must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[142]

This formulation not only encapsulated the fair use doctrine prior to its codification in the 1976 Copyright Act, but the influence of Justice Story's summary also remains discernible in the statute's four factors which dominate judicial analysis of fair use today.[143]

Both *Gray* and *Folsom* cast the rights of the copyright owner in terms of the market value of the work in question, as opposed to narrow

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136. U.S. Copyright Act 1790, Section 1. (Protected matter itself limited to maps, charts and books). English law was similar at the time. Loren, *supra* note 66, 13.

137. The simplicity of this general characterization is not intended to deny the existence of a more complex historical process or suggest that this transformation was entirely even. For a more detailed account, see Bracha, *supra* note 69.

138. *See* Loren, *supra* note 66, 13–15; Bracha, *supra* note 69, at 36; Gyles v. Wilcox, 2 Atk. 141 143, 26 Eng. Rep. 489, 490 (Ch.1740). In *Cary v. Kearsley,* Lord Ellenborough declared, "[the presence of] part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another. he may so make use of another's labors for the promotion of science, and the benefit of the public." Cary v. Kearsley 4 Esp. 168, 170 (1802) (spelling modernized).

139. Gray v. Russell, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5,728).

140. *Id.*

141. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

142. *Id.* at 348.

143. Campbell v. Acuff-Rose Music, 510 U.S. 569, 576 (1994).

rights of literal or evasive reproduction. The centrality of market value in Justice Story's abstraction of the protected work is manifest. In *Gray v. Russell* he explained the need to protect the work, both from extracts that sought to "supersede the original work under the pretence of a review," and abridgments which "by the omission of some unimportant parts . . . prejudice or supersede the original work" or compete with the original in "the same class of readers."[144] These points were reiterated in *Folsom v. Marsh*:

> It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.[145]

Fair use was not only coincident with this significant expansion in the rights of copyright owners, it was the fundamental doctrinal tool facilitating that expansion. During the 19th century, copyright began to outgrow literalism and refocused around a broader and more conceptually challenging notion of the work as an abstract object with economic value. Before fair use, copyright owners' rights were narrowly defined and the public at large retained a broad freedom to, among other things, extract and abridge existing works. Fair use enabled a significant expansion of owners' rights by establishing a limiting principle that subordinated the public's interest in the use of copyrighted works to the owner's economic interests, an irony that is often lost on modern observers.[146] Fair use is seen as a limitation on the rights of copyright owners, but it actually serves a structurally expansive role in relation to those rights.

2. Fair Use and Private Sphere Activity

Operationally, fair use may appear to benefit members of the public by limiting the rights of copyright owners. Nonetheless, structurally, fair use advantages copyright owners as a class by allowing their rights to be more expansively defined *a priori*. This tension between the structural and operational aspects of the fair use doctrine continues into the present

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144. *Gray*, 10 F. Cas. at 1038.

145. Folsom v Marsh 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901) (citations omitted).

146. Bracha, *supra* note 69.

day. The structural role of fair use in this regard can be seen most readily in relation to the regulation of the use of copyrighted material in the private sphere. In the domestic context, fair use has been effectively used by the courts to develop copyright law with more subtlety than Congress could have conceivably achieved legislating before the fact, and possibly even after. This illustrates the interrelationship between fair use's two structural roles. First, fair use is the flexible counter-weight that enables flexible copyright rights. Second, that flexibility is achieved by congressional delegation of substantial policy-making responsibility to the judiciary. The flexible design of both the exclusive rights and of fair use requires judges to adapt copyright to changing circumstances rather than waiting for congressional guidance which may never arrive.

The extent to which copyright owners can regulate the use of copyrighted material in the private sphere is one of the most compelling and enduring issues in modern copyright law. Traditionally, copyright owners have exercised very limited rights with respect to use of their works in the home for a number of reasons: lack of commercial significance of those uses, uncertainty as to the application of the rights, and practical difficulties in enforcement. According to Litman, the scope of allowable copying in the private sphere received little explicit attention in the revision process for the 1976 Act.[147] Congress' failure to say anything on the legality of private copying has been roundly criticized, but unfairly so.[148] Congressional silence on the issue has in fact allowed the law relating to private copying to develop in a more nuanced fashion than would have been possible if Congress had acted more decisively.

Presumably, when the last major revision to Copyright Act was finally passed in 1976, Congress would have been aware that issues would arise in relation to the private use of copyrighted material.[149] Given that awareness, Congress was faced with several choices: (1) make private use expressly immune from copyright; (2) make private use expressly subject to copyright; (3) try to specify which private uses were immune to copyright, leaving the remainder subject to copyright; (4) conversely, try to specify which private uses were subject to copyright, leaving the remainder immune to copyright; or (5) do nothing and leave it to the

147. LITMAN, DIGITAL COPYRIGHT, *supra* note 71, at 52.

148. Litman criticizes the omission because it has allowed regulation of private copying. *Id.* Goldstein takes the opposite view and comments that "[t]he silence of Congress on the issue of private copies has left a black hole in the centre of American copyright legislation." GOLDSTEIN, *supra* note 90, at 107.

149. *See, e.g.*, the exchange between Representative Beister and the Assistant Register of Copyrights in relation to off-the-air recording by consumers. June, 1971, Subcommittee No. 3 of the House Committee on the Judiciary; Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 445 (C.D. Cal. 1979).

courts to determine. As discussed in Part II, in drafting the 1976 Act, Congress was unusually sensitized to its own inability to predict the how technological change would effect the balance between copyright owners and the public. As part of the dynamic structure adopted in 1976, Congress opted by omission to leave questions relating to the private use of copyrighted material to the courts to resolve by applying the fair use doctrine. Doing so was the only practical solution given Congress' preference for expansive and dynamic exclusive rights.

If Congress had taken option 1 in 1976 and exempted private copying of copyrighted works from copyright liability, it would have done so in total ignorance of the potential effects of this choice. In 1976, Congress could not have realized the potential of personal computers and other devices linked via non-commercial peer-to-peer networks to displace commercial distribution of music, film, television, video games, and books.[150] It is now apparent that unauthorized peer-to-peer file-sharing of copyrighted works is unlawful, regardless of whether it is non-commercial or takes place purely within the privacy of private homes or college dormitories.[151] Unlike unauthorized home video recording for the purpose of time-shifting, unauthorized file-sharing is not fair use.[152] The Supreme Court is currently considering under what circumstances the distributors of peer-to-peer file-sharing software may be held liable for uses of their software that infringe third party copyrights.[153] Some commentators argue that unauthorized file-sharing should be treated as fair use, or else covered by some form of compulsory license.[154] Interestingly, Justice Stevens' first draft of the *Sony* decision took the view that the exclusive rights of copyright owners had *no application* in the private sphere as a matter of statutory interpretation.[155] However, since *Sony*, drawing any kind of bright-line distinction between public and private has become increasingly problematic because of the increased capacity of private individuals to rip, mix, burn and most importantly, file-share.

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150. GOLDSTEIN, *supra* note 90, at 106.

151. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1160 (9th Cir. 2004) (direct infringement by users of P2P file-sharing service undisputed); A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (unauthorized P2P file-sharing not fair use).

152. *Id.*

153. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 686 (2004) (certiorari granted).

154. WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004) (compulsory license); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (same); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) (fair use).

155. GOLDSTEIN, *supra* note 90, at 122.

On the other hand, if Congress had adopted option 2 and made no allowance for the private use of copyrighted material, the resulting law would have been both extraordinarily oppressive and unpopular. First, Congress probably could not have anticipated that the exclusive reproduction right it bestowed on copyright owners would be effectively transformed into an exclusive use right in the digital context. Consider that the user of a book simply picks it up and begins to read the equivalent activity in a digital medium requires first making a copy in random access memory of a computer.[156] It is seems unlikely that the public could be expected to tolerate this radical expansion of copyright without some assurance that their rights to use copyrighted material in the ways they had always used it would not be too greatly effected. Fair use provides that assurance, albeit somewhat uncertainly at the margins.

Second, on their face, the exclusive rights of the copyright owner are infringed by any number of seemingly harmless private activities. Examples include: time-shifting broadcast television (copying); converting music on CD into a format compatible with a portable device (also copying);[157] and singing "Happy Birthday To You" at a restaurant open to the public (public performance).[158] That these examples do not constitute copyright infringement illustrates a more general principle: the exclusive

156. *See*, MAI Sys. Corp. v. Peak Computer, Inc. 991 F.2d 511, 518–19 (9th Cir. 1993) *see also*, 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08 (2005).

157. There is considerable debate over whether time shifting and format shifting are in fact harmless, but it is safe to say most people think they are. *See* Mary Madden & Amanda Lenhart, *Music Downloading, File-sharing and Copyright: A Pew Internet Project Data Memo*, July 2003, *available at* http://www.pewinternet.org/reports/pdfs/PIP_Copyright_Memo.pdf (finding that 67% of Internet users who download music don't care whether the music they download is copyrighted). Even the Recording Industry Association of America acknowledges that consumers are entitled to make copies of their own CDs for personal use on computers and portable music players. Presumably, the fair use doctrine is the source of that entitlement. *See* The RIAA website *at* http://www.riaa.com/issues/ask/default.asp#stand. Counsel for the RIAA recently argued in the Supreme Court that "The record companies, have said, for some time now, . . . that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod." Grokster, Oral Argument, March 29, 2005, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf (page 12, lines 3–7). Query whether this apparent concession also applies to Section 1201(a)(3)(A) violations.

158. The Copyright Act only gives copyright owners an exclusive right to the public performance of a musical work, however, the statutory definition of when a work is performed "publicly" appears broad enough to include a restaurant so long as it is "open to the public" or "a substantial number of persons outside of a normal circle of a family and its social acquaintances" can gather there. 17 U.S.C. § 101 (2000). Whether "Happy Birthday To You" is in fact still subject to copyright is subject to some uncertainty, see Litman, *Sharing*, *supra* note 73, at 50 and footnote 111; Scott M. Martin, *The Mythology Of The Public Domain: Exploring The Myths Behind Attacks On The Duration Of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 322, footnote 61 (2002).

rights of copyright owners are not absolute, their application varies according to the context.[159]

The blanket solutions of option 1 and option 2 are infeasible; what of options 3 and 4? To some extent, Congress has pursued option 3 in an attempt to strike a balance between the interests of owners and the public in relation to private use of copyrighted material, by specifying some activities as non-infringing.[160] However, these specific exemptions represent only a small fraction of what the public is in fact entitled to do with copyrighted material in the private sphere.[161] As discussed earlier, the obsolescence of the AHRA illustrates the difficulties of effectively addressing these issues before they occur and the likelihood that existing solutions quickly become stale in the context of fast-changing technology and consumer behavior.[162] Clearly, the limitations that affect option 3 apply with at least equal force to option 4, but the consequences may even greater because of the different default rule.

In the majority of cases, instead of attempting to specify the circumstances in which private uses would or would not constitute copyright infringement, Congress has "taken the fifth" and left it to the courts to make that determination on a case-by-case basis by applying the fair use doctrine.

Judges are of course entitled to question the wisdom of congressional delegation, both in relation to private sphere copying and more generally. Nonetheless, until Congress enacts a more detailed policy, judges are stuck with making most of the hard decisions. The question is, how should they make them?

As discussed in Part I, the four factors contained in the statutory elaboration of the fair use doctrine should be seen as question-framing as opposed to outcome-determinative. Congress has given the courts a framework for deciding fair use cases, however it is still the responsibility of the courts to determine the scope of the copyright owner's rights in particular situations. This explains one half of the structural role of fair use, that it is a standard that shifts policy-making responsibility from the legislature to the judiciary.

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159. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (the law has never recognized an author's right to absolute control of his work).

160. For example, 17 U.S.C. § 117 authorizes the owner of a copy of a computer program to make a copy or adaptation of the program as an essential step in the utilization of the computer program, subject to certain limitations. The same section also authorizes an archival copy. *Id.*

161. In addition to the fair use examples already mentioned in this paper, it should be noted that "[n]o license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975).

162. See notes 104–106 and accompanying text, *supra*.

Structurally, the flexible and dynamic nature of fair use renders it both the counter-weight to, and the enabler of, the equally flexible and dynamic exclusive rights of copyright owners. The structural role of fair use allows the judiciary to adapt copyright law in response to new technologies or other external forces. This is especially significant given the broad expression of copyright owners' exclusive rights in the 1976 Act, and the increased breadth and duration of copyright protection brought about by the abandonment of formalities such as copyright registration, notice and renewal.

One of the more interesting implications of the structural role of fair use is that fair use actually benefits copyright owners as a class by facilitating a more expansive definitions of their rights. This suggests that judges should disregard theories that view fair use as merely a tax on copyright owners, or an *ad hoc* redistribution of entitlements. It also suggests that judges need to carefully consider the allocation of the burden of proof where the defendant raises fair use as a defense to copyright infringement. The jurisprudential implications of the structural role of fair use are considered in the next section.

PART IV—JURISPRUDENTIAL IMPLICATIONS

Judges cannot avoid making copyright policy in fair use cases. As discussed in the preceding sections, the indeterminacy of the statutory fair use factors, and the reluctance (or inability) of the legislature to enact specific rules in response to technological and social changes affecting copyright, necessitates that judges fill in the substantial gaps in copyright law.

How should judges make sense of the jumble of case law and theory of the last 200 years? The preceding structural analysis of fair use suggests that Congress has decided that the indeterminacy of a flexible fair use standard is preferable to the potential rigidity of anything more specific. The Supreme Court has also stressed the benefits of flexibility in its admonition to avoid the application of bright-line rules in fair use.[163] Given this indeterminacy, how can judges decide fair use cases in a principled and non-arbitrary way?

A comprehensive survey of the literature addressing this question is beyond the scope of this article. Nonetheless, it is possible to parse the majority of the literature into three different schools of thought: the cost-benefit analysis school, the external normative framework school, and

163. Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994).

the internal normative framework school. The meaning of these labels will become apparent shortly.

A. *Existing Approaches to Determining Fair Use*

The essence of a cost-benefit analysis approach to fair use is a comparison of the costs versus the benefits of allowing the unauthorized use to continue. However, this simple statement belies the complexity and diversity of opinions as to exactly how such a test might be implemented. Wendy Gordon, for example, proposes that a finding of fair use should be conditioned on the presence of market failure and a cost-benefit analysis that indicates a net gain in social value in allowing the unauthorized use to continue.[164] In contrast to Gordon, Glynn Lunney proposes a pure form of cost-benefit analysis without the filter of market failure.[165] Elsewhere I have undertaken a detailed examination of competing law and economics analyses of fair use.[166]

A few preliminary observations are worth making. First, viewing fair use as market failure necessarily characterizes fair use as an exception the norm of unbounded copyright rights. As has been shown, fair use plays a fundamental role in both bounding and thereby enabling expansive copyright rights; fair use is more than an *ad hoc* exception to market failure. Second, cost-benefit analysis asks judges to undertake a difficult and speculative factual inquiry. In that context, allocation of the burden of proof is likely to be more outcome-determinative than the actual costs and benefits themselves. Third, even if a case-by-case cost-benefit analysis were feasible, its administrative costs may well overshadow any gains in allocative efficiency that it achieves. Consequently, cost-benefit analysis, with or without a prerequisite of market failure, provides little guidance to judges as to how to actually decide fair use cases.

In contrast to the exacting methodology of the cost-benefit approach, a number of judges and scholars have suggested that fair use decisions

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1 64. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1 600,1 61 4(1982). Gordon initially proposed a further requirement that "an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner." However, Gordon herself has subsequently retreated from that very limiting proposition. *See* Wendy J. Gordon, *Market Failure And Intellectual Property: A Response To Professor Lunney*, 82 B.U. L. REV. 1031 ,1 032 (2002). Gordon also stresses that market failure is not confined to transactions costs (as many have assumed) but incorporates, informational asymmetries, endowment effects and negative externalities as well. *Id.*

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

1 66 Matthew Sag, The Law and Economics of Fair Use (2005) (working paper, on file with author).

should be made primarily with recourse to normative conceptions of "the good."[167] Perhaps the most well known proponent of this analysis is William Fisher. Fisher proposes reconstructing the fair use doctrine to "advance a substantive conception of a just and attractive intellectual culture," a vision of "the good life and the sort of society that would facilitate its widespread realization."[168] To achieve this goal, Fisher extrapolates a set of preferences from various schools of political philosophy.[169] While Fisher's proposal is thoughtfully developed, it nonetheless amounts to little more than a collection of thinly substantiated preferences,[170] reflecting *one man's vision* of the good life.[171]

Whether viewed as a subsidy or an entitlement, resorting to normative orderings as a guide for implementing fair use is problematic for at least three reasons. First and most obvious is the difficulty of locating an objective basis for any particular ordering. Second, reliance on preference orderings could easily generate perverse results. For example, allowing a generous scope for fair use in a particular market, such as education materials, might reduce incentives for production in that very market. Third, applying fair use based on preference orderings as opposed to conduct is not a close fit with the objectives of copyright, expressed in the Constitution as the encouragement of the progress of science and the useful arts, not the progress of scientists and useful artists.

Commentators such as Lloyd Weinreb and Michael Madison advocate a variation of grounding fair use decisions on orderings of social preferences.[172] They argue that fair use should concentrate on accepted norms and customary practice as the basis for determining the scope of the copyright owner's legitimate interests. Relying on the wisdom of the past assumes that those norms and practices were appropriate to begin

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167. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting); Merges, *supra* note 133, at 132–35 (advocates express recognition of fair use as both a tax on copyright owners and a subsidy in favor of certain classes of users).

168. William W. Fisher III, *Reconstructing The Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744 (1988).

169. *Id.* at 1745–1762.

170. Fisher's preference for symphonies over television being one example. *Id.* at 1768.

171. See Weinreb, *Fair Use*, *supra* note 68, at 1305 ("To concede that the vision is utopian is not enough, for the vision that Professor Fisher presented is only one utopian vision among a great many.").

172. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. AND MARY L. REV. 1525 (2004) (calling for more explicit acknowledgment of the role of "favored practices" and "accepted patterns" in fair use analysis); Lloyd L. Weinreb *Fair's Fair: A Comment On The Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990), (fairness as compliance with accepted norms and customary practice).

with and are applicable now, both of which may be incorrect. Furthermore, as technology and society continue to change, it will always be contested *whose* accepted norms should be applied or *which* customary practice is most applicable.

For example, file-sharers argue that their activities are consistent with an ethic of sharing and past practices, such as recording and sharing mixed tapes. They equate file-sharing with norms of individual autonomy which thrive on the internet, such as self-expression, and creative collaboration.[173] The recording industry argues that there is no precedent for consumers making perfect substitutes for the industry's products, and that legitimate sharing has never allowed wholesale copying.[174] Opponents of file-sharing equate it with theft and argue that it threatens the livelihoods of authors, artists, and a multi-billion-dollar-a-year industry. Both sides in this debate rely on the virtue of preexisting, but inconsistent, norms and practices; thus illustrating that reliance on existing norms and practices provides little guidance to judges in deciding fair use conflicts.

The third approach to answering this question looks at the fundamental principles underlying copyright law itself. Looking to the institution of copyright itself for the assumptions necessary to form fair use analysis is preferable to an unbounded normative inquiry precisely because it is limited. In spite of its non-statutory nature, transformative use has quickly become the dominant factor in fair use analysis.[175] The Supreme Court derived the transformative use test from its understanding of the purpose of copyright law itself. As the Court explained, the goal of copyright is the promotion of science and the arts, and that in turn requires some freedom for present authors to build on the works of the past:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of

173. Netanel, *supra* note 154, at 2.
174. *Id.*
175. Jeremy Kudon, Note, *Form Over Function: Expanding The Transformative Use Test For Fair Use*, 80 B.U. L. Rev. 579, 597 (2000).

> others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.[176]

From this foundation the Court concluded that transformative works—any work which "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message" to the original—deserve special recognition in fair use.[177]

This paper has proposed a structural understanding of fair use as the mechanism through which Congress has transferred a significant policy making to the judiciary. Judges should recognize fair use decisions as a policy making exercise; however, they should also be cognizant of the appropriate limits of policy making in that context. Specifically, judges should work within the framework that Congress has given them, and that framework is the law of copyright.

Transformative uses are given preference under the theory that encouraging the production of new works that embrace and extend existing works benefits society. The unstated assumption here is either that transformative uses are inherently good or that transformative uses are more likely than non-transformative uses to be welfare enhancing. Both of these assumptions are consistent with the Constitutional mandate for copyright, which is the promotion of the progress of science and useful arts as opposed to the promotion of public welfare in general.[178] Although the preamble does not create a substantive limitation on congressional power,[179] it nonetheless informs our understanding of what copyright is and how the copyright system is supposed to function.

Until now, this approach has been confined to the concept of transformativeness. But it follows from this article's structural analysis that the third approach can be expanded to incorporate other principles from copyright law. Although these principles are also normative, they have greater legitimacy as they are based in doctrinal principles, not just individual preferences. Additionally, these doctrinal norms are at least loosely based on congressional preferences since they are drawn from copyright law and its constitutional mandate.

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176. Justice Story in *Emerson v. Davies*, 8 F. Cas. 615, 619 (CCD Mass. 1845) (No. 4,436); Campbell v. Acuff-Rose Music, 510 U.S. 569, 575 (1994).

177. *Id.* at 579.

178. U.S. CONST. art. I, § 8, cl. 8.

179. *See* Eldred v. Ashcroft, 537 U.S. 186, 211 (2003). Nimmer observes that "In fact, the introductory phrase, rather than constituting a limitation on congressional authority, has for the most part tended to expand such authority." 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2005).

B. *A New Approach: Applying Copyright Principles to Animate Fair Use*

Judge Pierre Leval has urged courts to make transformative use the predominant factor in their analysis and to resist "the impulse to import extraneous policies."[180] Nonetheless, the limitations of transformativeness suggest that other factors must also be considered. Limiting judicial discretion to principles inherent within copyright itself makes sense, but transformative use is not the only animating principle from within copyright law to which judges should look.

Transformative use is far from the end of the fair use inquiry. There are a number of uses that do not appear to be transformative, but are nonetheless fair use. For example, transformative use does not offer a satisfactory explanation for the fair use status of untransformative reproduction of materials for use in the classroom, expressly provided for in Section 107 itself.[181] Nor can it explain the Supreme Court's ruling in *Sony* that noncommercial time-shifting of broadcast television is fair use. Transformative use also fails to provide a convincing explanation of the fair use status of reverse engineering of computer software, discussed in detail below.

In addition to these omissions, transformative use also has an ambiguous relationship with derivative works. As Jeremy Kudon has observed, the definition of derivative work appears to entirely overlap with the concept of transformative use.[182] Distinguishing between infringing derivative works and transformative works requires some concept of what the appropriate boundaries of the copyright owner's derivative rights should be. In many cases, transformativeness appears to be a conclusion rather than a test. Finally, because transformativeness typically applies to critical works such as parody or review, a number of scholars have expressed concern that courts have wrongly perceived some kind of critical element a necessary prerequisite for fair use.[183]

These criticisms do not imply that transformativeness is an inappropriate guiding principle. Rather they show that it can not be the only guiding principle elaborating the meaning and application of fair use. Other fundamental principles of copyright have a role to play in fleshing

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180. Leval, *supra* note 29, at 1135.

181. 17 U.S.C. § 107 (2000). "Notwithstanding the provisions of sections 106 and 106A the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

182. Kudon, *supra* 175, at 592. A problem acknowledged but unresolved in Level's original formulation. *See* Leval, *supra* note 29, at 1111–1112.

183. Bunker, *supra* note 115, at 17.

out fair use, once fair use's structural role is understood. Three key principles from copyright that may also play an animating role in fair use are: the idea expression distinction, consumer autonomy and medium neutrality.[184]

1. The Idea Expression Distinction

Copyright is celebrated as the "engine of free expression" because of the incentives it establishes for the creation and dissemination of information.[185] However, the efficiency of that engine depends on the effectiveness of the idea expression distinction. As the Supreme Court explained in *Harper & Row*, the idea expression distinction "strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."[186] Where particular situations and advances in technology threaten to undermine the idea expression distinction, courts have applied fair use to reinforce this copyright principle.

Cases addressing the reverse engineering of computer software illustrate the importance of applying fair use to preserve the idea expression distinction. Computer programs are written in source code, a human readable language, but they are typically distributed in object code which is only readable by computers.[187] The object code distributed on a compact disc or in the memory of a video game console is protected by copyright.[188] Yet the same object code also contains ideas and performs functions that are not entitled to copyright protection.[189] Unlike other copyright protected works, the unprotectable elements of computer

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184. It is also be arguable that some kind of pro-innovation policy animates the fair use decisions discussed in the remainder of this part. Without negating that view, analytically, the goal of promoting innovation is a second order consideration, not unlike maximizing welfare. Holding that copyright should be applied to increase innovation does not tell you very much about how it should be applied. In contrast, the policy goals identified herein—transformativeness, maintaining the idea expression distinction, consumer autonomy and medium neutrality—are more suggestive of concrete application.

185. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).

186. *Id.* at 556.

187. Source code is translated into a set of instructions for a particular type of machine through a process known as compilation. The resulting object code consists literally of a long sequence of ones and zeros that is then capable of running on a machine; to say that object code is 'read' by the machine does not imply that it is comprehended. For a more detailed discussion see, Daniel Lin, Matthew Sag & Ronald S. Laurie, *Source Code Versus Object Code: Patent Implications for the Open Source Community*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 235.

188. 17 U.S.C. § 102(a) (2000).

189. Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000).

programs distributed in object code are hidden from view. With the right tools, experienced programmers can extract the unprotectable elements from object code, however these methods almost invariably require making an unauthorized copy, or multiple unauthorized copies, of the program.

Federal courts have consistently held that making unauthorized copies of a computer program as a necessary step in reverse engineering is fair use.[190] The Ninth Circuit reverse engineering case of *Sony v. Connectix*,[191] illustrates the centrality of preserving the idea expression distinction and promoting legitimate competition in assessing the fair use status of reverse engineering. From the beginning of its decision, the court emphasized the importance of the idea expression distinction: "[W]e are called upon once again to apply the principles of copyright law to computers and their software, to determine what must be protected as expression and what must be made accessible to the public as function.[192]"

Consistent with its decision in *Sega*,[193] the court held that intermediate copying of software could be protected as fair use if the copying was necessary to gain access to the functional elements of the software.[194] The court based its ruling firmly in the importance of maintaining the idea expression distinction. "We drew this distinction because the Copyright Act protects expression only, not ideas or the functional aspects of a software program. . . . Thus, the fair use doctrine preserves public access to the ideas and functional elements embedded in copyrighted computer software programs."[195]

The Ninth Circuit decided that the first fair use factor, the nature and purpose of the use, favored the defendant in this case because it deemed reverse engineering to be legitimate purpose based on its understanding of the requirements of the idea expression distinction.[196] To comply with the perceived requirement that all fair uses must be transformative, the court unconvincingly asserted that the defendant's product was "mod-

190. *E.g.*, *Sony*, 203 F.3d at 602, *cert. denied*, 531 U.S. 871 (2000); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832 (Fed. Cir. 1992); Sega Enter. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1520 (9th Cir. 1992); *see also* David A. Rice, *Copyright and Contract: Preemption After* Bowers v. Baystate, 9 ROGER WILLIAMS U. L. REV. 595, 601 n.19 (2004) (further references).

191. *Sony*, 203 F.3d 596.

192. *Id.* at 598.

193. 977 F.2d 1510.

194. *Sony*, 203 F.3d at 604; *Sega*, 977 F.2d at 1524–26.

195. *Sony*, 203 F.3d at 603.

196. *Id.* at 607.

estly transformative,"[197] a conclusion based solely on characteristics of the defendant's non-infringing end product rather than its intermediate copying. The court was distorting the concept of transformativeness because it clearly considered that fair use should apply to reverse engineering. If the court had recognized that other principles of copyright can guide the application of fair use, not just transformativeness, these judicial acrobatics would have been unnecessary. The importance of the idea expression distinction alone should have been enough to include reverse engineering within the contours of fair use.

The Ninth Circuit's understanding of the idea expression distinction was also central to its determination of the market effect of Connectix's reverse engineering, the fourth fair use factor. The fourth factor requires courts to look beyond the mere presence of an effect on the market or potential market of the copyright owner and ask whether the market so effected is one which copyright protects. In *Campbell*, the Supreme Court quite plainly differentiated the copyright owner's general economic interests from the limited protection afforded by copyright.[198] Copyright neither protects the copyright owner from parody, nor recognizes a protectable derivative market for criticism in general.[199] Just as *Campbell* recognizes that criticism is outside of the copyright owner's protectable sphere of interest, the reverse engineering cases recognize that the copyright owner has no protectable interest in preventing the copying of unprotectable expression and ideas buried within its object code. In *Sony v Connectix*, the Ninth Circuit held that although the defendant's Virtual Game Station console directly competed with Sony in the market for gaming platforms compatible with Sony games, the Virtual Game Station was a "legitimate competitor" in that market.[200] The court concluded that Sony's desire to control the market for gaming platforms was "understandable" but that "copyright law . . . does not confer such a monopoly."[201] Principles such as the idea expression distinction inform the *a priori* assumptions that courts must make before they can apply the fair use doctrine in general or the four statutory factors in particular.

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197. *Id.* at 606.

198. Campbell v. Acuff-Rose Music, 510 U.S. 569, 591–592 (1994).

199. *Id.* at 592.

200. Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 607 (9th Cir. 2000); *see also*, Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522–23 (9th Cir. 1993).

201. *Sony*, 203 F.3d at 607; *see also*, *Sega*, 977 F.2d at 1523–24 (An attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine).

2. Consumer Autonomy

Justifying fair use in terms of critical transformative appropriation, or the necessity of maintaining the idea expression distinction, may address the majority of fair use decisions that courts are called on to make. They do not, however, bring us any closer to rationalizing the fair use status of uncritical appropriation, such as consumer time shifting which was the subject of the Supreme Court's decision in *Sony*. This subsection speculates that in addition to transformativeness and preserving the idea expression distinction, there is a third guiding principle that can be read into copyright—consumer autonomy.

Copyright's first sale doctrine and significant cases in other areas, such as *Sony*, appear to hinge upon an underlying notion of consumer autonomy. This principle has not been explicitly articulated in the cases, but it is both a normatively appealing concept and it provides a principled explanation for a range of developments. If consumer autonomy does come to be recognized by the courts, it too should be a copyright principle used to elucidate fair use.

To the extent that a principle of consumer autonomy exists, it is based on a combination of the first sale doctrine and the omission of "use" from the exclusive rights of the copyright owner. Under the first sale doctrine, the copyright owner's exclusive right to distribute a work is limited to its first sale; the owner of a copy of a work is entitled to sell or otherwise dispose of that copy without permission from the copyright owner, so long as the copy was lawfully made in the first place.[202] The copyright owner has the sole right to make copies and sell them, but for each copy sold, the owner's right to control distribution of any particular copy is exhausted by the first sale of *that copy*. According to the Supreme Court, "[t]he whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution."[203]

It has been suggested that the first sale doctrine has been weakened by technological changes, especially in the realm of computer software.[204] Several courts have now accepted the proposition that the transfer of data from a permanent storage device to a computer's random access memory ("RAM") constitutes a "copying" for purposes of copy-

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202. 17 U.S.C. § 109(a) (2000), but note the exclusions in 109(b).

203. Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 152 (1998).

204. For a nuanced discussion of the impact of technology on the first sale doctrine, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. Rev 577 (2003).

right law.[205] However, Section 117 of the Copyright Act limits the exclusive rights of the copyright owner with respect to computer programs. That section provides that the owner of a copy of a program is entitled to load a copy of that program to the computer's RAM if that is "an essential step in the utilization of the computer program in conjunction with a machine."[206] How far the RAM copying doctrine really extends the right of copyright owners to effectively control the "use" of their software depends on the proper interpretation the Section 117 exemption.[207]

The first sale doctrine combined with the absence of any "use" right in copyright allow a strong degree of autonomy for consumers; copyright owners are generally unable to control the use (as opposed to copying) of their works by the public. For example, the seller of a remotely activated garage door (operated by embedded software) has no right to control how many times it is opened or which brand of garage door opener is used to open it.[208] Similarly, the publisher of a magazine presumably has no right to control the order in which individual copies are read by consumers.

In the *Galoob* case,[209] the Ninth Circuit concluded that the Game Genie, a device that enhanced the operation of the Nintendo gaming platform (by allowing players to move differently and have more lives), did not infringe Nintendo's copyright because it neither copied Nintendo's games nor made derivative works of them.[210] The court declined to stretch the definition of derivative work to include altering the way a video game was played, for fear of chilling innovation in computer applications.[211] The court concluded that a program or device that improves the performance of a copyrighted program without copying it does not

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205. Stenograph L.L.C. v. Bossard Assocs. Inc., 144 F.3d 96, 101–02 (D.C. Cir. 1998); MAI Sys. Corp. v. Peak Computer, 991 F.2d 511, 518 (9th Cir. 1993). In addition to the DC Circuit and the Ninth Circuit, the RAM copying doctrine has been accepted by a number of lower courts, although implicitly rejected by others. *See* Anthony Reece, *The Public Display Right: The Copyright Act's Neglected Solution To The Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 139 and the cases cited therein.

206. 17 U.S.C. § 117 (2000).

207. Indeed, a recent Second Circuit decision gives a very broad scope to section 117, Krause v. Titleserv, Inc., 402 F.3d 119 (2d Cir., 2005). (Defendant's bug fixing, updating, conversion to windows-based system and adding features to software held within scope of essential steps in the utilization of the programs within the meaning of § 117(a)(1).) *See generally*, 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08 (2005).

208. Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1187 (Fed. Cir. 2004).

209. Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992).

210. *Id.* at 969.

211. *Id.*

create a derivative work of the initial program, even if it changes the way the initial program is perceived or displayed.[212]

Arguably, these cases and the first sale doctrine itself rest on the logic of a principle of consumer autonomy.[213] Nonetheless, the question remains: is there a freestanding principle of consumer autonomy that can inform fair use analysis, assuming that one or more of the copyright owner's exclusive rights appear to have been infringed? *Sony* sheds some light on this question.

In *Sony,* the majority explained that although consumers who engaged in time-shifting of broadcast television copied the entire program—a factor that usually weighs heavily against fair use—the extent of their copying did not have its ordinary effect because "time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge."[214] In other words, once a copyrighted work is lawfully placed into the hands of a consumer, the consumer is free to consume the product as she chooses, regardless of whether the copyright owner would prefer that she consume in some other fashion.

The same logic was applied in *Galoob,* where the Ninth Circuit held that even if the Game Genie created a derivative work (they held it did not), consumers were nonetheless entitled to use the Game Genie in conjunction with games they had lawfully acquired.[215] In both *Sony* and *Galoob*, the courts held that copyright owner's exclusive rights did not reach so far as to control the precise manner in which consumers used their works, provided that consumers paid the going price.

A principle of consumer autonomy is also evident in Recording Industry Association of America's ("RIAA") ill-fated challenge to portable MP3 players.[216] The RIAA sought to enjoin the manufacture and distribution of Diamond Rio's MP3 player, alleging that it did not meet the requirements for digital audio recording devices under the AHRA.[217] As a

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212. *Id.*

213. *See also* Krause v. Titleserv, Inc., 402 F.3d 119 (2d Cir. 2005).

214. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 449-450 (1984).

215. *Lewis Galoob Toys*, 964 F.2d at 971 (consumers are not invited to witness Nintendo's audiovisual displays free of charge, but, once they have paid to do so, the fact that the derivative works created by the Game Genie are comprised almost entirely of Nintendo's copyrighted displays does not militate against a finding of fair use).

216. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. 1999). The RIAA has apparently had a change of heart on this issue, see footnote 157, *supra*.

217. 17 U.S.C. §§ 1002(a)(1), (2) (2000) (digital audio recording device required to conform to the Serial Copy Management System); *Recording Indus. Ass'n of Am.*, 180 F.3d 1072.

matter of statutory interpretation, the court held that the AHRA did not apply to either a computer hard-drive, or a device that merely received files from a computer hard-drive.[218] In passing, the court commented on the purpose of the AHRA, which it viewed as "the facilitation of personal use."[219] The court adopted the words of the House report, explaining that the AHRA's home taping exemption, "protects all noncommercial copying by consumers of digital and analog musical recordings."[220] Echoing *Sony*, the court analogized transferring music from a CD to a portable MP3 player to recording broadcast television for the purpose of time-shifting. "The Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."[221]

The idea of consumer autonomy as a guiding principle for fair use can, of course, be taken too far. There is an important distinction to made between consumer autonomy for *consumers acting as consumers* as opposed to *consumers acting as potential rivals* of the copyright owner. In *Napster*, the district court held that the copying which the file-sharing service facilitated did not qualify as "personal use in the traditional sense."[222] The district court saw "critical differences" between Napster's try-then-buy argument[223] and the use of VCRs for time-shifting. An individual Napster user "who downloads a copy of a song to her hard drive may make that song available to millions of other individuals, even if she eventually chooses to purchase the CD,"[224] whereas time-shifting broadcast television or space-shifting music to a portable device does not distribute the copyrighted work beyond the intended user. On appeal the Ninth Circuit similarly distinguished the "shifting" analyses of *Sony* and *Diamond* because of the difference between personal use and distribution of the work.[225] So, clearly multiple courts are at least implicitly adopting an underlying concept of consumer autonomy.

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218. *Id.* at 1078–1079.

219. *Id.* at 1079; *see also* Senate report 102–294, "the purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use." S. REP. No. 102-294, at 30 (1992).

220. 17 U.S.C. § 1008 (2000), *see* H.R. REP. No. 102-873(I), at 6 (1992).

221. *Recording Indus. Ass'n of Am.*, 180 F.3d at 1079 (citation & quote omitted).

222. A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 913 (N.D .Cal. 2000).

223. Napster argued that unauthorized file-sharing did not have an adverse market effect on copyright owners because file-sharers might become consumers after sampling music online.

224. *A & M Records*, 114 F. Supp. 2d at 913.

225. A&M Records v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) ("Both Diamond and Sony are inapposite because the methods of shifting in these cases did not also

Various copyright doctrines either facilitate or restrict the practice of price discrimination. Price discrimination describes any situation where the seller is able to charge customers differently, based upon their individual valuation for the product. Copyright allows publishers to charge a dedicated Stephen King fan a higher price than someone the public at large by facilitating temporal market segmentation and versioning. Hardcover books are released earlier than cheaper paperbacks and are also more durable, yet they are essentially the same product at a much higher price. In theory, perfect (first order) price discrimination mitigates the dead weight loss associated with monopoly pricing. However, it is important to note that the kind of imperfect (second order) price discrimination practiced by copyright owners is not necessarily efficient.[226] Price discrimination is neither invariably a social good, nor is it always encouraged by copyright and other laws. Most obviously, the first sale doctrine limits a copyright owner's control of her products once released into the stream of commerce.[227] There is no absolute right to price discriminate. Nonetheless, before they can fully embrace the notion of consumer autonomy as an animating principle in fair use cases, courts should consider whether the copyright owner has an interest in price discrimination that outweighs considerations of consumer autonomy.

It is conceded that the principle of consumer autonomy does not emerge as clearly as the idea expression distinction. Nevertheless, there is some support for the notion of consumer autonomy as a fundamental principle of copyright. Indeed it is difficult to explain the evidentiary presumptions applied in *Sony* on any other theory.

3. Medium Neutrality

Finally, in addition to copyright's preference for transformative uses, maintaining the idea expression distinction and (possibly) preserving consumer autonomy, fair use analysis should also recognize the importance of medium neutrality. Medium neutrality is the principle that a use should not receive less protection, simply by virtue of being expressed in a different medium.

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simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user.").

226. Michael J. Meurer, *Copyright Law And Price Discrimination*, 23 CARDOZO L. REV. 55 (2001) (belief that price discrimination has mostly positive effects on social welfare predominant but mistaken).

227. Also, antitrust law prohibits resale price maintenance. For a more detailed discussion of the uncertain case for price discrimination in the context of intellectual property, see *id.*; see also James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007 (2000).

Medium neutrality is not a principle inherent to copyright in the same way as those listed above. However, it provides a useful reality check against importing unwarranted assumptions as to the illegitimacy of non-mainstream points of view and non-mainstream vehicles of expression. There is no reason to reject the unequal treatment of different media of expression out of hand, but unless Congress has indicated a preference for or against a particular medium, courts should at least be suspicious of analysis that leads to unequal treatment.

Again, the reverse engineering cases provide support for the idea of medium neutrality in the sense of preserving the idea expression distinction in computer software. The abstract idea of a storyline is not protected by copyright, even if it is contained in the text of a protected novel, nor are facts, dates and historical events, even if they are contained in a protected history book. Medium neutrality dictates that uncopyrightable programming structures and APIs should not receive special protection by virtue of being released in object code which makes them unreadable to humans. Consistent with the principle of medium neutrality, courts allow reverse engineering of object code to discover these unprotectable elements. Achieving substantive medium neutrality may require formally differentiated treatment. In the reverse engineering cases, computer software in the form of object code is treated differently, i.e. exposed to more copying, to ensure that works expressed in that medium comply with the idea expression distinction.

Computer software is not exceptional in this regard. Even within more conventional media, there is a strong case for a presumption of neutrality. For example, a recent Eleventh Circuit decision, *SunTrust Bank v. Houghton Mifflin Co.*,[228] indicates that courts attempt to accord equal treatment and respect to all forms of criticism, even if some necessitate more copying than others. In that case, the court ruled that Alice Randall's retelling of "Gone With The Wind" ("GWTW") from the perspective of Scarlet's African-American half-sister was clearly a criticism and a parody of the original. Using this literary device as the vehicle for her rejoinder to the perceived racism of GWTW[229] required Randall to

228. 268 F.3d 1257 (11th Cir. 2001).

229. *Id.* at 1269–1270. ("In the world of GWTW, the white characters comprise a noble aristocracy whose idyllic existence is upset only by the intrusion of Yankee soldiers, and, eventually, by the liberation of the black slaves. Through her characters as well as through direct narration, Mitchell describes how both blacks and whites were purportedly better off in the days of slavery: "The more I see of emancipation the more criminal I think it is. It's just ruined the darkies," says Scarlett O'Hara. Free blacks are described as "creatures of small intelligence . . . like monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild—either from perverse pleasure in destruction or simply because of their ignorance.") (citations omitted).

appropriate much more of the original than would have been required for other methods, such as a literary essay.

In a very strong statement suggesting the importance of medium neutrality, the Eleventh Circuit held, "[t]he fact that Randall chose to convey her criticisms of GWTW through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive TWDG of fair-use protection."[230]

The court held that even though Randall had made extensive use of characters, plot points and settings in GWTW, her work was capable of fair use protection because the extent of that borrowing was required by the critical genre she had chosen.[231] What separates Randall's work from mere fan fiction is its critical element—the court was convinced that Randall's book was "principally and purposefully a critical statement."[232] Based on that conviction it was willing to allow Randall enough freedom to achieve her critical purpose in her chosen medium. This lends support to the argument that medium neutrality is an important copyright principle, and so should be incorporated into fair use analysis.

C. *Assessment*

Fair use would be much more certain and much easier to administer if Congress had formulated policy more completely and given courts a set of bright-line rules to follow. Instead, Congress has relieved itself of the burden of difficult decisions and left the judiciary to apply a vague and open-ended standard. The merits of this choice are debatable, but the consequences for judges in fair use cases seem clear—they have no choice but to engage in policy making.

In this paper I have suggested that in order to make policy in relation to fair use, judges should restrict themselves to one toolkit—principles derived from copyright law. This approach lacks the lure of simple and immediate answers offered by a cost-benefit analysis, but it is a far more realistic exercise to expect judges to undertake, given the limits of judicial resources and the speculative nature of any case-by-case empirical inquiry. The approach suggested here must also be contrasted against that of encouraging courts to justify their assumptions in terms of an unlimited normative inquiry, or the closely related proposition of accepted norms and customary practice. Confining a judge's search for grounding assumptions to principles she can justify in terms of copyright law itself is still a normative exercise, but it is a sharply more limited one. These limits are

230. *Id.* at 1269.
231. *Id.* at 1267.
232. *Id.* at 1270.

important because they will, over time, lead to the development of a more stable and predictable fair use jurisprudence.

Conclusion

Deus ex machina, literally "god from the machine," refers to the resolution of an apparently insoluble crisis through divine intervention. In ancient Greek dramas, an intervening god was often brought on stage by an elaborate piece of equipment; thus the expression, god from the machine. Fair use is the god in the copyright machine. Unlike the Greek gods, who were unconstrained by reality, fair use does not dissolve the inherent conflict arising from opposing interests, but it is the mechanism for their resolution.

Law and technology interact with consequences that are fundamentally unpredictable. What is predictable is that copyright law will need to be continually adapted to the demands of changing circumstances. Fair use plays a vital role in the copyright system by facilitating change. The flexibility of both the rights of copyright owners, and the fair use that can be made of copyrighted works, stems from Congress' delegation of policy-making responsibility to the judiciary. Fair use is the structure through which the conflict between the needs for certainty and adaptability can be resolved.

Fair use has a curious and misunderstood relationship with the rights of copyright owners. Many emphasize fair use's role in limiting those rights. However, the fair use doctrine has also enabled the expansion of copyright rights, precisely because it establishes a flexible boundary on those rights. Historically, and in a contemporary setting, fair use has benefited copyright owners by facilitating a more expansive and dynamic definition of their rights than would be otherwise possible.

Those who see fair use as stemming the tide of copyright expansion are bound to be disappointed. Congress has seen fit to radically expand the application, duration and scope of rights associated with copyright. There is little point wishing the courts would apply the fair use doctrine in order to derail this agenda. Nonetheless, fair use remains an important counterweight to the broad rights of copyright owners. Properly applied, fair use ensures significant freedom for criticism, commentary, reference, innovation and experimentation. Congress has delegated substantial policy making discretion to judges so that they can apply fair use in this fashion, as changing circumstances require. The structural analysis of fair use advanced in this article shows that fair use is actually working as intended: fair use is not the failed protector of the status quo, but rather it is the successful agent of change in a complex and dynamic copyright system.