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Fair Use, 'Fared Use,' and Public Rights: Amending Section 107

By

Wendy J. Gordon and Daniel Bahls[1]

I. Introduction

Under provocative titles like "Fared Use"[2] and "the end of friction,"[3] commentators argue about

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 Wendy Gordon is Professor of Law and Paul J. Liacos Scholar in Law at the Boston University School of Law. Daniel Bahls is a 2007 *Magna Cum Laude* graduate of BU Law and a 2004 graduate of Williams College. A preliminary version of this paper was presented at the conference, "Exploring the Boundaries of IP Law", at IDC Radzyner School of Law, Herzliya, Israel.

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2 Tom Bell, *Fair Use vs. Fared Use: The Impact Of Automated Rights Management On Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

3 Robert P. Merges, *The End of Friction? Property rights and the contract in the 'Newtonian' world of on-line commerce*, 12 BERKELEY TECH. L.J. 115, 130 (1997). Also see, e.g. Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975 (2002). For a particularly powerful rejection of the view that 'market failure' is so limited, see Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

the viability of copyright's fair use[4] doctrine in a world of instantaneous transactions. As collecting societies such as the Copyright Clearance Center extend their licensing prowess, and Internet-based electronic commerce has made it possible to purchase digital copies with the click of a mouse, the suggestion is sometimes made that fair use could or should disappear. Decisions in the Second and Sixth Circuits have hinted that fair use may be foreclosed if a licensing market exists or is possible.[5] The presence of 'traditional, reasonable, or likely to be developed markets', they say, counts heavily against fair use,[6] although a later decision suggests that fair use might still be viable in the ill-defined realm of transformative uses.[7] For exact copies, it seems, the presence of a licensing mechanism might be fatal to fair use.[8] This is a perilous direction for copyright law.[9]

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4 Fair use allows the unconsented use of a copyrighted work. Developed as a judicial doctrine, fair use was eventually codified, although Congress gave ample warnings in the legislative history that judges should continue to use the precedent and not be constrained by the statute. The fair use provision can be found at 17 U.S.C. §107.

5 *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994); *Princeton University Press v. Michigan Document Services*, Inc., 99 F. 3d 1381 (6th Cir. 1996). Noted the *Texaco* court:
"(I)t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. ... [A]n unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use." 60 F. 3d 913, 930-31. On the dangers posed by this approach, see, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007); Loren, *supra* note [3], at 6,7 (regarding the ability of copyright owners to manipulate licensing markets).

6 *See Texaco*, 60 F.3d at 936. How heavily such markets should count is unclear. Some observers see "the absence of market failure" as "the conclusive rationale for rulings against fair use" in both *Texaco* and *Michigan Documents*. Ben Depoorter & Francesco Parisi, *Fair Use And Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453, 456 (2000).

7 The Second Circuit resisted the notion that willingness to license will always count heavily against fair use, but seemed to limit its new insight to cases of 'transformative' uses. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006). Admittedly the *Bill Graham Archives* court gives an immensely broad reading to 'transformative'. (It counts as "transformative" the exact but tiny replication of copyrighted concert posters in a book about the Grateful Dead). Nevertheless the *Bill Graham Archives* court doesn't go far enough.

8 But see, e.g., Jessica Litman, Lawful Personal Use, Tex. L Rev. (2007); Pamela Samuelson, The Generativity of *Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens, 74 Fordham L. Rev. 1831 (2006) (discussing various kinds of exact copies that should qualify as fair uses).

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9 It needs to be clear that any reproduction-- whether or not it can be seen as 'transformative'' -- can potentially need and deserve fair use, despite the presence of an owner willing to license. On the importance that non-transformative speech can have, see, e.g., Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 546 (2004) (the importance of exact replication); Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1591 (1993) ("Sometimes particular words are essential.") (Hereinafter, Gordon, *Self-Expression*); Gordon, *Do We Have a Right to*

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Contributing to this dangerous direction is a misunderstanding of how 'market failure' relates to fair use. The interpretation is often erroneously attributed to an article that one of us wrote in 1982. That 1982 article, *Fair Use as Market Failure,*[10] urged the courts to confirm that fair use was an appropriate response to situations where, if copyright were enforced over the contested usage, no licensing would occur and socially valuable uses would decrease. In other words, the article argued that the fair use doctrine embraced a user liberty to make exact copies when transaction-cost barriers between user and copyright owner were so high that no licenses would be likely to result even if the copyright were enforced.

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Such a 'market barrier' rationale for fair use had been implicit in some earlier cases, notably the 1973 case of *Williams & Wilkins v. United States.*[11] The rationale had not had not yet been fully understood, however, and in 1981 a liberty to make exact home copies had in fact been repudiated by the Ninth Circuit Court of Appeals, despite the apparent lack of any plausible route through which such home copies could have been licensed.[12] Therefore, it was important at the time to articulate that free use might appropriately be premised upon a consumer's inability to purchase copies through any plausibly convenient mechanism. But that 1982 article did not argue for displacement of other justifications for fair use. (Indeed, the article canvassed a number of fair use types to show how they corresponded to inadequacies of the market *other than* the inadequacy of 'transaction cost barriers that prevent licenses.') In short, the 1982 article only sought to secure a place for an additional fair use category, not to truncate any of the other bases for fair use. Nevertheless, a market-failure approach to

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Speak with Another's Language? Eldred and the Duration of Copyright, in COPYRIGHT AND HUMAN RIGHTS 109-129 (PAUL L.C. TORREMANS, ED., Kluwer Publishing 2004).

10 Wendy J. Gordon, *Fair Use as Market Failure* 82 COLUM. L.REV. 1600 (1982).

11 *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353, 203 Ct.Cl. 74 (1973), aff'd by an equally divided court, 420 U.S. 376 (1975) (per curiam).

12 *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir.1981), rev'd Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

fair use has persuaded some commentators to present transaction-cost barriers between copyright claimant and potential utilizer[13] as if it were the sole basis for fair use.[14] Thus, as the internet and other licensing mechanisms now proliferate, some argue that fair use should correspondingly diminish.

We disagree. While we believe that fair use has been justified on other grounds in the caselaw, we suggest in this article for dispelling the ambiguity on this point by amendingthe fair use provision to make clear that the availability of licensing does not foreclose the possibility of fair use. In the process, we will discuss some of the bases for triggering a fair use analysis that exist *independent of the presence of high transaction cost barriers between the copyright claimant and the potential utilizer.*[15]

In addition to addressing the 'fared use' issue, this article also suggests that the statute be amended to make clear that fair use is an affirmative right.[16] This may seem unnecessary because the statute already specifies that fair uses are not an infringement of copyright, which is equivalent to

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13 Obviously, transaction costs play roles beyond setting up barriers between copyright claimant and potential utilizer. It is transaction costs that are responsible for "externalities", including the positive externalities generated by some users (like teachers, students, artists) who can't capture in their pockets all the value they generate. When such a user is the defendant, the positive externalities she generates provide another possible basis for fair use. See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 49-50 (1997); Gordon, *Fair Use as Market Failure,* at 1630-1631, My thanks to Gideon Parchomovsky for reminding us to make this explicit.

14 Exceptions exist, of course, including Lydia Loren's excellent article, *supra,* note [3]; For Gordon's own responses, see, e.g., Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney* 82 B.U.L. REV. 1021 (2002); Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only* Part *of the Story,* 13 J. COPYRIGHT SOC'Y 149-197 (Fiftieth Anniversary Issue 2003); Wendy J. Gordon, *The 'Why' of Markets: Copyright and Fair Use,* 116 YALE L.J. POCKET PART 358 (2007), *available at* http://yalelawjournal.org/2007/4/25/gordon.html.
Also, for independent justifications for fair use, see see, e.g. Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use,*; Wendy J. Gordon, *Self Expression, Supra* note [8] at 1555 et seq..

15 A preliminary catalogue, analyzed from an economic perspective, appeared in Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors* ,82 Colum. L. Rev. 1600, 1627-33 (1982).The categories there presented were market barriers, externalities, non-monetizable interests, non-commercial activities, and anti-dissemination motives. *Id.*

16 Prior commentators have also urged recognition of 'user's rights' as their own categories. *See,* notably, Jessica Litman, The Exclusive Right to Read,13 Cardozo Arts & Entertainment Law Journal 29, 53 (1994). Richard Stallman, in a piece of dystopic science fiction, even imagined a revolution premised on part on the desire to recapture for the people 'the right to read." Richard Stallman, *The Right to Read,* 40 Communications of the ACM (February 1997) (*available at* http://www.gnu.org/philosophy/right-to-read.html); *see, also, e.g., See,* also, Julie Cohen, *The Place of the User in Copyright Law,* 74 FORDHAM L. REV. 347, 373 (2005).

Recently the Supreme Court of Canada has explicitly articulated fair use as a user's right. *CCH Canadian Ltd. vs. The Law Society of Upper Canada*1 S.C.R. 339 (2004), discussed further infra at __.

saying that fair uses are an area of liberty. (In post-Hofeldian terms,[17] where there is no infringement, the copyright owner has "no claim rights", and the public has correlative 'liberties'. Conversely, [18] the copyright owner has 'claim rights' in his areas of exclusivity, and in those domains the public has correlative 'duties'.) So the public already has liberty rights of fair use.

That is true; the liberty already exists. Calling it a "right" however, emphasizes that the liberty of fair use is an entitlement under both our statutory scheme and our traditions.

[transition is rough here] Courts in the pre-emption area sometimes have trouble seeing that fair use is a crucial part of the Congressional balance. [not enough detail] But of course fair use should play a role in preemption cases: when analyzing whether federal copyright preempts a state law claim,

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17 *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917); Wesley N. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (W. Cook ed., Yale University Press 1923). Our use of terms is *post* Hohfeldian in two respects: instead of 'right' we prefer 'claim right', and instead of 'privilege' we prefer 'liberty'.

To explain the first terminological change: The ability to enlist governmental assistance is known in Hohfeld's system as a "right". Recent commentators tend to use the term "claim right" instead, and we follow that newer usage. Substituting "claim right" for Hohfeldian "right" is helpful in avoiding confusion, since many the legal relations Hohfeld lists are also colloquially known as 'rights'. (For example, Hohfeld distinguishes 'rights' from 'powers' and 'privileges', yet the Hohfeldian 'power' to contract is colloquially known as the 'right' to contract, and the Hohfeldian 'privilege' of self-defense is colloquially known as the 'right' of self-defense.) Therefore we, too, will use the term 'claim right' (instead of simple 'right') to denote the ability to enlist governmental power.

Regarding the second terminological change, from 'privilege' to 'liberty': Hohfeld used the term 'privilege' to denote an area where persons are free of governmental restraint. He had in mind privileges like self-defense, which immunized an actor from ordinary tort liability. More public-oriented privileges (like the freedom from governmental restraint embodied in the First Amendment) were largely outside Hohfeld's areas of doctrinal concern. Most of us would feel awkward calling something like free speech a "privilege" since the word "privilege" connotes something that is extra or undeserved. I doubt Hohfeld intended his use of "privilege" to have such pejorative connotations-- I see "privilege" as simply the word that came to mind given his doctrinal contexts. The word "liberty" is just as accurate, and free of the negative connotation.

"Privilege" also has another difficulty in the copyright context: historically, the term "privilege" meant a law that applied to only one individual--such as a royal monopoly to sell salt or the monopoly to sell books-- granted for reasons unrelated to creativity or invention. *See, e.g.*, BLACK'S LAW DICTIONARY 1217 (7th ed. 1999); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History 1550-1800*, 52 HASTINGS L.J. 1255, 1561 (2001) ("[L]etters patent had nothing to do with legal rights or even inventions per se, but rather they represented royal privileges that supported royal policies. In this case, the royal policy was the introduction of new industries and manufactures to the realm, and the royal privilege was a monopoly grant ascertained through a letter patent.")

18 See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 746-47 (1917); Wesley Newcomb Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (W. Cook ed. 1923). Our use of terms is *post*-Hohfeldian in two respects: instead of 'right' we prefer 'claim right', and instead of 'privilege' we prefer 'liberty'. The reason for our change in terminology is explained in the preceding note.

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the state law's interference with Congressional and constitutional policy is crucial. Yet courts sometimes construe fair use narrowly as if it were a grudging exception to the Congressional scheme. The "rights" nomenclature on the user side may be of assistance here.[19]

In addition, courts have sometimes put the burden of proving fair use on the defendant by construing the current statute as treating fair use as an 'affirmative defense'. [Don't forget that Sony presumed that private noncommercial use was fair and put the burden on plaintiffs to overcome the presumption] Our proposal will allow courts to make more sensitive, policy-based decisions on pre-emption and burden of proof issues.

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We also suggest eliminating the first few words of the fair use provision, which reference "the provisions of sections 106 and 106A". These words can be interpreted to exclude DMCA defendants from calling on fair use.[20] [You should cite also to Chamberlain which construes 1201(c)(1) as a fair use preservation provision.] The omission of these words will make clear(er) that fair use applies to the DMCA anti-circumvention rules as well.[21]

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Our article relegates our discussion of the DMCA issue to the footnotes. The proposition that fair use should apply (or does apply) to the DMCA has been well-argued by others, and raises some

19 A related difficulty is the refusal of some courts to consider that copyright should sometimes preempt the enforcement of mass-market shrinkwrap and clickthrough licenses. See, e.g., Pro CD v Zeidenberg, 6 F.3d 1447 (7th Cir. 1996) and the criticism of that case in Wendy J. Gordon *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHICAGO-KENT LAW REVIEW 1367-90 (1998) (part of the SYMPOSIUM ON THE INTERNET AND LEGAL THEORY), reprinted in 5 INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW at 116-137 (DAVID VAVER, ED., Routledge, 2006).

An additional challenge is the refusal of some courts to see that, both within and alongside the "equivalent rights and subject matter" language of § 301, a court must engage in a 'conflicts' analysis when preemption is at issue.

20 Although at least one court has speculated that fair use would not apply in DMCA actions, *see* Universal City Studios, Inc v. Reimerdes, 111 F.Supp.2d 294 (S.D.N.Y. 2000), at least one court has noted that the issue has not yet been squarely raised, and might indeed be resolved in favor of the fair use claimant in a DMCA case if appropriately asserted. U.S. v. Elcom Ltd., 203 F.Supp.2d 1111 (N.D.Cal. 2002).

21 See fn 14 of the reverse notice & takedown article for cites to the commentators who have argued that fair use applies in anti-circumvention cases.

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complexities beyond our current scope.[22] Our focus instead is on the following propositions: that "fared use" cannot displace all of "fair use", and that fair use is a "right". These propositions are already true, but they are only implicit in the statute. We think the time has come to make them explicit in the manner we propose.

Roadmap

Our article will begin by stipulating a definition for "market failure." It then reaches into the core of Law and Economics and utilizes Ronald Coase's classic notion of "reciprocal cause" to illuminate a crucial reason why all benefits should not be internalized to copyright owners.[23] The article then gives two hypothetical fair users, one fully imaginary and one drawn from Bob Dylan's autobiography. We examine how these two examples might fare under bases for fair use other than transaction-cost barriers between them and the copyright claimant. We first canvas categories of fair use already found in the caselaw or literature, and then offer two additional ways in which a two-party market transaction -- even if it could occur sans transaction-cost barriers-- might fail to serve social interests.

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The article then addresses the terminological problem-- fair use as a 'right'. Our article concludes by suggesting some amendments that might be usefully added to the Copyright Act, to make it easier for courts to safeguard the fair use doctrine.

Remember: a finding of market failure does not mean that the defendant should win. It only

22 One complexity is addressing how fair use might be adapted to the DMCA prohibition against selling anti-circumvention devices, given that a device might be used for sometimes for infringing purposes and sometimes for fair use purposes. One answer to this conundrum is examined in Dan L. Burk & Julie Cohen, *Fair Use Infrastructure For Rights Management System,* 15 HARV. J.L. & TECH 41(2001). Jane Ginsburg tried to encourage the Copyright Office to address this question indirectly through its fair use rulemaking, but the Copyright Office has so far declined to do so. *See* Jane Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the US Copyright Act,* COLUMBIA LAW SCHOOL PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP, Paper Number 07-137, February 1, 2007, at 10 (Feb. 1, 2007).

23 Appreciation for the notion is also strongly associated with the early work of Guido Calabresi.

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means that we cannot *automatically* trust the copyright claimant's judgment. The judge's usual rigid deference to the copyright owner should give way to a more flexible inquiry into the merits-- particularly when it is not certain that the owner's claim rightfully extends to the disputed use.[24]

Definition of "market failure" and the role of "deference"

For our purposes, a market fails when it cannot be trusted as an allocator of social resources. The failure could be a technical, such as those arising out of the presence of transaction costs, strategic behavior,[25] endowment effect, or the presence of nonmonetizable interests. The failure may also be due to the inappropriateness of using market transactions in a given context. A comparative institutional analysis can show that at least in some contexts, markets are a less appropriate way of encouraging creativity and dissemination than alternative modes. [26] In short, although economists use 'market failure' in a narrower sense that that adopted here, we will employ the term to identify characteristics that would erode the conditions under which the market's "invisible hand" will automatically direct resources as society would prefer.[27]

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Note that we emphasize the market's failure to "automatically" function in a desirable way. The issue is one of appropriate delegation. As Morris Cohen pointed out, property is an area where the government delegates some of its decision making power-- cedes some of its sovereignty-- to the owner, a private party.[28] "Delegation of sovereignty" means that owner's decisions are automatically enforced, without judicial second-guessing. Such delegation of sovereignty is often efficient because

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24 We are indebted here to Abraham Drassinower's notion of copyright's intrinsic limits. See his draft on file with authors.

25 Some commentators would consider strategic behavior a kind of transaction cost.

26 *See generally, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS, HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOMS (Yale University Press 2006); LEWIS HYDE, GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 5 (Vintage 1983); *Wendy Gordon, Render Copyright Unto Caesar: On Taking Incentives Seriously,71 U. CHI. L. REV. 75 (2004).*

27 As a measure of social preference, we will usually adopt the economists' notion of efficiency, but we will not hesitate to articulate other goals as they arise.

28 Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

private parties usually employ local information to make decisions about resource use that serve not only their private interests but also the public interest in having resources valuably employed. In essence, the market, when it is working properly, does a better, lower-cost job of distributing resources than government regulation. For this reason, the government can allow property owners do their private balancings of cost and benefit through decisions to buy, sell and license—so long as the market structure is serving the public interest. When market structures cannot be relied upon to promote social welfare, however, this reason for the delegation of sovereignty also fails. The government then typically steps in to weigh the costs and benefits of a proposed cause of action.

Thus, cataloguing some instances of market inadequacies necessarily involves cataloguing reasons why autonomic deference to owners' wishes is inappropriate. But remember: lack of deference to a rights holder's private decision-making is not the same thing as saying the defendant should always win. Rather, it means that a decision-maker other than the property owner should judge whether the public interest is best served by enforcing, or not enforcing, the right. The presence of market failure, therefore, doesn't trigger the grant of "fair use" to a defendant. It triggers a judicial examination of the merits.[29] In the language of the common law, the presence of market failure essentially transforms a 'trespass' inquiry into a 'reasonableness' inquiry. Thus, for example, when two drivers accidentally collide in the tangible world, their lack of intention triggers a judicial inquiry into the reasonableness of

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29 What we are emphasizing is the *locus* of the weighing. Does the copyright owner do all the decision-making, or does a court make an independent judgment on the merits of the proposed use?

Note that fair use may involve judges in making some decisions that go beyond the Bleistein vision of judicial neutrality on aesthetic matters. Addressing this issue would take us beyond the scope of the current paper. For some useful discussion, *see, e.g.*, Robert Merges, *Are You Making Fun Of Me? Notes On Market Failure And The Parody Defense In Copyright*, 21 AIPLA QUARTERLY JOURNAL 305 (1993) ("[D]octrines of copyrightability - notably the requirements for registration and "originality" - have developed with an eye towards value neutrality. It seems impossible to remain neutral in the same sense when assessing whether a work is "really" a parody..."). Also see Alfred Chuh-Yih Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

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the drivers.[30] Reasonableness requires a decision by judge or jury as to the normative merits of the parties' behaviors.

Admittedly "reasonableness" is not usually employed as a standard when two users of tangibles interact intentionally. In copyright, the trigger for a quasi-reasonableness inquiry can be triggered by factors that are far subtler than a lack of intentionality. This should not surprise us. The copyright market is itself a compromise institutional solution [awkward phrase]. Plagued by dead-weight loss, copyright markets are incapable of 'perfection'. Moreover, if a copyright owner makes the wrong decision the stakes are particularly high given that free speech and democratic participation can be at risk.[31] Moreover, unlike a stranger's unconsented consumption of an owner's scarce tangible property, a stranger's unconsented use of a copyrighted work might cause no harm to the owner.

In forthcoming work, Professors Penalver and Katyal even argue that while a 'delegation' architecture is characteristic of tangible property, an 'anti-delegation' architecture is characteristic of copyright. [32] [too little explanation here] So it is no wonder if fair use has a lighter trigger [what does this mean?] than most tort defenses in the tangible realm. Moreover, the deference to owners that one sees in the tangible realm should not be overstated. Even in the realm of tangibles, when problems that afflict copyright arise -- such as hold-outs and other strategic behavior-- the law typically responds with a lack of deference.[33]

Recap [bad title; is this necessary? it wasn't that long]

A copyright owner's willingness to license a particular use does not necessarily mean that the

30 Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1971-1972).

31 *See,e.g.*, Neil Weinstock Netanel, *Copyright And A Democratic Civil Society*, 106 YALE L.J. 283 (1996); Edwin C. Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Edwin C. Baker, *First Amendment and the Internet: Will Free Speech Principles Applied to the Media Apply Here*, 11 ST. JOHN'S J. LEGAL COMMENT. 713 (1995-1996).

32 Sonia Katyal & Eduardo M. Penalver, *Property Outlaws* (Yale University Press, 2008) (forthcoming).

33 Hold-outs and other strategic behaviors motivate 'takings' law-- that is, the government's freedom to take property with compensation, but against the owner's will.

copyright owner has a right to control that use. Even if an owner is *willing* to license, the law may give him no claim right to demand a license. On the contrary, the putative user of the copyright work may have a fair use entitlement.

It is indeed true that an owner's unwillingness or inability to license can trigger far use,[34] but there are many other places where our society cannot afford to rely on an owner's self-interested decisions to further the public interest. The copyright statute should make this even clearer than it already does.[35]

In this article, we shall recapitulate some major categories upon which fair use can be premised, and add some new ones-- all of them consistent with three recognitions:

1. Copyright law employs the devices of property rights and markets to accomplish certain goals;
2. Certain identifiable characteristics can, when they appear in specific cases, make markets less likely to accomplish these goals;
3. The presence of high transaction costs impeding bargains between copyright claimant and potential utilizer is only one of many such characteristics.

Reciprocal Causation [not helpful title]

The fundamental reason why broad fair use is crucial to both economic health and cultural flourishing can be seen in one of articles that gave birth to the Law and Economics movement: "Theory of Social Cost" by Ronald Coase. In that article, Coase criticized the Pigovian notion that all costs of a polluting activity should automatically be borne by the factory.[36] Sometimes a factory can

34 See Gordon, *Fair Use as market Failure*, supra n. 4 (discussion of anti-dissemination motives and transaction-cost barriers).

35 Of course, our suggested change in language is not *necessary* to give proper scope to the fair use doctrine. The language would largely serve as a reminder, making it easier for future judges to avoid the occasional errors of some past decisions that improperly limited fair use.

36 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase's 'theory of the firm', R.H. Coase, THE FIRM, THE MARKET, AND THE LAW 40-47 (1988), also has profound implications for copyright. Thus Yochai Benkler argues for decentralized modes of social production. Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE. L.J. 369 (2002),. he classic statement of the opposing stance-- arguing that many intellectual products require

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make a cost-effective reduction in pollution, either by adopting filters or by reducing overall production, but sometimes it cannot; sometimes the downstream neighbors could avoid the pollution more easily and cheaply, perhaps by hooking up to the city water system instead of washing their clothes in the river.[37]

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It is possible to restate the Coasian lesson by taking it from the context of land-based nuisances like pollution, and adapting it to the new context of copyright law: Don't assume that the most obvious active party (the copyright owner) is the one to whom all the effects should be internalized. Sometimes the downstream author or user is in a position to take value-enhancing steps, and she needs incentives to do so.[38] Therefore, some privileges should be left to that downstream person: the law should allow the downstream person to keep some of the benefits, so that she will have incentive to take productive steps herself.

Preserving incentives for downstream actors is one of the reasons copyrights expire. Consider the impact if Shakespeare's multitudinous descendants owned copyright in the plays. How would it have complicated efforts to mount WEST SIDE STORY if Shakespeare's heirs had been able to capture much of the profit because of the play's obvious use of plot sequences from ROMEO AND JULIET? And what of Jane Smiley's best-selling novel, A THOUSAND ACRES? In that book, for which she received a Pulitzer Prize, Smiley interprets KING LEAR in a way sympathetic to the ungrateful daughters: the father has indulged in sexual abuse. Conceivably Shakespeare's heirs might have tried to suppress Smiley's novel.[39]

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centralization rather than decentralization-- is Edmund Kitch, The Nature and Function of the Patent System, 20 J.L. & Econ. 265 (1977).

37 See Wendy J. Gordon, "Ronald Coase", in NEW OXFORD COMPANION TO LAW (P. Cane, ed., forthcoming).

38 *See, also,* Wendy J. Gordon, *Copyright As Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003).

39 *See, e.g.*, Thomas Babington Macaulay, *A Speech Delivered in the House of Commons* (Feb. 5, 1841) (on the possibility that Boswell's descendants might have refused to allow republication of the Life of Johnson.)

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The need to allow productivity to flower in non-centralized hands is not only served by the durational limit; it also one of the prime reasons for the fair use privilege. It is a serious error to allow all benefits to be internalized by the copyright owner.[40]

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One might respond that because buyers in every market have consumer surplus, enforcing markets [awkward] won't internalize all benefits to the copyright owner. That is, because in typical markets the seller can't extract all of the value that the purchasers experience, the purchasers get to "keep" more than an infinitesimal portion of the benefits they paid for, and these benefits provide the incentives. [cite here to Julie Cohen's Vanderbilt article, The Perfect Curve]

The reply has some merit. Nevertheless, although purchaser surplus can indeed be very large in an ordinary competitive market, the same is often not true for copyright. Many owners of copyright in popular works have quasi-monopoly power and an ever-increasing ability to price discriminate. Detailed licensing schemes slice ever more thinly what purchasers can do with their digital copies. [sentence needs reworking] As a result, consumer surplus in popular copyrighted works-- the very words people might most want to parody or reread or build upon-- becomes ever narrower.[41]

In addition, it drastically understates the stakes [awkward] to look at the downstream user solely in terms of consumer surplus Copyright law imposes a loss of liberty with consequences far beyond

40 For some of the additional reasons why it is unwise to internalize all benefits to one party, *see, e.g.*, William W. Fisher, *Theories of Intellectual Property*, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, ch. 6(Cambridge, 2000) (interpreting Glynn Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996)). Also Landes and Posner point out, every increase in this generation's copyright increases the cost of creating for the next generation, who must use what came before. Willam M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325, 334 (1989).

41 At the same time, technological measures and DRM schemes limit consumers' ability to add value. We are very close to a place where a song might be licensed to play a limited number of times on a specific portable music player. While this might work for a consumer who simply wants to listen to a song once in a while, it will not work for the consumer who invents a less conventional use—perhaps she makes a song repeat softly on a loop to drown out traffic noise at night, or listens to the song often enough to learn how to play it herself. Sometimes copyright owners can 'sell' additional flexibility. Sometimes this works to further dissemination, and sometimes it does not. See, e.g., Michael J. Meurer, *Price Discrimination, Personal Use and Privacy*, 45 Buff. L. Rev. 845 (1997); *Michael J. Meurer; Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001). *Also see* Yannis Bakos, Eric Brynjolfsson & Douglas Lichtman, *Shared Information Goods*, 42 J. L. & ECON. 117 (1999).

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the monetary. Creative production may need a kind of freedom inconsistent with the bureaucratic record keeping that licensing requires.[42] The possibility of merely a monetary surplus may not be sufficient to encourage the kind of spontaneous play[43] among second-generation creators that we need.[44]

Consider Iso that many forms of incentives and remuneration are possible.[45] In emphasizing the need for downstream liberty (and the need for downstream innovators to keep some of the benefits they generate), we hardly gainsay that authors need money to live. The question is not "money or freedom," but rather, what institutional schemes give us the best possible mixture of monetary incentives to create, and the liberty needed to create.[46] Fair use, a tool for allowing flexibility within the dominant market model, is an essential part of the institutional arsenal.

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Two hypotheticals

To illustrate fair use rationales, we proffer two hypotheticals, the first of which is based on an anecdote drawn from Bob Dylan's autobiography(?).

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42 The need to obtain advance permission may "distort the borrower's creative impulse." Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 UNIVERSITY OF CHICAGO LAW REVIEW 75, 83 (2004). *See, also, Julie Cohen, The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 372 (2005).

43 On the importance of play, *see e.g*, see e.g, David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 Law & Contemp. Probs. 139 (1992); David Lange, *Reimagining the Public Domain*, LAW & CONTEMP. PROBS., 66 Law & Contemp. Probs. 463 (2003); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981). (Although this is a painfully unplayful footnote.)

44 For discussion of how bureaucratic and monetary constraints can inhibit the muse, see, e.g., Lewis Hyde, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 5 (Vintage, 1983).

45 Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J.; Stephen Breyer, The *Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV L. REV. 281, 282 (1970).

46 Thus, securing monetary returns via copyright ownership increases incentives to one generation, but increasing those returns too much impairs the interests (and raises the costs) of the next generation of creative persons. In Strahlivetz's witty phrase, this "introduce[s] a useful sort of Laffer curve to the analysis of innovation policy" Lior Jacob Strahilevitz, *Wealth Without Markets*, 117 Yale LJ 1472, 1481 (2007) (reviewing Benkler). A better (if less witty) analogy than the "Laffer Curve" might to be Guido Calabresi's search for a *system* that minimizes the costs of accidents: as Calabresi emphasized, reducing one kind of cost (e.g., discouraging fast driving) often increases other kinds of costs (such as enforcement costs, and pedestrian carelessness), so the search is for a calibrating the interrelated cost/benefit functions to generate the highest net result. Guido Calabrisi, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

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Dylan recounts how he took his some of his first steps toward becoming a songwriter. Fascinated by the Brecht/Weill composition *Pirate Jenny*,[47] "I found myself taking the song apart, trying to find out what made it tick…I took the song apart and unzipped it- it was the form, the free verse association, the structure and disregard for the known certainty of melodic patterns to make it seriously matter, give it cutting edge. It also had the ideal chorus for the lyrics. I wanted to figure out how to manipulate and control this particular structure and form which I knew was the key that gave "Pirate Jenny" its resilience and outrageous power."[48]

Let us assume for purposes of our fair use analysis that Dylan wrote down the complete lyrics and music in the process of "unzipping" it. Few of us would think Dylan violated copyright in making these copies by hands. [but see Nimmer who was not willing to say that hand copying was ever OK] Would our answer change if there were a website where potential songwriters who wanted to copy out lyrics or music could purchase a license to do so?

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Our second, more elaborate? hypothetical emanates from our imaginations (though we think it plausible).

Assume that a young scholar named Janine is preparing an essay on Aristotle's *Poetics*.[49] Although she can't read Greek (she only understands French and English), Janine doesn't want to be

47 "Pirate Jenny" is a famously bitter song by Brecht and Weill. Written in the nineteen twenties, and encountered by Dylan decades later, for Dylan the song was a totally new kind of experience which opened up a range of creative possibilities previously unglimpsed.

What we assume Dylan did-- writing down someone else's text word for word-- is neither unusual nor trivial. At least one English department regards as a 'secret bible' the 1920 book by Robert Gay, WRITING THROUGH READING. Gay urges the rewriting of others' prose as one of the best methods for students to learn to write and read well. Robert M. Gay, WRITING THROUGH READING (1920). [A pdf of WRITING THROUGH READING, which is both out of print and in the public domain, can be obtained by contacting wgordon@bu.edu. For some uses of Gay's work in the classroom, see, e.g., http://www.yale.edu/ynhti/curriculum/units/1979/4/79.04.01.x.html].

48 Bob Dylan, CHRONICLES VOLUME ONE 275-276 (1971).

49 We chose the POETICS with malice aforethought: Our topic is the utility of copying, and Aristotle emphasized that copying and imitation ("mimesis") was foundational to all art. ARISTOTLE, POETICS (Preston H. Epps trans. 1970).

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overly influenced by any one translator's interpretation of Aristotle. Indeeed, she wants to be in a position where she can comment intelligently on the various translations that are currently influential in her field. [50]

As an initial stage in her research, she plans to make a chart showing alternative translations for every Greek paragraph. Accordingly, she downloads (and pays for) the seven major translations of the *Poetics* that exist in English and French, in eBook versions.[51] One translation, we shall assume, is in the public domain because its copyright has expired. The copyrights in the other translations, we shall assume, have not expired.

After Janine downloads the eBooks she reads each of them, at least in part, many times. She then uses the 'copy' function to paste the full text of each into her word processor. In the process she loses the formatting and page numbers that had been in the uneditable version, but she doesn't mind. She can now move the English texts around, highlight what she needs to, and insert comments as she thinks of things to include in her essay. She then copies the relevant portions of the many translations into a master chart, making sure to match up the varying translations in French or English with the corresponding Greek paragraph to the extent possible. She then begins to write her essay, including in it many lengthy quotations (duly cited) from the translations.

None of Janine's actions, at first glance, seem at all unethical or unfair. As for lawfulness,

[50] 17 USC sec 106(1)

51 Regrettably, when we mention the purchase of eBooks (or essentially any intellectual products sold for computers) we stumble into the area of things putatively controlled by various licensing agreements. Leaving the technicalities of contract formation aside (such as whether a click-wrap, browse-wrap, or a vaguely-co-exist-wrap license is properly accepted), we stray into the domain of contract law and (since we have not left the domain of copyright law) into questions of how broadly copyright preemption should be applied. *See* 17 U.S.C. § 301. This topic is beyond the scope of our immediate project. For the moment, let us set aside the issue of whether contract or copyright should control in Janine's case. Instead, we can focus on a few questions. Assuming that no contract controls a particular use, (whether from failure to form a contract, failure to plead a contract-based cause of action, silence of an otherwise controlling contract on a particular issue, copyright preemption, or any other reason) what are the respective rights and privileges of the parties? If a term is ambiguous, should a court have a preference for one interpretation rather than another? Our discussion of 'packaging' could be relevant.
For the purposes of this article, we will assume that Janine has not managed to contract away any of her rights or privileges. While we believe that fair use would still play a role if the copyright owners tried to limit her rights by contract, detailing this role would take us outside the scope of this paper.

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clearly she's behaving lawfully when she copies into her word processor and quotes the translation whose copyright has expired. However, copyright law gives the copyright owner in the other translations an exclusive right of reproduction[52] and of licensing derivative works. Depending on how broad or narrow is one's conception of fair use, copyright law might or might not prohibit her from moving the text into a word processor, creating her chart of differences, quoting from the translations she discusses,[53] and possibly even from rereading the books too many times [to make this more plausible, mention that some DRM'd content, including MS's Zune share files, only allow so many plays before the DRM disables further access and use].[54] She is making unlicensed[55] reproductions of, and unlicensed derivative works from, copyrighted works.[56]

Is Janine's behavior an infringement of copyright or is it instead lawful as a 'fair use'?[57] Should

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52 17 U.S.C. § 106(1) gives copyright owners an exclusive right to copy. Moving a text to a word processor literally, if not in spirit, implicates this right., even if Janine destroys the original ebook version and simply substitutes the new platform for it. . First a copy is made in RAM, which many courts consider making a copy (despite legislative history to the contrary), and then she makes a copy to her hard disk.. On the "right to read" , we are indebted to the work of Jessica litman and Richard Stallman, see discussion infra at note __.

53 Scholarly quotation is well recognized as a fair use. Our question is examine whether this well-recognized liberty should vanish if copyright owners stood ready to license it,

54 17 U.S.C. § 106(1), which prohibits copying, coupled with a few court cases such as *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), which have viewed making a copy into RAM (which a computer must do every time it reads a file) to be sufficiently non-transitory to constitute "copying" under § 106 even though the "copy" disappears as soon as the computer is turned off. Thus, even if Janine owns a copy of an eBook, it might still be illegal for her to actually read it. *See, generally,* Jessica Litman, *The Exclusive Right to Read13 CARDOZO ARTS & ENT. L.J. 29 (1994).* We can assume that each eBook comes bundled with an implicit or explicit license to read it at least once—and probably more than once—otherwise nobody would buy it.[Meurer, Lichtman & Brynassfoln] However, if one book is licensed to be read five times (and to minimize the contract preemption issue mentioned in note 48, contains no provision expressly limiting Janine to reading it only five times,) would a sixth reading violate the copyright law? If the publisher offered to sell her a rereading license, would she need to buy it or would the seller be attempting to sell her something she already possessed?

55 We should highlight that the word "unlicensed" in this context does not mean illegal or unpermitted. It merely means that the copies would not be made with the permission of the copyright holder. This article investigates whether Janine needs the permission of the copyright holder.

56 If not for the fair use doctrine, copying and pasting would be a violation of the copyright owner's reproduction right, 17 USC §106(1). In addition, Janine will soon be making a derivative work from each of those translations as she makes her comparative charts and inserts her various comments and changes. Making derivative works is another behavior that the law appears to place within the copyright owner' exclusive ken. If not for the fair use doctrine, this would be a violation of the copyright owner's right to make derivative works, 17 USC § 106(2).

57 Suppose, for example, Janine copied the text of the first three books without any difficulties, but a window popped up when she attempted to copy the text of the final book. The window read, "Do you want to do more that read the PDF

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the answer change if the eBook publisher is willing to sell Janine a license to make additional copies and derivative works?[58] Must Janine pay these license fees, or is the publisher simply trying to sell her rights she already has?

How our Hypotheticals Fare

In our hypotheticals, transaction cost barriers between copyright claimant and potential utilizer are low.[59] Nevertheless, both have plausible claims to fair use.[60] In this subsection, we will mention some bases for their fair use claims already in the literature, and then advance what we think are two new bases for finding fair use: encouraging the development of efficient rights packaging, and privacy.

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version you have purchased? If so, additional charges apply. The publisher has reserved its exclusive rights, including the right to make copies and derivative works. If your copy is exclusively for personal use, the publisher is willing to sell you a license to make additional copies for $1.50 per page. You may enter a credit card number below."
The blurb in the window continued: "For derivative works recasting or transforming our copyrighted work, the price for each page used by you is $2.50, plus ten per cent of your gross revenues. For the preparation of derivative works, in addition to entering your credit card, enter the name of your project and the person in your enterprise capable of receiving service of process. We will contact that person once every three months to obtain progress reports and a statement of your gross revenues if any."

58 We might also ask about access restraints: if Janine's software prevents her from making this copy, is it unfair or illegal for her to find some kind of technological work-around in order to get a text she can edit? Such a work-around could be as simple as opening a new window and laboriously retyping the text of the entire play. Alternatively, Janine might print the play, scan it, and use text recognition software to get her editable version. Finally she might modify the actual file herself to circumvent the copy protection. This final option is likely a violation of the DMCA's anti-circumvention rule. *See* 17 U.S.C. § 1201(a) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.") The first option almost certainly is not a violation of the DMCA because the technological measure makes no effort to prevent copying by hand.

Another question is whether the DMCA should be amended so that instead of forbidding the sale and distribution of virtually all DRM technology, it would only forbid trafficking in technology that featured the capacity to distinguish, and permit, fair-uses. *See* Dan L. Burk & Julie Cohen, *Fair Use Infrastructure For Rights Management System*, 15 HARV. J.L. & TECH 41(2001). Such a result could also be accomplished through rule-making, by amending the scope of covered works to be those available on platforms that permitted fair uses. However, the Copyright Office rebuffed an inspired attempt of this kind by Jane Ginsburg. Jane Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the US Copyright Act*, COLUMBIA LAW SCHOOL PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP, Paper Number 07-137, February 1, 2007, at 10 (Feb. 1, 2007).

59 Admittedly, in our later discussion, the possibility arises that Janine may find all of her eBook copies accompanied by confusing licensing terms. This raises the possibility of a new kind of transaction cost barrier: the time and frustration for Janine having to decipher such licenses -- or the cost of uncertainty if one clicks assent without reading.

60 In addition to the factors mentioned in text, Dylan's activity will not cause any likely harm to the expected, normal markets of the songwriters or their assignees. But since we are trying to break the circularity of the 'licensing analysis', we will leave that out of the equation for now. See Wendy J. Gordon, *The 'Why' of Markets: Copyright and Fair Use*, 116 YALE L.J. POCKET PART 358 (2007), *available at* http://yalelawjournal.org/2007/4/25/gordon.html.

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As we will show, these justifications for fair use, both those that derive from the literature and our new contributions, can be characterized as forms of market failure *other than* those based on the presence of transaction-cost barriers between copyright claimant and utilizer.

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First let us canvas bases already recognized in the literature [you need to do more here, set forth the categories and then illustrate them with the hypos; what about mentioning the SCT caselaw suggesting that copyright is only consistent with the 1st A to the extent fair use exists as a limit on rights when you discuss the Dylan example; you should cite Lange in LCP and Jed R somewhere in here]: First, regarding Dylan, the bureaucratic process of obtaining permission is likely to chill creative experimentation.[61] That means that the market may not be a good (?) institution to employ here, and that instead the courts should allow a formal liberty, one regulated only by informal norms (like cooperative reciprocity among artists).

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Second, if Janine wants to do a truly scholarly job, she needs to make reference to all the respected translators. This gives any one of them a potential hold-out power. Analogous to an anti-commons problem, hold-out and bilateral monopoly problems have been shown to be potentially powerful bases for fair use.[62]

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Third, both Janine and the young Dylan are unlikely to have in their pockets money reflecting the ability of their use to serve social welfare. Both on distributional grounds,[63] and on the ground that they are generators of positive externalities,[64] they may support their claims to fair use.

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Fourth, Janine will want to discuss the various translations in her own article. The translations are "facts of life" in her field, and her essay would not be complete without extensive quotation and

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61 Gordon, *Caesar; see, also,* Julie Cohen, *The Place of the User in Copyright Law,* 74 FORDHAM L. REV. 347, 371 (2005).(making the same point).

62 On strategic behavior as a source for fair use, *see* Merges, supra note 3, at 133 (strategic behavior including bilateral monopoly) and Ben Depoorter & Francesco Parisi, *Fair Use And Copyright Protection: A Price Theory Explanation,* 21 INT'L REV. L. & ECON. 453 (2000) (discussing hold-out and anti-commons problems.)

63 Molly Shaffer Van Houweling, *Distributive Values In Copyright,* 83 Texas L.Rev. 1535 (2005).

64 *See* Loren, *supra* note [3] at 49-50 ; Gordon, *Fair Use as Market Failure, supra* note [9] at 1630-1631.

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analysis of the leading authorities. She should be protected in her efforts to use the facts, even when the facts are manmade.[65] A newspaper is sheltered by fair use when it prints a copyrighted photo that lies at the center of a controversy,[66] and a litigant is sheltered by fair use when it makes copies of copyrighted documents whose meaning is at issue in the litigation.[67] Janine's situation resembles that of the newspaper and litigant: her very topic is the copyrighted text.

Fifth, Janine is essentially seeking to understand an artifact of Western culture, the public domain text by Aristotle. She is like a programmer seeking to understand the public domain ideas within a copyrighted program: if the only practical way to gain access to the public domain is to copy, *Baker v Selden* and its progeny,[68] including the reverse engineering cases teach us that the person seeking a public-domain use might be able to employ others' copyrighted expression.[69] What is allowed for purposes of reverse engineering arguably should be allowed for scholarly purposes like Janine's. (Of course, there are additional complications to be investigated;[70] among other things, Janine has at least one public domain translation she can use, and she cannot call on patent-related policies that assisted the defendants reverse-engineering cases—should this be a fn?).

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Sixth, Janine will be discussing some of the copyrighted translations critically. This obviously implicates non-monetizable interest such as free speech. Further, the sale of 'rights to criticize' could degrade the quality of criticism.[71] Moroeover the willingness to be criticized is a 'good' that is

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65 Wendy J. Gordon, *Reality As Artifact: From Feist To Fair Use*, 1992 LAW & CONTEMP PROBS 93.

66 Nuñez v. Carribean Int'l News Corp., 235 F.3d 18, 22 (1st Cir. 2000)

67 [Perhaps cite to Nimmer here]

68 101 US 99 (1880). See Pamela Samuelson, *Baker v. Selden*: Sharpening the Distinction Between Authorship and Invention, in INTELLECTUAL PROPERTY STORIES (Rochelle C. Dreyfuss & Jane C. Ginsburg, eds. 2005) (discussing the link between Baker and the reverse eng'g caselaw).

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69 See, e.g., Sega Enterprises Ltd. v. Accolade, Inc. (fair use for reverse engineering); Sony Computer Entertainment, Inc. v. Connectix Corp. 203 F 3d 603

70 See, e.g., David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 14 (2001).

71 Posner at __; Gordon,i *Excuse and Justification in the Law of Fair Use: Commodification and Market*

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emotionally charged, and we suspect that such goods are particularly sensitive to a version of the endowment effect [72]. [many readers will need more of an explanation] This is most visible at the extreme: someone who *posseses* the right not to be criticized might not sell it at any price, but if he had to *purchase* the critic's silence, the price his could pay would be limited by his financial resources.[73] One might call the latter a 'pricelessness effect.' [74]

Admittedly, some might characterize the last-mentioned argument as a kind of market-barrier between copyright claimant and utilizer. But the endowment effect does not just make things 'priceless' (and thus prevent licensing); it can apply even when an author is willing to sell the right to quote him criticially as long as the price he would *pay* for silence is different than the price he would *accept* to allow the criticism. Ordinarily, economic analysts determine which use of a resource is most socially valuable by asking 'what would be the outcome of a market transaction between different potential users." For goods affected by 'endowment effect' and similar phenomena, however, the market would reveal different results depending on the identity of the party to which the law awarded initial ownership of the good. As a result, a market transaction could not reveal with any stability which use of the good (the critic's use to criticize, or the criticized person's use to protect himself) would generate more value. As a result of this and other considersations, a right to copy fairly lengthy excerpts for purposes of criticism is well established. As the *Bill Graham* court recognized,[75] and common sense suggests, a willingness to license would not wipe out fair uses for criticism.

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Perspectives in THE COMMODIFICATION OF INFORMATION 149-92 (NIVA ELKIN-KOREN & NEIL WEINSTOCK NETANEL, EDS., Kluwer Law International 2002) at __ (making analogy to Titmuss's argument regarding the sale of blood).

[72] On endowment effect generally, see WARD FARNSWORTH, THE LEGAL ANALYST (2007).

[73] On endowment effect and anti-dissemination motives, see Gordon, *Excuse and Justification* at __ (pricelessness and systemic effects); X also see Robert Merges, *Are You Making Fun Of Me? Notes On Market Failure And The Parody Defense In Copyright*, 21 AIPLA QUARTERLY JOURNAL 305 (1993); Landes & Posner.; Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79 (1991);Gordon, *Fair Use as Market Failure*, supra note at (anti-dissemination motives.)

[74] See Gordon, *Excuse and Justification.*

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Instead of surveying further the existing literature and caselaw, let us discuss two categories of fair use justifications that have been implicitly taken into account by some courts and commentators that we believeneed explicit recognition.. The first category is the need to maintain privacy, as something that can't be easily accommodated in individual deals between copyright claimant and utilizer.[76] The second category is the need to keep packages of rights relatively few in number, so that they can be understood by purchasers. [77]

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A. Private Transactions May Cause Communal Harm: The Eroding Expectations of Privacy

The ability to finely meter uses of copyrighted comes at a cost to the privacy of the utilizer.[78] When Jeanine sees a window appear offering her a license to download her initial thought would probably be something like this: Who is asking for a credit card number? Did this message really come from who it claims to come from or is somebody trying to steal her identity?[79] If she is satisfied that the message is genuine and its sender is trustworthy, she still might not want to share so much information about what she is doing. The purchase of such a license will leave a personally identifiable

76 The critic may complain that if transaction costs were zero, even the privacy of third parties could be taken into account. That may be true; it is also true that if transaction costs were zero, neither Dylan nor Janine would generate positive externalities. But that doesn't undermine our thesis. Our thesis is that fair use exists regardless of the absence of *transaction costs between copyright claimant and user*, barriers to their contacting each other and negotiating to a result that takes both of their interests into account. The transaction costs that prevent the interests *third parties* from being taken into account, are a different matter.

77 We are indebted here to Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle* 110 Yale L.J. 1, 26 (2000).

78 On the value of privacy especially in the Internet context, see, e.g., Sonia Katyal, Privacy versus Piracy, 7 YALE J. L. & TECH. 222 (2005); Pamela Samuelson, Privacy as Intellectual Property?, 52 STAN. L. REV. 1125 (2000). {note to self: are these good cites for THIS proposition?} [Julie Cohen is the primary commentator on this subject, especially the right to read anon'ly; her more recent paper in Case Western on copyright's public/private divide is also relevant; Jacquie Lipton has also weighed in; my paper is not so relevant to this point; more pertinent was my Copyright Grab article which mentioned the privacy implications of the White Paper's interpretation of ©]

79 The authenticity and trust problem is common to all transactions in information—particularly where that information is a credit card number. However, Internet commerce seems to have flourished despite this—thanks, perhaps, in part to middle-man services such as Paypal or Google Checkout.

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record of her desired use. Beyond the usual concerns about embarrassment,[80] persecution,[81] or undesired, targeted advertising, Jeanine might worry that such a license compromises any desire she has for secrecy in her work. She may not want other researchers to know what she is working on until she is able to publish it lest they preempt her work with a comparative chart of their own. If Jeanine decides to buy the derivative work license, she has functionally allowed the translations' copyright owners the ability to look quite closely at her current work. This secrecy concern might be heightened if she were a researcher racing for a patent—or a corporate CEO who not want somebody to know that he had been reading a book with a title like *Defending Against Hostile Takeovers for Dummies* (or worse, that he had read the book three times and printed "Chapter 7: They'll Never Guess You're Bluffing!").[82]

Consider the way that libraries refuse to give out their readers' lists of borrowing, lest borrowing be chilled.[83] Similarly, sometimes an uncompensated use of copyrighted works should be

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80 While worries about privacy and embarrassment frequently concern more prurient materials than Aristotle, Jeanine might not want some of her colleagues to know she does not actually know Greek. [these are concerns that Jeff Rosen discusses in his book on privacy]

81 Fortunately for Jeanine, researching Aristotle is not likely to get her on a no-fly list of any sort. However, her colleague doing research on the tactics of the Weather Underground or the IRA might not be so fortunate.

82 We should consider, briefly, whether Jeanine, the patent researcher or the CEO might be able to take steps to increase anonymity. It is possible to imagine an intermediary protecting privacy just as Paypal might protect credit card numbers. To a certain extent this might work, provided people had the technical savvy to use it and were readily able to find a trusted intermediary. Still, the intermediary might be vulnerable to subpoenas, and we doubt that the necessary technology exists to guarantee full anonymity even against sophisticated hacking. Moreover, Paypal and anonymity would hardly work where permission is sought to make derivative works. In such cases, copyright owners typically want to know the user's plans for the work.

83 Forty-eight states currently have confidentiality laws relating to library records. According to such laws library records are to remain confidential and not to be disclose except in very specific situation including pursuant to an order or subpoena (See e.g. New-York statute NY CLS CPLR § 4509, California statute Cal Gov Code § 6267), or when required to protect public safety (See e.g. Tex. Gov't code § 552.124) (disclosure is allowed upon approval of the user or to the extent necessary to operate the library).

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See also American Library Association (ALA) policy guidelines on confidentiality of library records. The ALA policy is to protect each library user's right to privacy and confidentiality with respect to circulation records, as a matter of professional ethics (see article III of the Code of Ethics of the American Library Association, available at http://www.ala.org/ala/oif/statementspols/codeofethics/codeethics.htm) . Such record are not to be made available except pursuant to an order or subpoena. Available at http://www.ala.org/Template.cfm?Section=otherpolicies&Template=/ContentManagement/ContentDisplay.cfm&ContentI=

deemed 'fair' to safeguard the privacy interests of someone who does not want to leave the kind of identifying 'tracks' that a license requires. It is true that Jeanine probably left a record with her purchase of the eBooks. However, the supplemental license would require her to leave a record of the manner in which she is using them as well as possibly the nature of her underlying work.

The more narrowly tailored a license, the more personal information it will contain. A book could be bought as a gift, as a coffee table decoration, to complete a collection, because the purchaser is friends with the author, or even because the purchaser liked the cover art. However, a license to read read, reread, or copy could imply a stronger interest in the underlying subject matter. If that subject matter is "how to leave my job" or "how to get over my neurosis," those who it would most benefit might be unwilling to leave a record of their need. This is not something society wants to chill.

Privacy is a particularly pressing concern in artistic matters. Just as privacy may involve shielding one's actions from the eyes of others, it can also involve creating a personal space free from external influences. In the hypothetical involving Bob Dylan's creative process, and the early stages of his burgeoning creativity as a song-writer, we see an example of how a demand for a licensing fee could be particularly intrusive. For young Bob Dylan, paying a licensing fee to copy down a song would invite a licensing agency into his intensely personal struggle to define and understand himself as an artist. Nothing kills a dream like boilerplate.[84]

Artistic integrity may require the kind of privacy that does not allow collusion with others. If a composer is writing a protest song, his work may be compromised if he is required to collude, even symbolically, with the very establishment he is protesting.

Our privacy concern extends beyond worries about specific transactions. By its nature, privacy must be protected at a societal rather than individual level. While Jeanine may not be at all concerned

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84 Of his first contract, Dylan says he signed it without reading it. CHRONICLES at __.

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about her privacy, if she sacrifices it, she increases the cost to the next researcher's privacy. If privacy is readily commoditized, those who value their own privacy will be assumed to be hiding something. We suggest that privacy concerns might justify a finding of fair use both to prevent the chilling of a the use by privacy-valuing individuals and to protect an individual's right to privacy without stigma.

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B. Another Example: Slivers of Rights—and Whom They Prick:[85] The Packaging Problem

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Slicing rights thinly can be lucrative, but it can also be destructive. This can be truenot only to the copyright claimant and the potential utilizer but also to other copyright owners and potential users. Let us illustrate with an example from the physical world.

When coins were made of uniform weights of gold, a lot of money could be made by shaving a few grams of gold from one's coins, and selling the harvested gold separately. This practice was highly discouraged. Yet if I own a piece of gold, property law suggests that I can melt it down to make a piece of jewelry if I wish. Why shouldn't I also be able to shave off a bit of it and put the coin back into circulation? After all, it is my gold.

The answer isn't difficult. We all know the problems that would arrive when I dump my diminished coin into the market.

Let's say a coin that formerly weighed 30 grams now weighs 24. If I shave this much off a coin, an astute purchaser will likely notice something isn't right. Let's assume I even tell my purchaser (perhaps in very fine print) that I have shaved off part of the coin. The savvy purchaser should notice this and appropriately discount the value of my coin. The transaction is arguably fair, depending on our mutual expectations and the size of the fine print. But let's assume it's fair at least between myself

85 As mentioned above, this section is indebted to the work of Thomas W. Merrill and Henry E. Smith in their article, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle* 110 Yale L.J. 1, 26 (2000).

87 There's a limit to the 'match' between public understanding and law. Private acts of reading aloud and record playing are subject to different rules than public performances.

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and my savvy purchaser.

I nevertheless have created some harm to others by shaving off my coin. I have devalued the worth of currency as an institution. Now every future merchant will need to weigh carefully every coin. Imagine the downstream chaos we would create if we gave change for a $20 bill by cutting off a proportion to equivalent to $3.17!

Even if I never receive any improper benefit from my coin modification, I have imposed costs on everyone. Now everyone now has to buy a scale that's sensitive to minute variations in weight. And if they don't buy scales, and shaved versions are circulating which people can't easily identify, everyone will need to discount the value of the coins they come across to account for the possibility they've been shaved, and I've devalued everybody else's currency. The value of a coin in the marketplace is smaller than it used to be.

Until recently, we rarely had to worry about the equivalent problem in the goods that embody intellectual products. Books (which embody literary works) and vinyl records (which contain musical works and sound recordings) came in readily understood packages. The bundle of rights you received when you purchased a book or a phonograph record was mostly understood by most people. You could read your book or play your record whenever you wanted.87 You could loan or sell the book or the record. You can take notes or copy out passages. We knew what we would pay for a book or record because we knew what we are getting.

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Digital right management88 and the growth of digital commerce in technically protected

88 DRM originated as an acronym for "Digital Rights Management", although as Richard Stallman has pointed out, "Digital Restrictions Management" might be a more apt referent. RICHARD STALLMAN, *Can You Trust Your Computer?, in* FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN 117, 117 (Joshua Gay ed., GNU Press 2nd ed. 2004), *available at* http://www.gnu.org/philosophy/fsfs/rms-essays.pdf.

DRM refers to technological restrictions placed on computer media, typically to prevent unlicensed use of music. The goal is to "manage" consumers use of digital media by restricting their actions to a subset of

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content have enabled intellectual products to be sold in previously unutilized packages.[89] [transition] We could, without too much trouble, sell a song that would only play on the sound system of a Cadillac driving between 75 and 85 MPH on a Monday. With a bit more effort, we might find somebody who would actually buy this bundle (on purpose). However, whatever benefit arises from such a transaction would be dwarfed by the headache to everybody else who now has to be careful not to accidentally purchase the Monday-Speeding-Cadillac bundle. [who would have guessed there would be such a market as that for recorded music as ring-tones for cell phones?]

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While many bundles are possible, not all bundles are equally valuable, and the more bundles there are, the greater the search cost to people who want to buy a specific bundle.[90] **[transition rough here]** Through fair use, a court can shape these bundles into more standard, readily recognizable forms. A court might determine that a sliver of a right, such as a right to reread, time-shift, or print a tangible copy, should, by default, be sold with a copy of the work.[91] This could curb the proliferation of non-standard packages that, in addition to leading to unpleasant consumer surprise, can actually decrease the value of intellectual products.[92] Copyright owners have thus far given inadequate notice to

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behaviors that the copyright owner gives them a "right" to engage in.. In this case, the "right" is determined by a bit of computer code that tells users' computers what the user is allowed to do. In practice, this usually means that behaviors the programmer expects and approves of will work fairly well, but that behaviors the owner wishes to discourage, or which are simply less conventional and thus overlooked by the DRM architects, will be inhibited.

Among other things, DRM may make it difficult for users to switch from one type of media player to another or to change computers without losing the functionality of their files.

89 In the paper and vinyl era, rights could possibly have been sold in most packages available now through clever contract language—but technological advance has made selling such rights more practical. We could imagine a book sold with a "burn after reading once" license—but it would not be commonly used, possibly because of enforcement issues or possibly because it is a stupid idea. Now we have the technology to create a digital eBook that could lock after being read once. (We do not yet have the technology to make this product a good idea.)

90 For this insight, we are indebted to the work of Thomas W. Merrill and Henry E. Smith in their article, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle* 110 Yale L.J. 1, 26 (2000).

91 Presumably, this would divide claimed uses into uses that are fair for anybody (such as short quotations), uses that are fair to anybody who owns a licensed copy (possibly including a right to reread or a first sale right), and uses that are not fair and thus must always be licensed.

92 Slicing rights thinly can be lucrative, but also destructive—not only to the copyright claimant and the potential utilizer but also to other copyright owners and potential users. Let us illustrate with an example from the physical world. A

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consumers about new technically restricted packages of digital content.[93] Again, note that our primary concern is with harm to other market participants who will be inflicted with increased uncertainty costs rather than harm to individual bargainers.

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Return to the Janine and Bob Dylan hypotheticals, two types of harm emerge. If Janine is required to buy a license to reread one of her books, she and anybody she talks to now have doubts about whether her other books are rereadable. She will have to check more carefully in the future to ensure that the she is purchasing what she thinks she is purchasing. Additionally, if she ever hopes to resell any of her eBooks in some form,[94] any prospective purchaser will need to find a way to ensure

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simple form of this example is suggested by Merrill & Smith's discussion on currency, weights, and measures. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle* 110 Yale L.J. 1, 48 (2000).

When coins were made of uniform weights of gold, a lot of money could be made by shaving a few grams of gold from one's coins, and selling the harvested gold separately. This practice was highly discouraged. Yet if I own a piece of gold, property law suggests that I can melt it down to make a piece of jewelry if I wish. Why shouldn't I also be able to shave off a bit of it and put the coin back into circulation? After all, it is my gold.

The answer isn't difficult. We all know the problems that would arrive when I dump my diminished coin into the market.

Let's say a coin that formerly weighed 30 grams now weighs 24. If I shave this much off a coin, an astute purchaser will likely notice something isn't right. Let's assume I even tell my purchaser (perhaps in very fine print) that I have shaved off part of the coin. The savvy purchaser should notice this and appropriately discount the value of my coin. The transaction is arguably fair, depending on our mutual expectations and the size of the fine print. But let's assume it's fair at least between myself and my savvy purchaser.

I nevertheless have created some harm to others by shaving off my coin. I have devalued the worth of currency as an institution. Now every future merchant will need to weigh carefully every coin. Imagine the downstream chaos we would create if we gave change for a $20 bill by cutting off a proportion to equivalent to $3.17!

Even if I never receive any improper benefit from my coin modification, I have imposed costs on everyone. Now everyone now has to buy a scale that's sensitive to minute variations in weight. If they don't buy scales, they will instead discount the value of all coins to reflect the possibility they've been shaved. The value of a coin in the marketplace is smaller than it used to be.

[93] Pamela Samuelson & Jason Schultz, Regulating Digital Rights Management Technologies: Should Copyright Owners Have to Give Notice About DRM Restrictions?, J. Telecom. & High Tech. L. (forthcoming 2007)

94 In this case, if rereading is not permitted, reselling is probably out of the question. Still, the first sale doctrine suggests that she should be able to resell her copies. *See* 17 U.S.C. § 109(a).

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that she actually possesses the rights she thinks she does.[95]

The Dylan example presents an entirely different problem. To make things interesting, assume that Dylan did not own a copy of "Pirate Jenny," but transcribed it from memory. The copyright claimant wants to sell him a license. People similarly situated to Bob Dylan can hardly complain that their copies are being devalued because they do not own any copies. However, other copyright owners may be harmed if some of the value of their copyrights comes from people like Bob Dylan appreciating and analyzing their songs. If Dylan thinks he must ensure that he has permission before he can copy a song's lyrics, the value to him is decreased, as is any benefit the music copyright holder receives when Dylan appreciates their music. Thus, if most holders of music copyrights would freely allow lyric transcribing, a few spoilers can decrease the value of everybody's interests in the development of new copyright works.

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Fair use can also create consistency between old and new media. What rights come with an eBook?[96] A court might approach this question by analogy. What is an eBook? It is like a book, but electronic. Thus, an eBook should have a similar set of rights to those of a book—modified primarily by the necessities of its electronic form. In some cases, such as transferability, the peculiarities of the electronic form may suggest a slightly different default package[97]—thought the burden for shifting from a recognized form to a new form falls on the party claiming a use is unfair. A court should thus

95 *See* Henry Hansmann and Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights The Journal of Legal Studies* Harvard Law School, Public Law Research Paper No. 37, 382 (2002) (recognizing numerus clausus in property law but suggesting that its root cause is allowing potential purchasers to verify of what rights are possessed.)

96 Again, we assume that these rights are controlled by copyright law rather than contract. *See* fn 48, *supra.*

97 For an example where a digital form presents problems not present in a physical form, *see, e.g.,* Gal Oestreicher-Singer & Arun Sundararajan, *Are Digital Rights Valuable? Theory and Evidence from eBook Pricing* Working Paper CeDER-06-01, Center for Digital Economy Research (January 2006). Oestreich-Singer and Sundararajan suggest that the value of an eBook could be maximized by allowing users the abilities such as sharing, electronically reading aloud, and copying text but that an option to print tended to decrease the price of the book, perhaps due to loss from piracy. While the authors are discussing technological protections rather than legal rights, research such as theirs might help a court determine an ideal package. While we might suggest that rights associated with physical copies should, as much as possible, be ported to digital copies, a court would need to determine whether a purported increased risk of piracy would outweigh the added uncertainty harm to the broader market.

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consider not only whether a market is likely to be developed but also whether the development would be socially beneficial.

CONCLUSION:

Toward a Theory of Public Rights

The Supreme Court proclaimed that the public has "rights to copy and to use" what the patent law did not make exclusive. That is, the Court has treated the areas where the legislature has refused to grant exclusivity as constituting an *affirmative* grant to the public of the corresponding liberty.98 The Court has affirmed the same principle for copyright as well as patent:99 when the Lanham Act threatened to encroach on the public domain set up by copyright law, the Supreme Court gave the Lanham Act a restrictive interpretation lest it erode the public's rights to use the public domain work.100 One of us has argued that the very 'natural law' rights that provide the moral premise for an author's claim to reward, also provide the premise for a strong set of expressive rights in the public.[101]

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We need a comprehensive definition of the public's rights in the realm of expression.102 Julie Cohen has stated this as a need to define 'user's rights',103 That is a salutary starting place, particularly if one recognizes that authors are users, [104] too, but it is narrow: the public has rights in many capacities.. Members of the public have rights from many sources, not just from their status as

98 All duties have correlative rights; all areas of no-duty are realms of liberties. See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917).. (In Hohfeldian language, one would state the second proposition this way: that 'no-rights' are correlative to 'privileges').

99 In dicta, it extended the treatment to copyright and patent both. Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). It wasn't until Dastar that it put teeth in the copyright half. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

100 *Id.* at 33.

101 Gordon, *Self-Expression, supra, n. 8* (particularly 1555-71 regarding the public's entitlement and 1592-96, 1601 regarding the applicability of Lockean theory as a basis for fair use).

102 Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005).

103 *Id.*.

104 Cf., Jessica Litman, *The Public Domain* 39 EMORY LAW. J. 965, 966 (1990) (no authorship exists without debt to predecessors).

utilizers : for example, they have rights as co-creators of the copyrighted work105, as harmed parties seeking redress through self-help,106 as holders of first amendment free speech rights,[107] and as human beings.[108]

The current statute could be organized around the public's many liberty rights, but instead is organized in the opposite way: around a copyright owner's exclusion rights. But the statute could be set up in the opposite way, stating all the things the public CAN do as the first order of business, and only as a second order of business identifying exclusive right holders who have the power to unlock the gates to the things the public cannot do.

The two forms of organization are analytically identical. In the graphic arts, the identity is obvious: foreground and background are drawn by the same stroke of the pencil. One can map an archipelago by focusing on the ocean and drawing where it ends, or by focusing on the islands and showing where they end.

Putting the specification of rights at the center of the statute makes sense as a matter of drafting strategy: Because the right to copy is assumed to be the background condition,[109] it is simplest to

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105 Cite to Lior's book and Dan's paper.

106 See eg Falwell; property right in self express; self-defense discussion in Excuse paper. First amendment sharply limits the RIGHTS the government can give to private parties to obtain monetary redress for the harms done them by speech. But 'fair use' and cognate doctrines (e.g. estoppel) only give LIBERTIES as redress: the ability to use speech to fight back against the injurer.

107 *See, e.g.*, Neil W. Netanel *Copytight and a Democratic Civil Society*, 106 YALE L.J. 283, 302 (1996) ; Baker, *First Amendment Limitation on Copyright*, Supra note 29, at 897-898.

108 *See, e.g.*, Universal Declaration of Human Rights art. 27(1), G.A. Res 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"). International Covenant on Economic, Social and Cultural Rights art. 15.1(a)-15.1(b), Dec. 16, 1996, 993 U.N.T.S 3, *available at* http://www.ohchr.org/english/law/cescr.htm ("The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b)To enjoy the benefits of scientific progress and its applications").
Jeremy Waldron distinguishes between rights we hold because of what we do (special rights) and rights we hold because of our status as humans (general rights.) Jeremy Waldron, THE RIGHT TO PRIVATE PROPERTY (Oxford Clarendon Press 1990). Some of fair use is premised on special rights, and some on general.

109 Copyright and patent are seen as islands of protection in a sea of liberty. Whether the background really is a sea of

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assume the sea of liberty, and spend one's words on specifying the islands.

That is the way most of us perceive law: as the exception, the places where we have duties instead of liberty.110 But the result is that the public's rights aren't enumerated (except in rare instances like the fair use provision itself). Most of the statute sets up areas where the user has duties, not rights.

What would be one such first order right? As Litman and Stallman have suggested, one such right is "the right to read". Our gorge rises at the thought that we'd have to account to someone else for our reading, or allow someone else to track what we read and make us sign up for it. Because of technological changes, and some doubtful judicial precedent, browsing on-line is probably considered making a reproduction.[111] As noted above, this act of private copying may trigger a prima facie duty to get permission first.

If the statute were written with ordinary expectations about public rights made explicit, it would say "no permissions needed for private reading." But it was omitted because no one would have imagined that such a statement would be necessary. But then technology changed, and the act of reading became something that might involve reproduction. So fair use is needed to restore the right to read.

Someone with a lawful copy of a digital text -- say, an eBook, or a downloaded course book-- should be able to read and reread it as often as they like on their computer. Even if the owner of copyright were standing right there, the reader should be entitled to say, "I don't care if you stand ready and willing to sell me a license to read. I have a rightful liberty to read without paying." And if the

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liberty, however, is open to debate. See e.g., Reichman. ???

110 This understanding is culturally based. An old joke goes this way:
In the US, everything is allowed except if forbidden.
In Germany, everything is forbidden except if allowed.
In the USSR, everything is compulsory except if forbidden.

111 This is the unfortunate legacy of a case with a different focus, Mai Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993). See fn. 51, *supra*.

reader buys a new computer or other platform, and the owner of copyright says, 'you can't copy without my permission,' the reader should be able to use the example of the book as his touchstone and say: 'I have a right to read, and to carry my books with me.'

This may also extend to the case of music. Although the issue is subject to debate, of course, many have noted that the widespread disobedience to copyright law in music might signal not something wrong with the copyists, but rather with copyright law. Again, a prior era's custom could provide a touchstone. Taking one's vinyl record from one record player to another could provide a legitimate analogy for taking one's music from one platform to another. Perhaps a consumer should freely be able to switch from one music player to another without losing a music collection, just as one could replace a poorly-functioning record player with a new one. And again, this right may be valid even if the copyright owner is standing right in front of the music fan, saying "I'm willing and able to sell you a license to transfer your music."[112]

For now, we make a modest suggestion: The statute should make it explicit that fair use is a 'right'. The Supreme Court of Canada has done no less, in *CCH Canadian Ltd. v. Law Society of Upper Canada*.[113] As that Court writes: "[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defense. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and user, it must not be interpreted restrictively. As Professor Vaver... has explained...: 'User rights are not just loopholes. Both owner rights and user rights should therefore be

112 In fact, it might be particularly important for a user to avoid a transfer fee—particularly if the user is transferring due to dissatisfaction with the company's products.

113 CCH Canadian Ltd. *v.* Law Society of Upper Canada, 2004 SCC 13, at par 48. (Decision available at http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html) See generally the stimulating discussion in Abraham Drassinower, Originality, Novelty and Distinctiveness: Author and Users in Canadian Copyright (draft on file with the author)(2006).

given the fair and balanced reading that befits remedial legislation.'" [Dreyfuss also wrote on user rights in U Chi L Rev in recent years]

It is overdue for our courts to do the same. They can and should do so without a statute, but a legislative nudge rarely hurts.

Conclusion

We would revise the current Section 107[114] to read as follows, with italics indicating areas of change:

§ 107. The *Right of* Fair use

Notwithstanding *other provisions of this title*, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means *[words omitted here]*, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is *a right and* not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished *or that a license is available for the contested use* shall not itself

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114 Section 107 now reads:

§ 107. Limitations on exclusive rights: Fair use

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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

bar a finding of fair use if such finding is made upon consideration of *all relevant* factors.

Our proposed modifications to copyright law would clarify that uses such as Janine's and Bob Dylan's would remain fair use even if a publisher offers to explicitly license such use.

In the above, we suggest adding language to § 107 that would clarify that courts should look not only at whether a market for the use exists but at the larger issue of whether such a market leads to a socially desirable result.

As for the location of the change, it is logical to place it where Congress corrected the courts the last time they tried to artificially constrain fair use, Congress made clear that no one factor (there, the unpublished status of plaintiff's work) should be determinative. The resulting sentence added to section 107 reads as follows: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." We suggest a similar course for fair use, and amending the sentence to include a reference the availability of licensing.[115][116]

As mentioned, we adopt this agenda in part because some courts and commentators apparently believe that a § 107 fair use claim should be denied if a licensing market for that use exists. This ambiguity, combined with a largely one-sided interaction between savvy right owners and risk-averse down-stream producers,[117] has threatened to shrink fair use. The fair use provision of the copyright

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115 We thus add to the above sentence a reference to license availability. We also changed the last two words of the existing sentence, to make clear that the four factors listed in the statute are not the only ones that matter. Decades of jurisprudence and legislative history have consistently indicated, that the four factors listed in section 107 are merely illustrative. See 17 U.S.C. § 107 (listing factors to "include" in consideration of fair use). *See also id.* § 101 (indicating that, "The terms 'including' and 'such as' are illustrative and not limitative."). Also see (reference to House Report).

116 We would also like to add another clause clarifying that fair use should be a defense to a charge under 17 U.S.C. § 1201 of circumventing a technological measure that effectively controls access to copyrighted work. We do not focus on this change because the reasons for this change have been persuasively argued by others. Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium"*, 23 COLUM. J.L. & ARTS 137, 151 (1999); Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM. J.L. & ARTS 1, 8-9 (2000); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 540 (1999); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1199 n. 14 (Fed. Cir., Aug. 31, 2004); *see also* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act* 148 U. PA. L. REV. 673, 739 (2000).

117 *See, e.g.*, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law* 116 YALE L. J. 882, 887 (2007).

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statute, however, is critical to copyright's ability to serve the social interest.

We suggest additional changes, as noted: we suggest that section 107 drop its potentially restraining first clause, and that fair use be identified as a "right." These changes would further underline the importance of fair use, by making clear it can play a role in cases involving the DMCA, that fair use is a crucial part of any "conflicts" analysis under preemption, and that the burden of proving all elements of fair use need not rest on the defendant. As the Supreme Court has said of the public's ability to copy unpatented inventions, the public's ability to "copy and to use" fairly is a "right"[118] that cannot be lightly abandoned.

E N D

Post script:

WJG is in France, and available at Hotel Jardin de L'Odeon, 011 33 1 53 10 28 50, and at wgordon@bu.edu. She should be back in Boston by Tuesday, Aug 21, 2007. Her cel phone is 617 304 4412, and her office is 617 353 4420. If you need to reach her urgently, and the other two numbers don't answer, she can also be reached at home: 617 916 2110

Daniel is at squashed@gmail.com, and his phone is (734) 213-3389.

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118 *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *also see* ***Dastar Corp. v. Twentieth Century Fox Film Corp.***, 539 U.S. 23 (2003) (giving the trademark law a restrictive interpretation in order to avoid trademark being used in a way that would erode copyright's public domain).

When the law imposes no duty it correlatively creates an area of liberty. Hohfeld. There is a sense, therefore, that makes it a tautology so say that fair use, or the ability to copy after copyrights expire, is a 'right'... these are areas where the law imposes no duty. But the Supreme court's enunciations-- like the Canadian Supreme Court's statements in *CCH Canadian Ltd. vs. The Law Society of Upper Canada* 1 S.C.R. 339 (2004) -- go beyond this mere tautology, to suggest that the right to copy not only merely exists, but is worth preserving on its own account. That it may the be a kind of moral/natural/human entitlement or 'right' that legislatures should respect.

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