June 22, 2007
Fourth Rough Draft

Fair Use and Face-to-Face Bargaining: Having an Opportunity to Bargain Doesn't Create a Requirement to Do So:

By

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I. Introduction

Alex has have a ten-year-old video cassette of a favorite movie. Unfortunately, she does not have a video cassette player. She wants to copy the movie onto her iPod. To do this, she borrows a VCR from a friend, runs a cable to a video capture port on my computer, reformats the file into something the iPod can read, and sends the file to the iPod, which she will use to watch the movie in the future. After the file is securely on the iPod, she will delete all record of the movie from my computer. Destroy the original VHS copy seems wasteful to her, but if the law demands it, she is willing to do so, though she would prefer to simply box it up next with her 8-track tapes, laser disks, and 5 ¼ inch floppy disks—none of which she will use again. In the beginning she had one copy of the movie on a VHS. At the end, she has one usable copy on an iPod. Who would deny that her use is fair? Should the essential fairness of her use hinge in any way on whether the movie has been released on DVD or is available as a download?

Our proposed modification to copyright law would clarify that uses such as Alex's remain fair use even if a publisher offers an alternative means to the same end. We suggest two specific revisions to § 107. First, we would add language to § 107 that would clarify that courts should look at not only

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The authors thank James Corwin,Tamar Frankel, Brandy Karl, and Gavin McCormick for helpful comments.

whether a market for the use exists but whether such a market leads to a socially desirable result. Specifically, a sentence should be added to § 107 stating that a finding of harm in a particular market does not bar a finding of fair use unless that market itself promotes the progress of science and the useful arts.[2] Secondly, we would 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. Because the reasons for this change have been persuasively argued by others, we will focus on the first issue.[3]

We adopt this agenda in part because one of us has on occasion been 'credited' with the judicial developments that put the role of markets into question.[4] Some courts and commentators apparently believe that a § 107 fair use claim should be denied if a licensing market for that use exists.[4] This ambiguity, combined with a largely one-sided interaction between savvy right owners and risk-averse down-stream producers[5], has threatened to shrink fair use. The fair use provision of the copyright statute, however, is a critical element of the legislature's balancing decisions when passing the copyright act. As the Supreme Court said of the public's ability to copy unpatented inventions, the ability to "copy and to use" fairly is a "right"[6] that cannot be lightly abandoned. Fortunately, some

2 You could compare this proposed sentence to the clause already in the section that reads, "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." 17 U.S.C. § 107.

3 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).

4 [Insert Monster of a Footnote]

5 See, e.g., James Gibson ...

6 Bonito Boats; also see [Dastar] (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 abilty 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 XX-- 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.

courts are beginning to recognize the danger that over-enshrining a narrow market can pose for fair use. Our suggested amendment would post a lighthouse to keep all courts from the shoals.[7]

These shoals are treacherous indeed—or so we surmise by the number of courts and commentators who have foundered on them. Some court holdings suggest that a use such as shifting a movie from one platform to another is not a fair use because it involves creating a copy and the owner of the copyright .[8] Alex could buy a DVD or buy a copy of the movie online and download it directly to the iPod. Others might focus on the copyright owner's lost profit when it cannot sell Alex a digital copy of the DVD.[9] Some would say that the mere existence of a market for the use in question should preclude a fair use claim.[10] Some might argue that the copy I end up with on my iPod is, materially at least, a better product because it will ~~not gradually lose~~ preserve its quality over time. Some might even suggest that the copyright owner should have a right to control the manner in which I watch the movie.[11] Still others would balk at ever giving any~~body~~one rights to create (even temporarily) an unprotected digital copy for fear that it would find its way into the hands of a third party. These objections have varying degrees

II. Background

The copyright clause of the Constitution allows Congress to grant copyrights for the ~~"promot~~no~~ion~~ of science and the useful arts."[12] By allowing authors exclusive rights in their work, Congress gives

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7 *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006) ("'[A] copyright holder cannot prevent others from entering fair use markets merely "by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work."')

8 *See* MAI

9 Rebinding a book could also keep the profit of another copy away from the publisher, but rebinding a book does not involve literal copying.

10 Currently there is a market for DVDs and for downloading movies directly from services like iTunes. There is not, to our knowledge, a market for a license to transfer a previously purchased movie from one platform to another. However, even if such a market existed, we would suggest that it should not change the essential fairness of this transfer.

11 Cite Cleanflicks (?), *compare* 17 U.S.C. § 106A.

12 U.S. Const. Art. 1 § 8 (The Congress shall have power ... by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries).

them an economic incentive to create works. On the other hand, if these exclusive rights are too broad, copyright could deter future works by locking up the very building blocks of language and culture. As 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.[13] Consequently, Congress performed a delicate balancing act when crafting the Copyright act.

Perhaps Congress foresaw that societal change and technological progress might someday upset that balance. Fortunately, Congress codified the doctrine of fair use to allow courts to recalibrate this balance as society and technology changed. The fair use clause of the copyright act creates a balancing test for courts to determine whether certain uses are fair and thus outside the scope of an author's exclusivity.[14]

Section 107 lists a number of uses traditionally considered fair and then provides four factors for courts to consider when determining whether other uses (either not enumerated or not foreseen) are fair.[15] The fourth of these factors looks at "the effect of the use upon the potential market for or value of the copyrighted work."[16] This factor is often considered the most important of those listed—which makes sense. After all, copyright has chosen to use market dynamics to promote science and the useful arts. To the extent that market forces promote the aims of the statute as a whole, markets should have a large influence on whether or not a particular use is fair. ~~However~~, in cases where the market fails to promote the aims of copyright law, the existence or potential existence of a market should not weigh against a claim of fair use.

[Incorporate past discussion on market failure by reference.]

III. Market Harm to Third Parties

13 Cite

14 17 U.S.C. § 107.

15 Set out statute

16 17 U.S.C. § 107 (2007). I use the term "fourth factor", rather than the sometimes used term "fourth prong," because the word "prong" implies that the four listed factors are an exclusive list which, according to the plain language of the statute, they are not. *See* 17 U.S.C. §101 (clarifying "including" is "illustrative and not limitative.").

Ultimately, when we talk about what rights users of intellectual products have, we are concerned both about the interests of the individual and broader social interests.

A. Privacy Concerns

One simple example where individual bargains can create external harms relates to sacrifices of privacy. While technologies such as cellular phones and the Internet have made small payments to copyright owners feasible, they come with a certain cost to privacy. While the financial cost of a license for a small use might be relatively minimal, it require the user to leave a personally identifiable record of that use. This leaves the user vulnerable both to targeted (and probably undesired) marketing, identity theft, and possible embarrassment. This cost to privacy adds another small transaction cost. However, a privacy cost is not simply a transaction cost, in that it can cause harm to third parties. One person's acceptance of a privacy cost erodes other individuals ability to reject that privacy cost because it will be assumed that the few hold-outs have something to hide. Because most people are willing to browse the Internet without any steps to protect their identity, those who go to lengths to protect their anonymity are viewed with suspicion. We think they must have something to hide. Privacy is most effectively protected at the societal rather than the individual level. While one person might rationally and profitably sacrifice some privacy for a minimal benefit, each casual sacrifice in privacy devalues the privacy of others.

B. Worry about Fragmentation[17]

Slicing rights thinly can be lucrative, but also destructive. 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

17 Cite Merrill & Smith throughout this section

highly discouraged. Yet if I own a gold coin, 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. Noweveryone 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 carry literary works) and vinyl records (which carry 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.18 You could loan or sell the book or the record. We knew what we would pay for a book or record because we knew what we are getting.

It has now become possible to sell consumers a much smaller bundle of rights with the copy.

If we are buying music online, our copies might have restrictions placed on them--either by computer code 19, or by a 'license' agreement's fine print, or by law. Because of technology changes, a simple sale of an ebook or MP3 file has become complex. What one has purchased is less easy to understand. Information costs increase, adding inefficiency to the market and hindering both the development of new technology and the fully productive use of copyrighted works.

With the change in technology, what consumers receive is less likely to match what they think they receive. This can both frustrate consumer expectations and impede the adoption of new technologies.

We suggest that fair use is one of the appropriate tools for courts to use to prevent this devaluation by uncertainty. If for example a judicial ruling construing RAM as reproduction would strip away one of the rights that purchasing a copy typically entails, then fair use should restore the user's right. The courts should not consider the availability of license a bar to a finding of fair use... with one caveat.

Sometimes participants receive benefits by being able to mold the transaction. (As in my prior example: possible the object I want to buy with my gold coin is 'worth' only seven-eighths of the coin, and the other party has nothing to give me that's worth only one-eighth If shaving coins is outlawed, then I cannot buy the object I want except by paying one-eighth too much for it.) If a court is

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18 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.

In all discussions of public understanding of copyright, we are of course indebted to the work of Jessica Litman and Lloyd Weinreb.

19 [Briefly explain DRM]

persuaded that shaving the coin-- eliminating a liberty from the normal purchase package -- would create a societal benefit large enough to outweigh the costs of complexity, then it is appropriate to honor the market. But when the B-to-C20 pattern diverges from the ordinary, the burden should be on the copyright claimant to show that the new market will further 'science and the useful arts".[21]

Notably, costs related to market confusion and consumer expectation become less convincing the more carefully a license is negotiated. What could, on a small scale, be a fair use for an average user, be something that could and should be negotiated on a large scale if the relevant parties are much larger corporations.

IV. Toward a Theory of User Rights

Let us take a heading from the Supreme Court. It 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.22 The Court has done this for copyright as well as patent:23 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 copyright public domain.24

We need a comprehensive definition of the public's rights to copy and to use.25

Julie Cohen has stated this as a need to define 'user's rights'.26 That is a salutary approach, but

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20 [we might want to spend more time elaborating the differences between business to consumer and business to business. How do merril & smith handle it? Page cites to them wd be useful][this footnote is forthcoming]

21 Merrill & Smith go a step farther, suggesting that new forms should be created exclusively by the legislature. PINPOINT.

22 All duties have correlative rights; all areas of no-duty are realms of liberties. See Hohfeld. (In Hohfeldian language, one would state the second proposition this way: that 'no-rights' are correlative to 'privileges',)

23 In dicta, it extended the treatment to copyright and patent both. Sears & Compco. It wasn't until Dastar (see immediately following note) that it put teeth in the copyright half.

24 Dastar

25 See Julie Cohen

narrow: the public has rights in many capacities. Members of the public have rights from many sources, not just from their status as users: for example, they have rights as cocreators of the copyrighted work27, as harmed parties seeking redress through self-help,28 as holders of first amendment free speech rights.

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.

But unlike graphic art, words can't simultaneously draw background and foreground. Something must take precedence in order for anything to be stated.

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,29 it is simplest 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

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26 Cite to Cohen article

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

28 See eg falwell; prop rt in self express; self-defense discussion in Excuse paper. First amendment sharply limits the RIGHTS the govt 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.

29 Copyright and patent are seen as islands of protection in a sea of liberty. Whether the background really is a sea of liberty, however, is open to debate. See e.g., Reichman.

instead of liberty.30 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.

So what would be one such first order user right? But 'user's rights' is one place to start. 31

As Litman and Stallman have implied, 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, 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 considered making a reproduction. Making a reproduction requires either permission, or an implied license or fair use. The act of private copying triggers a prima facie duty to get permission first.

If the statute were written with ordinary expectations about user's 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 coursebook-- 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 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

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30 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.~~ not forbidden was compulsory

31 Discuss any of this: It's like the question of suum, and the libertarian position that we have a right to use our physical objects (our computers and our ipods) superior to other's rights over their nonphysical objects.

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.

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."

The example of books and eBooks shows where private interests may have overstepped the boundaries Congress meant to put on copyright. Fair use is simply one mechanism Congress has used to protect the interests of the public. Uses where benefits to a licensor are likely to be outweighed by the harms of increased confusion are likely to be areas where there are relatively few people who would like to license relative to the number of people seeking that use. These are likely to be relatively common or relatively minor uses that society considers, in a word, fair. This might mean that in some cases the particular use would come included with the purchase of a copy. For example, playing a DVD with a computer involves copying the movie into a number of different types of memory. Presumably a right to make these (relatively) transient copies comes included with the cost of the DVD. If a company sought to charge an additional fee to play a DVD on a laptop computer, the court could appropriately hold that even if there were a niche market willing to pay for this license, it would decrease the value of all other DVDs as prospective purchasers wondered whether their intended purchase would play every day of the week.[32] When prospective purchasers are willing to pay less for a product, sellers (and owners as potential sellers) are also hurt. However, some of these user rights would not require any purchase at all. For example, most owners of copyright would not object to the

32 *See* Merrill & Smith, watch example.

public humming of their copyrighted works. In fact, they might get quite frustrated if people called to ask permission before humming a song. If one particularly obnoxious copyright owner sought to license humming of his songs, a court might say that, for the sake of simplicity, humming is a permitted use in all cases.

We saw the beginning of such an argument in Sony. Many of the copyright owners and most of the users wanted time shifting to be permitted for broad casts. In fact, most people want it to be permitted for most content—and it is already permitted when there is a physical copy of a work such as a video cassette. Time shifting is almost always okay. Because the strong norm that time-shifting is permitted, we can consider the permissibility of time shifting to be a general rule. Any exceptions to this rule would cause a certain harm in through increased uncertainty. If the uncertainty great enough and the benefit of a time-shifting license is small enough, a court could hold that time shifting is always permitted.[33]

Notably, if a theory of user rights stems from confusion and harm to the general population of users, it is largely irrelevant whether the restriction is made by law or by code. It would be quite easy to restrict music files to only play on certain days of the week. However, such a restriction would run afoul of the rights of the users. Users should not be liable for accessing material they have a right to use any more than home owners should be liable for the destruction of a lock illegally barring them from their homes.

33 *But c.f.*, DVR case

When we talk about "user rights," we risk of stumbling into a rhetorically powerful but analytically shallow field where we advocate things that argue for ....
To rigorously develop a set of user rights
User Rights should not be transferred. (This does not have to mean that they cannot be transferrable).