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The Perfect Storm: Intellectual Property and Public Values

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INTRODUCTION

It begins easily enough. Section 107 of Title 17 of the United States Code, at its core, expresses a straightforward promise: "Notwithstanding the [statutory rights granted copyright holders,] the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[1]

A small carve out, an exception, a set aside from the otherwise robust privileges offered to the owners of copyrights. And yet in 2005—still in the very early stages of what portends to be a remarkable new era of information-based social activity—that promise, at least among the many on both sides of the pitched battles over the scope, meaning, and content of the copyright law, seems to have been lost. Today, the concept of fair use in the copyright law is viewed by some as an empty pledge, where only the battered husk of an idea remains after years of unceasing assault by the organized legions of corporate content controllers.[2] Yet among these content creators, so often the villains of this twenty-first century tale, fair use is an increasingly dirty epithet: one used (in their view) to justify the theft of valuable property on a scope and scale unimaginable a decade ago.[3]

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1. 17 U.S.C. § 107 (2000).

2. *See, e.g.*, Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity 68-73 (2004); Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. Times, Jan. 25, 2004, § 6 (Magazine), at 40; Electronic Frontier Foundation, Unintended Consequences: Five Years Under the DMCA (Sept. 24, 2003), http://www.eff.org/IP/DMCA/unintended_consequences.pdf.

3. *See, e.g.*, Verne Kopytoff, Matthew Yi & Jose Antonio Vargas, *Music Lawsuits Snare 18 in Bay Area*, S.F. Chron., Sept. 9, 2003, at A1 ("We simply cannot allow online piracy to continue destroying the livelihoods of artists, musicians, songwriters, retailers and everyone in the music industry." (internal quotation omitted)); Jack Valenti, *Two Smoking Barrels*, Fin. Times, Mar. 9, 2004, Creative Business, at 15 (arguing that piracy now costs the movie industry $3.5 billion dollars a year, and also "fuels other forms of criminality").

The result of this is a virtual crisis for reasoned dialogue and deliberation; the gulf between advocates of "the public domain" and the content creators is so broad as to virtually preclude the sort of discussion that could lead to mutually beneficial agreement about the policy changes that must occur in this new era of the copyright law.

I. HOW WE GOT HERE: A LOOK AT THE FUNDAMENTALS OF FAIR USE

The basic premise of the fair use concept in copyright law is simple: to set aside some classes of activities that would otherwise be regarded as infringement of copyright.[4] The statutory section provides several examples of "uses" of works deemed "fair," and establishes a (purportedly) nonexclusive four-factor test for analyzing fair use, (though courts rarely stray beyond these four factors, and indeed often find one or more factors to be less than useful in their analytic approach):

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.[5]

These four factors, with their "weasel word" quality,[6] and their invitation to a wide-ranging, holistic, fact-specific analysis, are, of course, a lawyer's dream. And these factors have been analyzed by hundreds of courts, and

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4. *See* 17 U.S.C. § 107; *see also* Eldred v. Ashcroft, 537 U.S. 186, 219-22 (2003); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574-94 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546-69 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447-55 (1984).

5. 17 U.S.C. § 107.

6. Stephen Breyer, discussing these factors after they were initially proposed in The Copyright Revision Bill, S. 543, 91st Cong. (1st Sess. 1969), quipped, "As the Scottish preacher told his congregation when delivering a sermon on an abstruse theological question, 'Now, bretheren, wee cum to a verra great deeficulty: wee shall look it squarely in the face and pass on.'" Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 330 n.199 (1970).

have been the subject of entire careers of legal scholars.[7] While the precise nature of the relationship among these factors is impossible to generalize (indeed, that seems to be the point[8]), it is useful to think of the relationship as one between the "nature" of the allegedly fair use, and the impact of such use on the copyright holder, reflecting what appears to be the twin goals of the fair use exception. As a general matter, when the use at issue is less commercial, more altruistic in nature, the more likely it is to be "fair" use.[9] This is because the fair use provision is, if nothing else, a clear statement of congressional intent to privilege certain forms of uses over others, even to the extent that such uses impinge upon the wishes of the copyright holder. Second, the lesser the impact that the use has on the rights of the copyright holder—and in the United States we are talking mainly about utilitarian economic rights rather than moral rights—the more likely it is to be fair.[10] If these two factors are thought of as distinct axes describing a relationship, they can be visualized as follows:

7. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014-17 (9th Cir. 2001); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1399-1403 (9th Cir. 1997); Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1385-88 (6th Cir. 1996) (en banc); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 918-32 (2d Cir. 1994); Sega Enters. Ltd., v. Accolade, Inc., 977 F.2d 1510, 1521-27 (9th Cir. 1992); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 969-72 (9th Cir. 1992); Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 Int'l Rev. L. & Econ. 453, 454-55 (2002); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1669-86 (1988); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110-25 (1990); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1550-64 (2004); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1, 16-21 (2002).

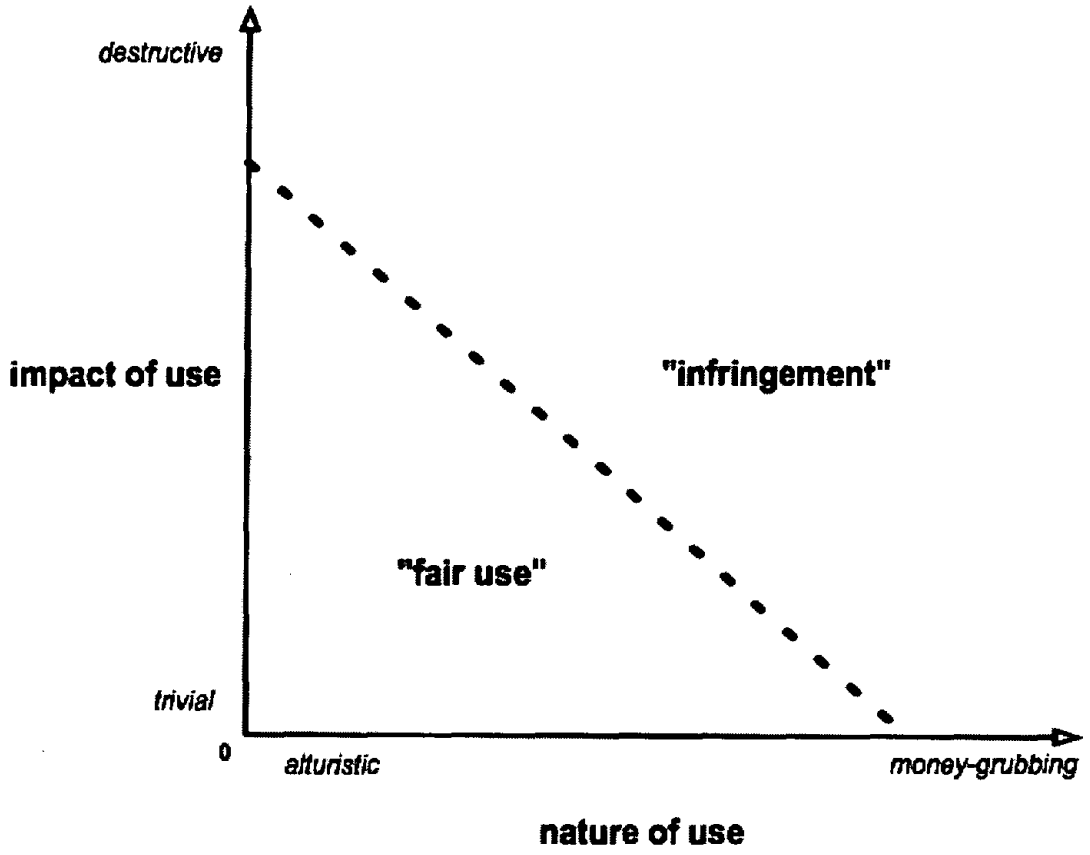
8. *See* H.R. Rep. No. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Id.

9. *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 198 (3d Cir. 2003) ("If a new work is used commercially rather than for a nonprofit purpose, its use will less likely qualify as fair."); Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993) ("We have been more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes.").

10. This axis is primarily a derivation of the "market effects" factor in 17 U.S.C. § 107. *See, e.g.*, Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 517 (7th Cir. 2002) ("[C]opying that is a substitute for the copyrighted work . . . or for derivative works from the copyrighted work, is not fair use." (internal citations omitted)); Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194, 206 (4th Cir. 1998) ("A use that does not materially impair the marketability of the copyrighted work generally will be deemed fair.").



In this figure, the area under the curve is the set of possible "fair" uses of a particular copyrighted work, where the determinants of fairness are both the nature and impact of the use. Thus, a high-impact use (one that directly interferes with the copyright holder's ability to make money, for example) may be a "fair" use if the nature of the use is relatively noncommercial; conversely, a relatively commercial use can be "fair" where the impact of the use is negligible.

The important point here is not to describe the location of this line. Indeed, even at this level of generality, there is little more that can be usefully said about the division between fair and unfair uses in practice: The "know it when you see it" nature of the analytic approach in this context simply precludes such observations.[11] The insight here is to

11. *See, e.g.*, 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, 1604 (1982) ("[T]he ambiguity of the fair use doctrine and its statutory formulation obscure the underlying issues and make consistency and predictability difficult to achieve."); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1138 (1990) ("I doubt that the results in concrete cases can be made predictably responsive to a limited set of definite principles—certainly not large, general principles and not very often even more specific, intermediate ones.").

recognize that this "line" is not at all distinct, but rather describes a "zone of uncertainty" between "fair" and "unfair" uses in the copyright context. That is, given the nature of the fair use inquiry, this line will never, in fact, be a "line"—but will instead be a region of distinct uncertainty for both copyright holders and users alike. And this region is not static, but can (and does) change in response to external conditions.

Fundamentally, what we have experienced in the past several years (and what is, in my view, the fundamental cause of the crisis in both fair use dialogue and the broader discussion about intellectual property rights) is a distinct broadening of the zone of uncertainty in the fair use context. It is simply less clear now what is and what is not fair use. Many commentators argue that the availability of fair use has diminished, or increased; that recent events have moved the dividing line one direction or the other.[12] But in this dynamic, expectations-driven environment, perspective is just as important at the net result—and note, that as the zone of uncertainty broadens, the set of uses that fall clearly within fair use, or clearly within the rights of the copyright holder, diminish. Both perspectives "see"—quite correctly, as it turns out—an encroachment on their expectations with respect to copyrighted works. Both sides—understandably—feel aggrieved. And both sides are surely losing.

Understanding the reasons for this broadening of the zone of uncertainty in fair use is important. Some of this is inevitable change, the plate tectonics of progress bumping up against the law. Rapidly changing technology has generated entirely new classes of works and uses that are not readily categorized. The nature of academic work and scholarship has changed, taking advantage of new sources of information, and new mediums of distribution. And the stuffy old academy, of course, has dramatically changed, in no small part due to the realities of the current funding environment: The ivory tower is looking more and more like Class A office space as universities, think tanks, and other organizations behave increasingly as marketplace actors across a variety of areas. At least some of the growing uncertainty is in response to new laws, such as the Digital Millennium Copyright Act,[13] that may—or may not—change the legal

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12. *Compare* Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 Harv. J.L. & Tech. 41, 48 (2001) ("[N]ew technological and legal protections confer a degree of control over access to and use of copyrighted content that goes well beyond the rights afforded by copyright law.") *with* John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. Cin. L. Rev. 45, 70 (2003).

> As barriers that slow the dissemination of information memes are permeated—whether politically (e.g., through increased democratization), legally (e.g., through an expansion in recognized fair use defenses to intellectual property law), or technologically (e.g., through increased data compression (mp3) and superior methods of digital propagation (broadband))—the efficient propagation of information into the world culture is better facilitated.

Id.

13. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

contours of fair use.[14] But we must also understand that this growing uncertainty is in no small part a reflection of the behavior of all of us, actors on the stage of copyright. Recent years have seen a number of uncertainty-stimulating behaviors, including overbroad claims of copyright infringement as well as unsupportable claims of fair use.[15] Statements by officials in the music and media industries downplaying the scope of fair use in the context of personal video recorders, etc., do little more than muddy the analytic waters.[16] And many of the legal claims advanced, even in court filings, with respect to the supposed fair use nature of the distribution of copyrighted works via peer-to-peer networks are similarly unhelpful.[17] Indeed, what appear to be exaggerated statements about the scope and vitality of fair use—even those that run counter to the interests of those promulgating them—have become prevalent enough that a cynic might be forgiven for suspecting that there were incentives (political, fundraising, tactical) on both sides to obfuscate the reality of this issue.[18] In

14. *See, e.g.*, Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium."* 23 Colum.-VLA J.L. & Arts 137, 140-43 (1999); Cassandra Imfeld, *Playing Fair with Fair Use? The Digital Millennium Copyright Act's Impact on Encryption Researchers and Academicians*, 8 Comm. L. & Pol'y 111, 125-28 (2003); Michael Landau, *Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access?: Attempting to Reach a Balance Between Users' and Content Providers' Rights*, 49 J. Copyright Soc'y U.S.A. 277, 299-302 (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L.J. 519, 537-43 (1999).

15. See for example, George Loewenstein & Don A. Moore, *When Ignorance Is Bliss: Information and Exchange and Inefficiency in Bargaining*, 33 J. Legal Stud. 37 (2004), on the reasons that people will view situations divergently without a common framework.

16. For example, Jamie Kellner, then chairman and CEO of Turner Broadcasting Systems, asserted in a 2002 interview that "[a]ny time you skip a [television] commercial . . . you're actually stealing the programming." Staci D. Kramer, *Content's King*, Cable World, Apr. 29, 2002, at 24, 32. Still, the high-water mark for technophobic hyperbole on behalf of copyright owners probably lies with Jack Valenti, the chief executive of the Motion Picture Association of America, who, testifying before Congress in 1982, famously pronounced that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." *Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705*, 97th Cong. 8 (1982). Perhaps in the interest of preserving their legacies, both men, now on the verge of retirement, while remaining staunch opponents of fair use exceptions to copyright law, have recently engaged in rhetorical back-pedaling. *See, e.g.*, Julia Angwin, Peter Grant & Nick Wingfield, *In Embracing Digital Recorders, Cable Companies Take Big Risk*, Wall St. J., Apr. 26, 2004, at A1 ("Mr. Kellner says now that 'stealing' was probably too strong a word . . . ."); John Borland, *Jack Valenti's Curtain Call*, CNET News.com, June 21, 2004, http://news.com.com/2008-1025_3-5242156.html?tag=nm_arch ("I was never opposed to the VCR, mainly.").

17. *See, e.g.*, Appellant Napster, Inc.'s Opening Brief at 34-42, A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401, 00-16403) (arguing that sampling of copyrighted music is a fair use). More recently, Lawrence Lessig has argued that several types of illegal peer-to-peer file sharing, including sampling, are beneficial to society and harmless to copyright owners. Lessig, *supra* note 2, at 68-73.

18. *See, e.g.*, Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 Berkeley Tech. L.J. 501, 503 (2003); Declan McCullagh, *Debunking DMCA Myths*, CNET News.com, Aug. 19, 2002, http://news.com.com/Debunking+DMCA+myths/2010-12_3-950229.html.

any event, it is clear by now that this struggle over fair use, in the press and in the courts, has no winners, only losers. Both sides will continue to perceive themselves as losing. And both will be correct.

Note the pattern emerging here: Divergent views lead to uncertainty; broadening uncertainty leads to the (real) perception of "loss" by each side of the issue; this perception of loss leads to even more overbroad (and uncertainty-stimulating) claims; and the cycle begins anew. That is, in many respects, the recent discussion over the scope of fair use has resembled a "perfect storm," a self-perpetuating confluence of events whose result is perhaps worse than the sum of its parts might otherwise suggest. The debate continues on, uncertainty increases, and both sides feel the loss.

In the abstract, of course, all would probably agree that—on balance—certainty is better than uncertainty. But it is important to understand the truly pernicious effects the broadening zone of uncertainty has in the fair use context. Consider the following:

Increasing incidence of litigation. Where enforcement is determined by private parties (as in most copyright disputes), decision making concerning litigation versus settlement is driven primarily by the expectations of the parties involved. Where expectations diverge (or appear to be in rough equipoise), litigation will be an increasingly frequent choice.[19]

Increasing transaction costs. Even if the parties involved wish to avoid litigation, the uncertainty with respect to the underlying entitlement (here, the scope of fair use) will make any agreement costly in terms of both time and money.

De facto entitlement shifts. As transaction costs increase, the possession of the initial entitlement becomes more important, because the costs of shifting the entitlement create a barrier to doing so.[20] Note that this aspect of the issue is quite technology dependent: Where the technology allows ease of engaging in (fair) use of a copyrighted work (or, conversely, difficulty in stopping it), the de facto scope of fair use expands.[21] On the other hand, as technology allows for prevention of unauthorized uses (for example, the implementation of effective digital rights management ("DRM")), the de facto rights of the copyright holder expand.[22] Given the

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19. *Cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 15 & fig.6, 16 (1984) (depicting how expectations can affect the likelihood of settlement).

20. *See, e.g.*, R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

21. Benny Evangelista, *Heading Off Film Piracy: Movie Trade Group Staying One Step Ahead in Lobbying Efforts*, S.F. Chron., Apr. 28, 2003, at E1 (discussing how technology allows new forms of piracy); Jon Healey, *Labels Will See Music File Sharers in Court*, L.A. Times, June 26, 2003, at A1 (same).

22. *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 275 (2002) ("By distributing music through a trusted system, content providers can not only charge users for every copy made, they could theoretically charge users every time a song is played, limit the locations in which a file could be used, or even program a file to expire after a certain date."); Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 Berkeley Tech. L.J. 137, 138 (1997)

dynamic technology environment, one can expect such shifts to be nearly constant, suggesting that the "real" entitlements are not stable.

Reallocation of power. In this uncertain, case-specific, holistic legal analytic environment, the real power to determine fair use shifts to the federal judiciary, and to a lesser degree, the lawyers who predict the courts' analysis.[23] Whether this is good or bad might depend upon your point of view, but it does seem clear that such an effect is likely to systematically disadvantage the new and unfamiliar (both in terms of claims of fair use, and in terms of the works themselves), and may yield results that seem to turn as much on aspects of the parties themselves (socially conscious African-American author: "good";[24] Norwegian hacker teenager: "bad"[25]) as on the merits. I note that in the context of the scholarly environment, these effects are especially troubling, as one fully expects the best forms of academic research to be challenging to the status quo.

Systematic advantage to the resource rich. Given the direct relationship between the level of uncertainty and the various costs involved in reducing that level of uncertainty, one can expect that parties who are best able to bring relevant resources to the table (money, expertise, time, etc.) to be more successful. It is conventional, of course, to assume that this aspect of the problem will favor copyright owners, but that is not necessarily the case, since many copyright owners will not be the "rich" parties in many disputes.[26]

Increasingly user unfriendly. Finally, but perhaps most importantly, a broadening zone of uncertainty greatly diminishes the utility of the fair use concept to all but a small handful of knowledgeable experts. As our society becomes increasingly information based, copyright law will become ever more important in everyday activities. If, as we have seen over the past few

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("With the development of trusted system technology and usage rights languages with which to encode the rights associated with copyrighted material, authors and publishers can have more, not less, control over their work.").

23. *See, e.g.*, Mauricio España, Note, *The Fallacy that Fair Use and Information Should Be Provided for Free: An Analysis of the Responses to the DMCA's Section 1201*, 31 Fordham Urb. L.J. 135, 141 (2003) ("[C]ourts have continued to apply fair use inconsistently on a case-by-case basis, justifying this practice on varying grounds of equity and fairness.").

24. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

25. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

26. *See, e.g.*, Shannon P. Duffy, *Artist Battles Film Producers, Claims the Patriot Costumes Violate Copyright*, Legal Intelligencer, July 25, 2000, http://www.bochettoandlentz.com/news.php?action=view&id=9; *Dateline NBC: Field of Dreams; Larry Moore and Mike Parsons Claim MasterCard Stole Their Movie Idea tor Its Ad* (NBC television broadcast June 22, 2003) (transcript available at www.lexisnexis.com). Similarly, resource-rich copyright owners are able to employ oppressive litigation tactics against resource-poor artists who have parodied their work. *See, e.g.*, Bob Levin, The Pirates and the Mouse: Disney's War Against the Counterculture 92-94 (2003); Press Release, Negativland, U2 Negativland: The Case from Our Side (Nov. 10, 1991), *reprinted in* Negativland, Fair Use: The Story of the Letter U and the Numeral 2, at 21-25 (1995); Bill Werde, *Barbie's Manufacturer is Ordered to Pay $1.8 Million in Legal Fees to Artist*, N.Y. Times, June 28, 2004, at A11.

years, fair use becomes so vague and abstract as to preclude its effective use by the vast majority of users, then the vitality of fair use for its intended purpose fades.[27]

Uncertainty in any legal regime is almost always undesirable. For the reasons noted above (as well as, certainly, others), it seems especially pernicious in the context of fair use under the copyright law, yielding results whose only systematic effects are to harm both copyright owners and potential fair users. Indeed, at the end of the day it is likely that this phenomenon—the duality of harms caused by growing uncertainty—generates efforts on both sides to "rectify" the situation, which in turn tends to create more uncertainty. This potentially unending cycle, the perfect storm of copyright controversies, has the potential to erode the foundations of fair use—and with it much of the social benefit of the copyright law. Commentators, scholars, and policymakers will do well to recognize that perhaps the chief driver in the evolving state of affairs of fair use is not simply the advent of new technology, but the uncertainty created by the deeply polarized reactions to it.

II. INFORMATION WANTS TO BE FREE: FAIR USE IN CONTEXT

Next, any considerations of a way forward for scholarly fair use must understand the role of the doctrine in the broader context of the copyright system. Indeed, it is often overlooked that fair use—while undoubtedly distinctly important—is merely one of several "relief valves" that operates to prove Thomas Jefferson's insight that that information and ideas cannot be, in reality, controlled. Put more directly, it turns out that information really does "want to be free." And although fair use plays a role in this arrangement, it does not do so alone.

As I have observed elsewhere,[28] it is important to understand that copyrighted information cannot be fully appropriated; intellectual property is a social construction, not a law of nature. Consider that on a daily basis there are unquestionably millions (and perhaps billions) of copyright-implicating transactions, and yet only a trivially small percentage of these involve an exchange of money, and an even smaller proportion are the subject of any real dispute.[29] Virtually all copyrightable information is offered for free. Understanding why this is so is important.

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27. *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 381 (1996) (describing how uncertainty in copyright law stifles the development of new forms of expression); Alison P. Howard, Comment, *A Fistful of Lawsuits: The Press, the First Amendment, and Section 43(a) of the Lanham Act*, 88 Cal. L. Rev. 127, 163 (2000) ("[U]ncertainty over whether speech is protected tends to chill speech.").

28. *See generally* R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Colum. L. Rev. 995 (2003). The several paragraphs following this footnote are adapted from that work.

29. Given that copyright attaches to a work upon creation, consider that virtually all information creation, distribution, and exchange implicates the copyright law. Virtually

Perhaps the major reason for so much free exchange, of course, is that virtually all the time the point of information creation is for sharing and distribution. But it is also important to recognize that a variety of quite tangible, real-world constraints operate to prevent the complete control of copyrighted works, including the following:

Enforcement costs. Rights holders will not enforce rights where the cost of doing so would outweigh the returns.[30] In the copyright context, the non-rival nature of the property implies that in many circumstances, ex ante enforcement may not be cost justified: The marginal cost to the owner of "one extra copy" of a copyrighted work is likely to be quite low relative to enforcement efforts. It simply is not worth trying to stop me from making an extra copy of a music CD for use on my iPod. The calculus is quite different, of course, where many copies are made and distributed—or at least potentially distributed. Thus, it may well be worth suing me for ripping that CD and making it available online.[31] While the line between cost-prohibitive and cost-justified enforcement will depend upon a number of contextual factors, the point here is to recognize that the line exists: There will be some low level of infringement that, even if the content owner is aware of it, will simply be tolerated.[32] This is particularly crucial, of course, in the scholarly context, where the "uses" of copyrighted works will be (alas) of necessarily limited interest to the general consuming public.

Normative Limitations. The important role that social norms play in structuring behavior, both within and without a legal framework, is well documented.[33] In the copyright context, this is true as well; powerful social norms against appropriating information exist in many contexts. Few people think of asserting a proprietary right to the information they post on an email list, for example. Academics—the creators of enormous amounts of potentially propertized information—have deeply held norms concerning the free exchange of ideas. At least part of the success of open source software development can be attributed to the social norms held by those in the software-development community. Further, note the importance in this

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every email message, web page, fax, letter, report, publication, audio, and video is the subject of copyright. The scale is almost unimaginable.

30. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 355-57 (1967).

31. The history of copyright law in particular is replete with cases where changing the relationship between enforcement and distribution costs held out the prospect of radically changed levels of enforcement—which resulted in changes in the underlying legal regime. *See* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 Cal. L. Rev. 2187, 2191–206 (2000).

32. Savvy content owners will likely embrace this economic reality, by emphasizing the additional value of the underlying work. Consider, for example, the pricing practices in the software industry, with substantial discounts for educational users, discounts for 'multi-seat' licenses, and site-licensing arrangements.

33. *See, e.g.*, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1643-96 (1996) (analyzing the interplay among fair and efficient norms, decentralized and centralized law, philosophical concepts, and game theory).

context of shaming or embarrassment as a result of assertions of overbroad claims of copyright or claims leveled at particular users.[34]

Marketplace effects. The market's effect on intellectual property merits brief consideration in two ways. First, market pressures are likely to substantially limit the real monopoly power one might otherwise expect to be conferred by intellectual property rights: Substitutes for copyrighted information will often exist, albeit often in less desirable forms.[35] Additionally, similar pressures may even induce market actors to give away their intellectual property for low or no cost, as a sort of "loss leader" effort.

Technological-logistical limitations. Another extra legal effect on the appropriability of copyrighted works is what might be called technological-logistical reality. Put simply, perfect control is impossible. To a significant degree, this observation is only heightened by the continuing development of the Internet and digital communications; indeed, the impossibility of control is a consistent (if perhaps overstated) complaint of the content industries.

Fair use, as a statutory mechanism, plays an important role in supporting and enhancing the widespread use of copyrighted goods. But it is a mistake to focus on that doctrine as the sole mechanism by which scholars can gain access to copyrighted works. Any proposed solution to the concerns of scholarly fair use must operate within this broader context.

III. GETTING PAST FAIR USE: SOME THOUGHTS ON THE WAY FORWARD

I have argued above that the chief culprit in the current perception of the erosion of fair use is a growing uncertainty concerning the true nature and scope of the allocation of rights in the copyright system. I have also noted that fair use, while undoubtedly important, cannot be viewed myopically as the sole relief valve in the copyright system. In this section, I conclude with a few brief suggestions in light of the above.

The first is the importance of commitment to openness. For scholars, access to and distribution of information is our lifeblood; we cannot meaningfully exist without it. As such, we must commit to maintaining or even growing the quantity of open information available to us. But this commitment means more than simply chanting the words "fair use" when presented with copyright-related difficulties; it means more than simply accepting the too-often uninformed and overly risk-averse edicts of our general counsels. We need to pick our fights: pushing back against overbroad claims of infringement where appropriate, and altering our behavior where that is called for as well. It means becoming savvy about the full context of copyright, and recognizing that fair use alone will not

34. For example, Diebold was forced in the face of political and marketplace pressures to back away from its threats of copyright-based litigation against those who posted embarrassing internal correspondence about its voting systems on the web. *See* Boynton, *supra* note 2, at 40.

35. For example, text can be paraphrased, facts can be reported, and works can be described in ways that invoke the copyrighted work.

always get you where you want to go. It means practicing what we preach, and resisting the increasing pressures to limit access to our information. And, just as importantly, it means respecting the idea of fair use, recognizing that not everything a scholar wants to do will be free and fair. Fair use needs to be nurtured, and the current political and legal climate surrounding this issue is barren indeed.

Second, any reform of fair use itself must, in my view, address the root causes of the current controversy: uncertainty. One way of doing this would be to simplify or reduce the four-factor test, perhaps basing the test strictly on marketplace effects, such as whether a deal was reasonably available to engage in such use. Another important component might be the use of default rules and presumptions: For example, if the rule was market based, the copyright holder might be required to bear the burden of proving the availability of a reasonable accommodation. Or a strong presumption of fair use might attach to noncommercial uses, thus narrowing the inquiry substantially. All of these options would have the long-run effect of increasing certainty and clarity.

The third is the much-discussed option of a fair use protection organization or consortium, as an attempt to equalize many of the systematic effects of uncertainty in fair use. While this is an attractive option, it is important to note that this is a decidedly second-best solution, aimed at devoting additional resources to the fair use question, rather than addressing the underlying causes of the problems. At its best, such an organization will assist in generating real dialogue between users and content owners about the nature and function of fair use in the copyright law. At its worst, it will merely generate an arms race of litigation, doing little more than enriching generations of copyright litigators.

Last, but certainly not least, is the necessity of honest educational efforts—to animate fair use (and, indeed, copyright law more generally) for the future citizens who will increasingly come into contact with it. I emphasize honest here, for copyright law is a balance between appropriation and openness, and it is only by understanding both the terms and the importance of that balance that real understanding can be achieved. Education via polemics today will only leave greater confusion, uncertainty, and problems to the next generation of scholars.