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Gideon Parchomovsky

University of Pennsylvania Carey Law School

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FAIR USE, EFFICIENCY, AND CORRECTIVE JUSTICE

Gideon Parchomovsky*

The fair use doctrine is at once the most significant and the most problematic qualification of the copyright owner's right to exclusivity. An affirmative defense against copyright liability, the fair use doctrine legitimates certain unauthorized reproductions of copyrighted materials that would otherwise be regarded as copyright infringements. Notwithstanding its importance, "fair use" continues to be "the most troublesome [doctrine] in the whole law of copyright."¹ Throughout its long history, neither courts nor legislatures have provided a useful definition of "fair use" nor have they adumbrated its objectives.² Since the doctrine's inception over two and a half centuries ago,³ courts and legislatures have attempted to formulate, explicate, refine, and revamp the fair use doctrine. Generally, these efforts have proven unfruitful.⁴ At best, they have resulted in various formulations of how to approach fair use questions⁵ that offer courts and users of copyrighted works scant guidance on how fair use should be recognized. All this would not have been of grave concern had judges shared a common understanding of fair use or of the principles that should guide them in deciding fair use cases. The problem is that they do not.⁶ Rather, the case law reflects widely divergent notions of the concept of fair use. The lack of consensus is best witnessed

*J.S.D. candidate, Yale Law School; LL.M. University of California at Berkeley; LL.B. Hebrew University, Jerusalem.

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1. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). See also Robert C. Ellickson, *ORDER WITHOUT LAW, HOW NEIGHBORS SETTLE DISPUTES*, 258 (1991) (describing the fair use doctrine as "a murky area of law"); and Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137–38 (1990) [hereinafter: Weinreb].

2. See generally Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–6 (1990) [hereinafter: Leval].

3. See generally William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2nd ed. 1995) 3–18 [hereinafter: Patry].

4. *Id.* at 1106.

5. See, e.g., Paul Goldstein, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE*, § 10.1 at 10:1–10:2 (2nd ed. 1995) [hereinafter: Goldstein, *Copyright: Principles*].

6. Leval, *supra* note 2, at 1106 ("Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones").

in the multiple reversals⁷ and divided courts⁸ that have become the hallmark of fair use litigation.

This unhappy state of affairs has led some legal scholars to conclude that the doctrine of fair use is impervious to generalizations, and thus that its meaning should be derived "by induction from concrete cases."⁹ Other prominent scholars have rejected this skeptical conclusion, and have instead sought to explain and, where possible, to justify a particular interpretation of the fair use doctrine. The theories proffered in support of these interpretations fall into two general categories: those that explain fair use in, broadly speaking, efficiency terms¹⁰ and those that see fair use as an elaboration of certain communitarian ideals.¹¹ Given that the doctrine at issue is "fair use," conspicuous by its absence is an explanation of the doctrine grounded in more general considerations of fairness.¹²

The various attempts to explain the doctrine by economic efficiency and communitarian principles are misguided. The most well-known and fully developed accounts are internally inconsistent, nearly impossible to implement in practice, and incapable of offering guidance to potential users of

7. Six recent prominent cases were reversed at every stage of review. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y.), *rev'd* 366 F.2d 303 (2d. Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) the Second Circuit reversed an injunction issued by the district court. In *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd* 464 U.S. 417 (1984) the Ninth Circuit reversed the district court's finding of fair use and then was reversed by the Supreme Court's holding for the defendant. In *Harper & Row Publishers Inc. v. Nation Enterprises*, 557 F. Supp. 1067 (S.D.N.Y.), *modified*, 723 F.2d 195 (2d Cir. 1983), *rev'd* 471 U.S. 539 (1985) the decision of the district court to award damages to the plaintiff was reversed by the Second Circuit, which in turn was reversed by the Supreme Court. In *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d. Cir.), *cert. denied* 484 U.S. 890 (1987), the Second Circuit reversed the district court's finding of fair use. In *New Era Publications International v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd* on other grounds, 873 F.2d 576 (2d. Cir. 1989) the district court's finding of fair use was reversed on appeal. Finally, in *Campbell v. Acuff-Rose Music, Inc.*, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd* 972 F.2d 1429 (6th Cir. 1992), *rev'd* 510 U.S. 569 1164 (1994), the district court's finding of fair use was reversed by the Sixth Circuit and then reversed again by the Supreme Court.

8. In the first two cases that reached the Supreme Court it split 4-4 and thus in both cases no opinion was issued. *See Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975); *Columbia Broadcasting Sys. v. Lowe's, Inc.*, 356 U.S. 43 (1958). The *Sony* case was decided by a 5-4 majority; *see Sony*, 464 U.S. 417; the *Harper & Row* case was decided by a 6-3 majority; *see Harper & Row*, 471 U.S. 539.

9. Weinreb, *supra* note 1, at 1138.

10. *See, e.g., Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessor*, 82 COLUM. L. REV. 1600 (1982) [hereinafter: Gordon, Fair Use] and William F. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988) [hereinafter: Fisher].

11. *See, e.g., Linda J. Lacey, Of Bread and Roses and Copyrights*, 1989 DUKE L. J. 1532, 1584-93 (1989).

12. Weinreb in his short comment on Ileva, *supra* note 2, does not advance a full-fledged theory of fairness or anything akin to that. Although he deems fairness pertinent to the "fair use" problem he touts a case-by-case analysis and does not offer a specific test that can be applied to fair use determinations. *See Weinreb, supra* note 1. It is noteworthy that the approach Weinreb intimates and the view I lay out in this article vary dramatically.

copyrighted works. In addition, these accounts fail to account for central features of existing doctrine and rest on dubious normative foundations.

Property rights are normally understood as conferring upon their holders the power to exclude and to alienate. Thus, property rights are often understood in terms of control or autonomy over a resource that resides in the right holder. The fair use doctrine has established a significant constraint on the power of a right holder to control one's resources. Such constraints typically call for a justification. In other words, the principle, if there is one, that underlies fair use doctrine should explain why some uses or takings are "fair" and thus do not require compensation, whereas other uses are unjustified takings requiring compensation. Existing theorizing fails to produce the needed justificatory principle.

After making good on my claim that prevailing accounts inadequately explain existing fair use doctrine and fail to justify the distinctions fair use doctrine invariably involves, I propose an alternative account that explains central features of existing doctrine, offers practical guidance, is implementable in practice, and is, in addition, normatively attractive.

My claim is that "fair use" doctrine embodies a general requirement of fairness that is expressed by what George Fletcher refers to as the paradigm of reciprocity of risk.¹³ At the heart of this paradigm lies the principle that liability should be affixed to persons who impose nonreciprocal risks on others. This principle is satisfied when a person creates a risk to others that is different in *degree* or *kind* from the risks to which this person is subject.¹⁴ Reciprocal risks, on the other hand, do not give rise to liability because they cancel or balance each other. To determine which risks are reciprocal and which are not, one ought to look to the customary practices and the social conventions that govern risks in a relevant community.

Understanding fair use as an elaboration of the principle of reciprocal risk has two implications for how courts should understand and apply the doctrine in particular cases. First, only creators but not copycats should be potential candidates for fair use. This is because copycats who slavishly reproduce intellectual works impose a nonreciprocal risk on creators of copyrighted works. Second, only users whose takings comport with customary practices that govern creative activities in the relevant community should be able to avail themselves of the fair use defense.

Although these principles fall short of supporting a bright line rule, they are clear and relatively easy to apply. While I do not claim that courts have consistently decided fair use cases in accordance with these principles, I do claim that a significant part of the case law is compatible with them. More importantly, these two principles are reconcilable with the constitutional

13. See George F. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) [hereinafter: Fletcher].

14. *Id.* at 548.

and statutory provisions that demarcate the law of copyright, and thus courts may apply these principles without need for any legislative action.

The article itself is divided into four parts. Part I sketches the development of the fair use doctrine ever since its emergence in the English courts of Law and Equity to the most recent decisions of the Supreme Court of the United States. Part II describes and evaluates the prevailing efficiency and communitarian theories of fair use. Part III, the heart of the article, explores the relation among fair use, corrective justice, and reciprocity of risk. It also provides a rights-based analysis of the doctrine of fair use and lays out a normative theory of how fair use cases should be decided. Part IV shows how the paradigm of reciprocity of risk fits within the statutory framework and applies it to some of the leading fair use cases.

I. THE EVOLUTION OF THE FAIR USE DOCTRINE: BETWEEN FAIRNESS TO EFFICIENCY

The doctrine of fair use originated in the decisions of the English Law and Equity courts. A review of the early English cases reveals that, in its nascent form, fair use was a relatively coherent doctrine.¹⁵ The English courts regarded the copyright as the property of the author and treated intangible and real property evenhandedly.¹⁶ The focal point of the fair use inquiry was whether the putatively infringing use of the defendant was legitimate. In particular, the courts looked to two factors: whether the putatively infringing use involved "the fair exercise of a mental operation deserving the character of an original work"¹⁷ and whether the second user had taken from the first with the intention of pirating (*animo furandi*).¹⁸ It is important to note, however, that when the allegedly infringing work failed to meet the required standard of creativity, fair use was denied, notwithstanding the fact that the second user had acted in good faith.¹⁹ In addition to these two factors—the nature of the second use and the intention of the appropriator—the English courts ascribed some importance to prevailing customs and practices of trade.²⁰ A fact that bears emphasis is the strict exclusion of public utility considerations from the fair use inquiry. The fair use inquiry

15. See Patry, *supra* note 3, at 3.

16. See, e.g., *Tonsow v. Walker* 3 Swans. (App.) 672, 680 (1752); also *Mawan v. Tegg* 2 Russ. (Ch.) 385, 390–91 (1826).

17. *Wilkins v. Aikin* 17 Ves. (Ch.) 422 (1810); cited in *Bramwell v. Holcomb* 3 My. & Cr. (Ch.) 737, 738 (1836).

18. See, e.g., *Cary v. Kearsley* 4 Esp. 168, 170–71 (1803).

19. See, e.g., *Roworth v. Wilkes* 1 Camp. 94 (K.B. 1807); also Patry, *supra* note 3, at 11 n. 22 and the sources cited therein. As Patry points out, the absence of *animo furandi* did not operate as a legal defense, but its presence operated "to deprive the appropriator of the privilege of fair use." *Id.*

20. *Dodsley v. Kinnersley* Amb. 403, 405 (1761) (No. 212). ("The court must take notice of the springs flowing from trade; and though they cannot regard customs of trade as binding, yet will consider the consequences of them").

centered on the rights of the copyright owner vis-à-vis the alleged infringer. The interest of the public at large was deemed irrelevant.²¹

The early American decisions followed the principles that had been laid out by the English courts. The essence of the fair use doctrine that evolved in England was captured by Justice Story in his landmark opinion in *Folsom v. Marsh*.²² Justice Story began his opinion by describing two extreme cases of copying. At the one extreme he located cases where the entire substance of a copyrighted work is lifted. At the opposite extreme he located cases of copying for the purposes of genuine review and criticism that do not supersede the original work.²³ In-between cases were required to exhibit a "real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely facile use of the scissors."²⁴

As William Patry points out, Story's opinion in *Folsom* is laudable because it avoids the mistake of weighing the interest of the author against the interest of the public. Instead, it focuses on the question whether the defendant's taking was fair.²⁵ It is noteworthy that in this case the infringing work was an adoption of a series of books on the life and writings of President Washington that was intended to serve school libraries, and thus the public interest strongly supported a finding of fair use.²⁶ Nonetheless, this factor did not figure in Story's decision. However, public interest and utilitarian considerations did not remain beyond the ken of the fair use determination forever.

Utilitarian considerations have infiltrated the fair use analysis relatively recently. In 1966 in *Rosemont Enters. v. Random House, Inc.*,²⁷ the Second Circuit subordinated the fair use doctrine to the constitutional foundation of copyright law by asserting that:

The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit,

21. *Tonson v. Walker* 3 Swans. (App.) 672, 680 (1752). ("Arguments from public utility may be urged on both sides; but if this were more doubtful still it is clear that injunction ought to be granted, because the notes were colourably abridged or taken . . . and only twenty-eight were added. . . .")

22. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,091).

23. *Id.* at 344–45.

24. *Id.*

25. See Patry, *supra* note 3, at 23 ("The error in modern fair use litigation—avoided in *Folsom v. Marsh*—is to start with precisely the "public interest" inquiry, which may be expressed in the question, "Does the public interest favor enforcing plaintiff's copyright?" Justice Story did not make the error of balancing the interests of the author and the public, but instead examined whether "defendant's use qualified as fair use with the full burden of making out an affirmative defense properly resting on the defendant" [emphasis in the original]).

26. More specifically, the defendants copied 319 letters of President Washington that were included in the original work. They did not copy any of the narrative parts. The defendant's book contained 866 pages and was written in the form of an autobiography. The original work consisted of twelve volumes.

27. 366 F.2d 303 (2d Cir. 1966) quoting *Berlin v. E. C. Publications Inc.*, 329 F.2d 541, 544 (2d Cir. 1964).

"To Promote the Progress of Science and the Useful Arts." . . . To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in maximum financial return to the greater public interest in the development of art, science and industry."²⁸

Since *Rosemont*, utilitarian considerations have been gaining ground at the expense of fairness. Yet, notions of fairness have continued to figure in fair use cases alongside utilitarian notions.²⁹ The fair use doctrine has become a hotchpotch of fairness and utility. Instead of clarifying the contours of the fair use doctrine, the shift from fairness to efficiency has resulted in a quandary.

Congress contributed to the fair use conundrum when it codified the fair use doctrine in section 107 of the 1976 Copyright Act. The statutory provision is best described by Weinreb:

Having indicated that it did not intend to alter the prior law or inhibit its further judicial development, Congress adopted three considerably inconsistent ways of doing nothing: simple reference to fair use, specification of what is fair use by illustrative examples, and prescription of nonexclusive "factors to be considered" in determining whether a particular use is fair.³⁰

The problem with the statutory provision is that it says too much and too little at the same time.³¹ It neither defines "fair use" nor formulates a test of fairness. Instead, the section provides a non-exhaustive list of illustrative uses—such as comment, criticism, scholarship, research, news reporting, and teaching—that may qualify as non-infringing uses, and then it enumer-

28. *Id.* at 307. It is important to note that the court neglected to mention that the Constitution intended to "Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I sec. 8, cl. 8 (emphasis added).

29. See generally Robert A. Gorman & Jane C. Ginsburg, COPYRIGHT FOR THE NINETIES, CASES AND MATERIALS, 551–54 (4th ed. 1993).

30. Weinreb, *supra* note 1, at 1139 (footnotes omitted).

31. In its entirety, § 107 provides as follows:

Notwithstanding the provisions of section 106, 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.

ates four factors to be weighed by the courts in deciding whether a particular use is fair. The factors specified in the section are: (1) the purpose of the use, including its commercial or non-commercial nature; (2) the nature of the protected work of the plaintiff; (3) the amount and importance of the parts that were reproduced; and (4) the impact of the use on "the potential market or the value of the copyrighted work."

The statutory text gives rise to various problems. It remains unclear how the illustrative uses and the list of factors are to be reconciled; whether all four factors ought to be satisfied for a fair use to be granted; how much weight each of the four factors is to be accorded in cases of conflict; whether additional factors can be considered and what they are. Even more vexing is the fact that the statutory formulation fails to specify an underlying principle that should guide the courts in hard cases. In sum, without an underlying principle, the statutory language offers very little purchase on the question of fair use. Even so, when the legislation emerged there existed a forlorn hope that the courts, most notably the Supreme Court, would fill in the statutory void and provide the missing principle. This hope did not materialize.

Virtually all commentators agree that the Supreme Court failed to apply consistently the statutory provision and that its assay to make sense of it only added to its preexisting ambiguity.³² Unable to decide which of the four factors should control when they conflict, the Court vacillated among the various factors, and after a decade of confusing statements³³ concluded that "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use."³⁴ Furthermore, the Court did not confine itself to the statutory criteria. In particular, the Court clearly indicated that fairness and custom are still pertinent to the fair use analysis despite the fact that section 107 makes no mention of them.³⁵ At the end of the day, the Supreme Court's interpretation of the statutory provision is of very little value. Aside from exploring the four statutory factors and adding some extraneous ones, the Supreme Court decisions provide very limited insights into the foundations of the doctrine. The various decisions provide neither a coherent theory nor a serviceable yardstick by which to understand what fairness means or requires in this context. More regrettable is the fact that the Court has not even attempted to illuminate whether fairness or efficiency should control the fair use inquiry.

32. See, e.g., Fisher, *supra* note 10; Jay Dratler Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988) [hereinafter: Dratler]; also Weinreb, *supra* note 1.

33. In *Sony*, Justice Stevens writing for the majority stated that every commercial use is to be presumed unfair. 464 U.S. at 451. A year later in *Harper & Row* Justice O'Connor writing for the majority branded the fourth factor—the effect of the second use on the potential market for the original work—as "the single most important element of fair use." 471 U.S. at 556.

34. *Campbell*, 510 U.S. at 579.

35. *Harper & Row*, 471 U.S. at 562–63. See also Fisher, *supra* note 10, at 1679–82.

The current state of affairs exacts a heavy toll on authors and users of intellectual works as well as on the public at large. In its present form the fair use doctrine significantly adulterates the right of authors over their work. Furthermore, it impairs the ability of authors and users to ascertain their respective rights and privileges vis-à-vis one another. This in turn may lead to underproduction or diminished use of intellectual works. The incoherence of the doctrine may also generate excessive litigation.³⁶

Against this backdrop, several attempts have been made to rid the doctrine of its incoherence and provide a principled test for determining fair use. It is to these attempts that I now turn.

II. ECONOMIC EFFICIENCY AND COMMUNITARIANISM

The existing literature offers two theories that seek to explain and justify the fair use doctrine: economic efficiency and communitarianism. Economic efficiency is both a positive and a normative theory. As a positive theory, economic efficiency is aimed at demonstrating that law can be best understood in wealth-maximizing terms. As a normative theory, economic efficiency endorses the claim that "law should be made to conform as closely as possible with the dictates of wealth maximization."³⁷ By contrast to economic efficiency theories, communitarian theories are committed neither to the concept of wealth maximization nor to marginalist models of thinking. Instead, these theories seek to promote social solidarity by inculcating certain qualities and ideas that are deemed virtuous. Because communitarian theories put a premium on forming better communities and enhancing certain values, for the communitarian the individual is not the focal point, but is rather a repository of the interests of the community.

Although the two theories differ widely, they do have something in common. Neither economic efficiency nor communitarianism takes individual rights seriously. Both theories are willing to accommodate individual rights only to the extent that doing so will promote the values these theories seek to advance. Neither theory accords independent weight to rights, and both maintain that individuals can be used to advance the interests of others without securing right holders' consent. Economic efficiency sacrifices individual rights on the altar of wealth maximization. Communitarianism is prepared to sacrifice the interests and rights of the individual to promote communitarian values. Both economic efficiency and communi-

36. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1372 (1989) [hereinafter: Gordon, *An Inquiry*].

37. Richard A. Posner, *THE PROBLEMS OF JURISPRUDENCE* 362 (1990). The term "wealth" in "wealth maximization" is defined as "the sum of all tangible and intangible goods and services weighted by prices of two sorts: offer prices (what people are willing to pay for goods they do not already own); and asking prices (what people demand to sell what they own)." *Id.* at 356.

tarianism violate the Kantian imperative to treat rational individuals as ends in themselves and not merely as means.³⁸

In the following paragraphs I will explore both the theoretical and the practical merits of the various accounts which suggest that fair use should be grounded in economic efficiency or communitarian principles. In evaluating each view I will focus on three questions: Is it theoretically coherent? Can it possibly be applied by courts to decide fair use cases? Does it explain prevailing legal practices?

A. Economic Efficiency

American copyright law has a utilitarian hue.³⁹ The utilitarian view of copyright is sustained by the constitutional language and is widely shared by copyright scholars.⁴⁰ Nonetheless, two points bear emphasis: First, the doctrine of fair use is a judicial creation that evolved by a process of accretion independently of the constitutional text. Second, nothing in the constitutional text or the statutory wording supports the extension of the utilitarian view to the fair use doctrine.⁴¹ The last point merits elaboration. Judge Leval, for one, argues that the first statutory factor, which looks to whether the use is productive or transformative, countenances a utilitarian construction of the fair use doctrine.⁴² This argument is flawed, however. Transformative or productive uses may result in improved, unchanged, or diminished utility. Consider, for example, the case of vitriolic reviews of books or movies. Doubtless, such reviews are transformative, yet the harm they cause to the author of the reviewed work can outweigh the benefits they generate. The converse is also true. Untransformative reproductions of works can sometimes be socially important. This holds true when the original work has not been published or has been kept away from the public.⁴³ Nor does the fourth statutory factor—the effect of the second use on the potential market for the original work—point to utilitarianism. The sale of unauthorized copies of a copy-

38. See Immanuel Kant, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* 46 (Thomas K. Abott trans., 1949). For a discussion of this principle, see generally Jeffrie G. Murphy & Jules L. Coleman, *PHILOSOPHY OF LAW* 77–81 (revised ed. 1990) [hereinafter: Murphy and Coleman].

39. See generally, Paul Goldstein, *COPYRIGHT'S HIGHWAY* 165–196 (1994) [hereinafter: Goldstein, *Copyright's Highway*].

40. See, e.g., Leval, *supra* note 2; Fisher, *supra* note 10; and Gordon, *Fair Use*, *supra* note 10. However, Jeremy Waldron observes that “[i]t seems psychologically unavoidable that rights grounded in utility will be taken as ends in themselves: too much emphasis on the utilitarian character of the premises can undermine people’s sense that it is a right (as opposed, say, to some defeasible presumption or rule of thumb) that is grounded in this way.” Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 *CHI. - KENT L. REV.* 842, 851 (1993).

41. Weinreb, *supra* note 1, at 1141.

42. Leval, *supra* note 2, at 1111.

43. See, e.g., *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968), where the public interest in having as much information as possible on the assassination of President Kennedy weighed heavily in favor of allowing the incorporation of unique pictures of the murder in a book on that subject; also Weinreb, *supra* note 1, at 1143.

righted work may, in some cases, enhance social welfare by reducing the market price of the work. Even so, the sale of such copies would be regarded as unfair under the fourth factor since it would adversely affect the potential market for the original work. The fourth factor is concerned solely with the distributive effects of a fair use finding.

Nevertheless, two comprehensive accounts that ground fair use in economic efficiency can be found in the academic literature. The first is advanced by Wendy Gordon and the second by William Fisher.

1. Fair Use as Market Failure

Wendy Gordon suggests that courts should "seek[] a base for fair use in structural and economic considerations."⁴⁴ She begins with the paradigm of the perfect market.⁴⁵ When markets are perfectly competitive, resources gravitate through consensual exchanges to their highest value users, and efficiency is thereby maximized. In the real world, however, the conditions of perfect markets cannot be satisfied; thus, markets are fraught with imperfections, or as Gordon, following conventional discourse, calls them, "market failures." When the market fails one can no longer rely on consensual exchange to result in the socially desirable allocation of resources.⁴⁶ Therefore, Gordon concludes that in the presence of market failures, courts should promote efficiency by emulating the perfectly competitive markets. That is, they should vest the legal right in the party who would have acquired it through the market if it had been feasible. By the same token, the doctrine of fair use should be employed to correct for market failures. Namely, courts should award fair use whenever the second use is socially desirable.⁴⁷ Gordon then crafts a three-step test for recognizing when fair use should be awarded:

(1) market failure is present; (2) transfer of the use to the defendant is socially desirable [i.e., results in a net gain in social value]; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner.⁴⁸

The first problem with Gordon's account concerns her understanding of efficiency. Although some economists define efficiency abstractly, others, like James Buchanan, insist that the notion of economic efficiency has to be defined relative to a particular institutional framework.⁴⁹ According to Buchanan, efficiency is the outcome of voluntary trade under certain given

44. Gordon, Fair Use, *supra* note 10, at 1601.

45. *Id.* at 1605–6.

46. *Id.* at 1607, 1616.

47. *Id.* at 1613.

48. *Id.* at 1614.

49. See, e.g., James M. Buchanan, *Politics, Policy and the Pigovian Margins*, 29 *ECONOMICA* 17, 19 (1962) ("To argue that an existing order is 'imperfect' in comparison with an alternative order of affairs that turns out upon careful inspection to be unattainable may not be different from arguing that the existing order is perfect"); Jules L. Coleman, *RISKS AND WRONGS* 87–102 (1992) [hereinafter: Coleman: *Risks and Wrongs*]; Murphy and Coleman, *supra* note 38,

conditions. Hence, the outcome of voluntary exchange in a market like ours, which is ridden with transaction costs and imperfections, is as efficient as the outcome of a similar exchange under perfect market conditions. Both outcomes are efficient. If the Buchanan view is the right one, the quest for efficiency is frivolous and the entire doctrine of fair use is unprincipled for it only acts to redistribute wealth from original authors to subsequent users.⁵⁰ Because the debate about the correct understanding of efficiency has never been settled, I will proceed to examine the three conditions of Gordon's test.

a. Market failure. The first condition that has to be met is presence of a market failure. In her article, Gordon identifies three types of market failures that plague the market for copyrighted works: anti-dissemination motives, positive externalities, and transaction costs.⁵¹

The first market failure identified by Gordon results from anti-dissemination motives. According to Gordon, the problem of anti-dissemination motives arises whenever a copyright owner is disposed to forgo an economic gain in order to retain control over the flow of the information that is embodied in his or her work.⁵² Although it is true that sometimes copyright owners may be so disposed, anti-dissemination motives by themselves are simply not a market failure. A market failure occurs when a user who values an asset more than its owner cannot secure it through a voluntary exchange. Because it is a consequentialist theory, economic efficiency is concerned exclusively with outcomes. It does not inquire into the motives of the transactors. Accordingly, the anti-dissemination motives of the copyright owner are irrelevant. No inferences as to the relative value to the owner of the copyright, on the one hand, and the second user and society, on the other, can be drawn from the refusal of the owner to disseminate one's work. If the benefit the owner derives from keeping the work to oneself exceeds the combined benefits of the second user and the public at large, the owner should retain the work.

The second market failure mentioned by Gordon is positive externalities.⁵³ As Gordon correctly observes, the information contained in intellec-

at 228–29; Jules L. Coleman, *The Foundations of Constitutional Economics*, in *CONSTITUTIONAL ECONOMICS: CONTAINING THE ECONOMIC POWERS OF GOVERNMENT* (Richard McKenzie ed., 1984); also Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 *IOWA L. REV.* 577, 603–4 (1987) (“In fact a fundamental theorem of economics is that every society with a given amount of resources faces a multiplicity of economically efficient states from which to choose; the particular efficient state toward which society gravitates reflects that society's value”).

50. This applies with equal vigor to Fisher's account that will be discussed below; see text accompanying notes 75–82.

51. Gordon, *Fair Use*, *supra* note 10, at 1627–35.

52. *Id.* at 1632–33.

53. Externalities are the effects of one's activities on others' activities and entitlements. For a more elaborate discussion of the problem of externalities see Richard Cornes & Todd Sandler, *THE THEORY OF EXTERNALITIES. PUBLIC GOODS AND CLUB GOODS* 29–66 (1986) [hereinafter: Cornes and Sandler].

tual works confers benefits not only on purchasers but also on third parties. Intellectual works stimulate debate and discussion, which benefit the entire community.⁵⁴ Nevertheless, economists note that the problem of externalities on its own is hardly compelling.⁵⁵ Nor does it necessarily call for intervention in the market.⁵⁶ When transaction costs are low and property rights are well defined, the problem of externalities simply does not arise.⁵⁷ But even conceding that the existence of external benefits is a market failure that justifies intervention, it remains unclear how awarding fair use helps combat the problem. The solution to the problem of externalities is internalization. Internalization can be achieved either by government intervention⁵⁸ or, when transaction costs are low, by private negotiations between the affected parties.⁵⁹ In the copyright context, the internalization of external benefits that authorship generates can be accomplished by subsidization of authorship and other creative activities. The doctrine of fair use, however, is an inadequate means for subsidizing authorship. A fair use award can be viewed as a subsidy to subsequent authors at the expense of previous ones.⁶⁰ But, absent empirical evidence to the contrary, the benefits that subsequent authors reap from the existence of the doctrine might be outweighed by the harms suffered by original authors. Therefore, as between authors the impact of the fair use doctrine as a means of subsidizing authorship is indeterminate. It should be emphasized, though, that the fair use privilege extends not only to authors but also to a vast number of users who are not engaged in authorship or creative activity of any sort, and it allows them to avail themselves of existing intellectual works without compensating the authors of these works. Consequently, for users who are not authors, the fair privilege creates opportunities for "free-riding." Thus, in the final tally, it appears that the fair use doctrine may well be ill-suited to internalize the external effects of authorship and creativity.

The third type of potential market failure is high transaction costs. That high transaction costs stifle the effective operation of markets for intellec-

54. To determine whether copyright protection generates external costs and external benefits, we first have to clearly define the terms "cost" and "benefit." For an illuminating discussion of the subject see Jules Coleman & Arthur Ripstein, *Mischief and Misfortune* (Annual McGill Lecture in Jurisprudence and Public Policy), 41 MCGILL L.J. 91 (1995) [hereinafter: Coleman and Ripstein].

55. See, e.g., Steven N. S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J. L. & ECON. 49, 70 (1970) (concluding that "[t]he concept of 'externality' is vague because classification and theories [thereof] are varied, arbitrary and *ad hoc*. For these reasons, theories generated by the concept of 'externality' are not liable to be helpful"); also, James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 ECONOMICA 371 (1962).

56. See, e.g., Carl J. Dahlman, *The Problem of Externality*, 22 J. L. & ECON. 141, 143 (1979) ("It cannot be shown with purely conceptual analysis that markets do not handle externalities: any such assertion necessitates an assumption that the government can do better").

57. Paul A. Samuelson & William Nordhaus, *ECONOMICS* 314 (14th ed. 1992).

58. *Id.* at 310-15.

59. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

60. See *Sony*, 464 U.S. at 479 (Blackmun, J. dissenting).

tual works is indisputable. Insofar as copyrighted works are concerned, the cost of consummating a market transaction often exceeds by far the value of the copyrighted material to the potential user. Moreover, high monitoring and litigation costs preclude authors from enforcing their legal rights against infringers. However, the problem of transaction cost is not impregnable.

A possible solution to the problem of transaction costs comes in the form of technological innovations. Paul Goldstein reports that in the near future new technologies will substantially reduce negotiation costs between authors and users. Moreover, they will also allow authors to police unauthorized users and exclude nonpayers. He suggests that in light of this technological revolution, the fair use doctrine should be abrogated, or, at a minimum, be construed very narrowly.⁶¹

A different solution to the transaction cost problem is the formation of legal institutions that act to reduce transaction costs and streamline transactions. In the field of copyright law these functions are performed by institutions such as ASCAP and CCC.⁶² These institutions combat the problem of transaction costs in two different ways. First, by creating pools of copyrighted works⁶³ they allow licensees to pay a predetermined fee and in return gain access to an entire repertoire of protected works without additional charges. Second, by collectively enforcing the rights of authors against infringers they economize on policing and litigation costs.⁶⁴ Therefore, in the presence of such institutions the question for proponents of law and economics is not when fair use should be awarded, but rather, why have the fair use doctrine at all?⁶⁵

More astounding is the fact that not only law and economics proponents but virtually all commentators seem to agree that, absent transaction costs, fair use should be abolished.⁶⁶ In effect, they all suggest that authors' ability to charge should be the test for fair use: When authors can charge for

61. Goldstein, *Copyright's Highway*, *supra* note 39, at 223–24; see also Paul Goldstein, *Copyright in the New Information Age*, 40 *CATH. U. L. R.* 829, 829 (1991) [hereinafter: Goldstein, *Copyright in the New Information Age*].

62. ASCAP, the American Society of Composers Authors and Publishers, is a copyright collective that licenses rights for public performance of musical works. CCC, the Copyright Clearinghouse Center, licenses the right to reproduce literary works. For a comprehensive review see David Sinacore-Guinn, *COLLECTIVE ADMINISTRATION OF COPYRIGHT AND NEIGHBORING RIGHTS* (1993).

63. To become members in such institutions, creators ought to assign the rights to their works to the institution and authorize it to license the works as it sees fit.

64. See generally Robert P. Merges, *Contracting into Liability Rules: Institutions Supporting Transaction in Intellectual Property Rights*, 84 *CAL. L. REV.* 1293 (1996).

65. This is because the existence of the fair use doctrine threatens to thwart the effective operation of copyright collectives like ASCAP and CCC. Indeed, if fair use is to be awarded too generously, copyright collectives will be unable to collect any revenues as users will always resort to fair use arguments to avoid paying.

66. See, e.g., Goldstein, *Copyright's Highway*, *supra* note 39, at 223–24; Dratler, *supra* note 32, at 294 ("It makes no sense to provide a fair use subsidy to a user when a license could be efficiently negotiated"); also *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994).

subsequent uses, fair use should never be granted. This test, however, is extremely odd, as the ability to charge by itself cannot possibly determine legal rights. A hoodlum might have the ability to charge protection fees from businesses, and yet no one would argue that this in itself gives him a right to do that. Similarly, I may be able to sell to you a car that does not belong to me, but it does not follow that I am justified in so doing. Absent an underlying theory of rights, the ability to charge is normatively meaningless. Therefore, to suggest that fair use is nothing but a means to overcome the problem of transaction costs is misconceived and ill-founded.

Champions of economic efficiency will invariably disapprove of the above analogies. After all, from an economic standpoint, the point and purpose of copyright protection is to secure sufficient returns to creative authorship, and if the fair use doctrine vitiates this goal it should simply be abolished, and authors should be entitled to charge for each and every use of their works. The problem with this argument is that it cannot be sustained by any empirical evidence. Prior to the introduction of any far-reaching changes in the existing copyright system it is useful to recall George Priest's quintessential caveat that "[i]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."⁶⁷ Therefore, the claim that the abolition of the fair use doctrine will enhance social welfare is merely an assumption that cannot support an adequate basis for normative recommendations. Furthermore, the abolition of fair use may not even be in the best interest of authors. As William Landes and Richard Posner point out, previously produced works act as raw materials in the production of new works; thus, the elimination of fair use will make copyrightable works more costly to produce.⁶⁸ This leads them to the conclusion that from the point of view of authors, optimal copyright protection should be weaker than complete. Therefore, the call for abolishing the fair use doctrine is problematic even when viewed through the lens of economic efficiency.

b. Desirability of the transfer. According to Gordon the second condition that must be met is that an award of fair use should effect net social gain. To determine whether this condition is satisfied the courts are required to weigh the loss to the original author and to similarly situated authors against the gains of the second user and society as a whole. It is questionable, however, that courts are capable of conducting this cost-benefit analy-

67. George Priest, *What Economists Can Tell Lawyers about Intellectual Property*, in 8 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS 21 (J. Palmer & R. Zerke eds., 1986). Likewise, Timothy Brennan appears to be right to conclude that "[a] full economic evaluation of copyright policy is impossible because the complexity of competitive interaction and demand substitutions among copyrighted works is beyond the capability of economic theory or data to generate cost-benefit analyses." Timothy J. Brennan, *Copyright, Property and the Right to Deny*, 68 CHU.-KENT. L. REV. 675, 704 n.101 (1993).

68. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325, 341 (1989).

sis.⁶⁹ Practicability has been, and still remains, the proverbial Achilles' heel of law and economics. In the case at hand, three unique features make a cost-benefit calculus especially difficult. First, intellectual works involve an emotional dimension that cannot be assessed in monetary terms. Second, courts are required to value the social gain (or loss) not only to the parties in the case but also to the public at large. Third, courts must measure the losses (or gains) of potential authors who are similarly situated to the plaintiff in the case at bar. The question is: Can we practically expect courts to perform this calculus successfully? I am afraid that this question should be answered negatively. When the interests of so many third parties are involved, even a rough cost-benefit analysis is simply impracticable.

The impracticability problem cuts much deeper, for it is the second users, not the courts, who are supposed to perform this calculus in the first place. It is unrealistic to suggest that users will be able to immerse themselves in this intricate calculus whenever they have to decide whether to use a copyrighted work. Therefore, efficiency cannot guide courts and users through the fair use maze.

c. The substantial injury limitation. Gordon's third condition—that the fair use award will not result in substantial injury to the author—appears either otiose or incongruent with her framework of analysis. From an efficiency point of view, the injury to the original author has no importance per se. Obviously, it is a factor that must be incorporated into the cost-benefit analysis, but on its own, the injury to the original author is not determinative. If, however, this condition carries independent clout one should wonder how it squares with the underlying goal of economic analysis. Gordon elucidates the need for this limitation:

The substantial injury hurdle serves several functions. First, it preserves the incentive system at the core of copyright. Second, it reflects a recognition that judgments courts make about whether a defendant's use is value maximizing are rough approximations Third, awarding copyright owners a veto whenever their injury is substantial gives some guarantee that the fair use system will not put them at an intolerable disadvantage.⁷⁰

The inclusion of the third condition not only injects vagueness into Gordon's account but also renders it somewhat incoherent. If economic efficiency should be the benchmark in fair use cases, then the third condition is a non sequitur. If, on the other hand, economic analysis cannot unravel the fair use puzzle, why should courts follow Gordon's recommendation to look to principles of economic efficiency? For if the rights of authors and

69. For a normative discussion of the institutional aspects of law and economics, see Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 549 (1980) (arguing that even if economic efficiency should be maximized it does not follow that courts and agents should act to this effect without "a further theory of institutional competence").

70. Gordon, *Fair Use*, *supra* note 10, at 1619 (footnotes omitted).

copyright owners trump efficiency considerations, then a normative justification for the doctrine should be sought in theories of justice, not economic efficiency.⁷¹

Gordon's account is in tension with itself. Its basic normative framework is problematic and inadequately motivated. Moreover, it fails to account for the full range of existing legal practices.

To be sure, Gordon makes a limited claim for the capacity of her view to explain existing practices. She does not claim that her view comports perfectly with the case law. Indeed, significant portions of the existing law cannot be reconciled with her framework. Three examples stand out: protection of unpublished works, parodies and reviews. Under the existing law, the unpublished nature of the work militates strongly against a fair use finding.⁷² Such works generate no social utility, but nonetheless they enjoy a higher degree of protection. Often publication of such works against the owner's will might enhance social welfare. Accordingly, the attitude of courts toward unpublished works cannot be explained on efficiency grounds.⁷³ Reviews and parodies give rise to a different problem. Sarcastic reviews and parodies usually inflict an irreparable harm upon creators and might undermine their incentive to produce intellectual works in the future.⁷⁴ Such reviews and parodies vary enormously in their importance to society depending on their content, and, as such, they may not enhance social welfare enough to offset the obvious and large costs they impose. Nevertheless, there is little doubt that such uses are fair.

2. *The Incentive/Loss Ratio*

Like Gordon, William Fisher also touts economic efficiency as a possible solution to the existing fair use quandary. Unlike Gordon, however, Fisher does not claim that the existing case law is defensible on efficiency grounds.

71. Indeed, Avery Katz concludes in a recent article that

Modern Neoclassical welfare economics never was suited to the task of constructing a normative order for law. A normative concept [of economic efficiency] rooted in positivism and not even regarded as decisive in the home field [i.e., economics] hardly could serve as an organizing concept for a separate discipline [i.e., law] that traditionally treated normative analysis as a central part of its task.

Avery Weiner Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2260-61 (1996).

72. *Harper & Row*, 471 U.S. at 564; *New Era Publications*, 873 F.2d at 583; *Salinger*, 811 F.2d at 97 (2d Cir.).

73. Indeed, William Landes suggests that from an economic efficiency perspective copyright protection of unpublished works created for private purposes (i.e., that are not going to be published) should be relatively weak. William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUD. 79 (1992).

74. Empirical data in the context of libel actions suggest that the majority of libel victims believe that money damages cannot make good their injuries. Twenty percent of the victims believe that no remedy can adequately redress their harms. See Rendall P. Bezanson, John Soloski & Gilbert Cranberg, *LIBEL LAW AND THE PRESS MYTH AND REALITY* 1-28 (1987). Alfred Yen maintains that these findings can be extended to authors whose works have been parodied or harshly reviewed. Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 105-6 (1991).

Moreover, believing that the present state of affairs is beyond repair he sets out to reconstruct the fair use doctrine according to efficiency considerations. The core of Fisher's enterprise is the incentive/loss ratio, which he offers as a benchmark for fair use cases.⁷⁵ Basically, the incentive/loss ratio is a sophisticated way of conducting a cost-benefit analysis. The numerator of this fraction represents the monetary return the original author could reap if the use in question were held unfair and the author could charge payment for any such use. The denominator represents the resulting loss to society from granting the author exclusivity over the relevant use.⁷⁶ Put simply, the test compares potential loss to the author against the potential loss to society. So far, Fisher's test is quite similar to Gordon's second condition. He parts company with Gordon in requiring courts not to confine themselves to the case at hand but rather to consider all the possible uses of a copyrighted work in deciding a specific fair use case. In other words, Fisher demands that courts "determine the universe of activities vis-à-vis" the original work that might be considered infringing.⁷⁷ For example, if a detective story can be the subject of a book review, a parody, a computer game, and a musical, courts must consider all these activities in every fair use case that involves this story. Then courts should devise an incentive/loss ratio for every such use and by ranking the various ratios decide which activities should be deemed fair and which should not.⁷⁸ Although Fisher's account is coherent, it is desperately impracticable. The doubts about the practicability of this view are best expressed by Fisher himself:

If such a comparative analysis must be employed in most cases, is not economic analysis in this doctrinal context hopelessly impracticable? The discussion of the highly stylized case presented in section B was complex enough. If we removed the simplifying assumptions, limited judge's investigatory power, and burdened him with other cases, it would be ludicrous, surely, to ask him to undertake an inquiry like the one outlined above. Perhaps. It is hard to imagine a judge making even rough guesses at some of the figures critical to the calculus.⁷⁹

In sum, Fisher's account is a stimulating thought experiment that demonstrates the analytical vigor of economic analysis alongside the difficulties involved in applying economic principles to real-world situations.

75. In many respects Fisher's test parallels a test offered by Louis Kaplow in the context of patents. See Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813 (1984).

76. Fisher, *supra* note 10, at 1707.

77. *Id.* at 1706.

78. Specifically, Fisher suggests that each judge, after devising an incentive/loss ratio for each putatively infringing use, should arrange the various uses on the X-axis in order of their ratios and thereafter plot a graph of the "[n]et impact on economic efficiency of forbidding each successive use." Based on this graph, the judge has to determine the use at which the net-efficiency curve peaks and then declare all the uses to the right of this point fair, and all the uses to the left of this point unfair. For a graphical illustration of this determination, see *id.* at 1716.

79. *Id.* at 1718.

One last point on fair use and economic analysis bears emphasis. The existing attempts to justify the fair use doctrine on economic efficiency grounds are somewhat peculiar. The fair use doctrine establishes a strict "all or nothing" legal rule. The existing rule offers two extreme options: If a use is fair, the second user can avail herself of it without compensating the original author; if it is not, the second use will be enjoined.⁸⁰ In both cases someone is harmed. A fair use finding inflicts harm on the original author;⁸¹ an injunction deprives society of useful knowledge. In the context of copyright law, it appears that economic efficiency could have been better served had the fair use doctrine taken the middle ground by allowing second users to use the original work and then compensate its author. Put differently, in a market so rife with transaction costs and imperfect information, liability rules would probably outperform property rules in terms of enhancing economic efficiency.⁸² Thus, economic analysis is at a loss to explain why compensation should not be awarded in fair use cases.

B. Communitarianism

A different approach to the fair use problem is presented by proponents of communitarianism. By their lights, courts must turn to community interests and values to determine what uses are fair. Joining Fisher in his criticism of the existing interpretation of fair use, Linda Lacey recommends that courts should focus the fair use inquiry on the public interest, namely the community interest.⁸³ Accordingly, whenever an intellectual work is of considerable value to the community, courts should employ the fair use doctrine to make it available for the public. In other words, the greater the importance of a work to the community, the weaker its copyright protection.⁸⁴ In Lacey's view, the fair use doctrine should serve as a vehicle for taking from creators

80. Under the typology of Calabresi and Melamed, the fair use doctrine constitutes a property rule, or at least a variant thereof. Under their definition, a right is protected by a property rule when a transfer of an entitlement requires the ex-ante consent of the holder thereof. Liability rules protect entitlements by granting the owner a claim for compensation whenever the value of the entitlements is diminished by the actions of other people. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter: Calabresi and Melamed].

81. The public also suffers an indirect loss when fair use is awarded because any such award—by the lights of economic analysis—adversely impacts the incentive of the original author to create in the future.

82. For many years law and economics literature has suggested that when transaction costs are high, liability rules are superior to property rules. See, e.g., Calabresi and Melamed, *supra* note 80; Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 57, 70 (4th ed. 1992). The most recent writings in this field suggest, however, that liability rules are better suited to enhance economic efficiency than property rules under circumstances of imperfect information. See, e.g., Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Cosean Trade*, 104 YALE L. J. 1027 (1995); also Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

83. Linda J. Lacey, *supra* note 11, 1584–93 (1989).

84. *Id.* at 1587.

and giving to the public without even compensating authors for their losses. This view gives rise to a variety of problems.

First, her approach is unprincipled. In her view, the interest of subsequent users of intellectual goods and the public at large should prevail over the interests of original authors, but absent an account of why this should be, the recommendation cannot stand. Why should authors surrender their rights, interests, and talents to advance the interests of the public? Why should they not, at a minimum, be compensated for their labor? Lacey attempts to answer these questions by arguing that the assumption that authors expect remuneration is flawed, but the evidence she provides to support this claim is inadequate. At best, her argument proves that when they make the decision to create, some creators expect to be rewarded while others do not.⁸⁵ But even conceding that some authors are not moved by financial reasons, we still might want to compensate them on grounds of fairness—whatever their expectations. Therefore, her argument cannot carry the day.

Second, Lacey's view is susceptible to the copyright paradox. Although Lacey's approach might promote the dissemination of knowledge in the short run, it will likely decrease, or in the extreme eliminate, the dissemination of knowledge in the long run. For if authors care about their own financial welfare they will put their creative efforts to rest. This, in turn, will lead to a dramatic decrease in the amount and quality of intellectual works available to the public. Thus, Lacey's enterprise might harm the very interest it seeks to protect.

Finally, Lacey assigns to the courts the role of deciding what works are of social importance. But how are the courts to make this determination? How does one recognize an important intellectual work? In an oft-cited paragraph, Justice Holmes warned that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."⁸⁶ This warning applies with equal force to other copyrightable works. Lacey herself offers very little guidance on this matter. She asserts that "political information which contributes to the debate about the very nature of our government and its policies, is of greatest value to a community."⁸⁷ This on its own is not very helpful. Thereafter, Lacey contends that the Supreme Court was clearly wrong in holding that off-the-air videotaping constitutes fair use.⁸⁸ This statement begs the question. Television programs often provide large amounts of political and otherwise valuable information. The availability of videotapes of television programs surely contributes to the wide dissemination of important information, as it makes these programs available to

85. *Id.* at 1572. The data Lacey offers suggest that 70 percent of the authors who published at least one book are engaged in another work other than writing. No inferences can be made based on these data as to what impels authors to create. The use of these data to support the argument that authors do not expect monetary rewards is highly inadequate.

86. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903).

87. Lacey, *supra* note 11, at 1588.

88. *Id.* at 1591.

more viewers. Why, then, was the Supreme Court wrong? My point here is not that the Supreme Court was right, but rather that deciding what is important is completely idiosyncratic. It involves a value judgment that courts are ill-fitted to make. Without an objective benchmark, which Lacey fails to provide, courts will face tremendous difficulties deciding uses of what works are to be considered fair. Also, the importance criterion will likely spur enormous confusion among users.

At bottom, recourse to communitarian values cannot solve the fair use problem. Without a further theory, there is no apparent justification to prefer the interests of the community over the rights of the individuals. Moreover, Lacey's attempt to foster wider dissemination of knowledge runs aground as it is subject to the proverbial copyright paradox. Hence, her approach is, at least to some extent, incoherent. Finally, the benchmark of importance is too vague and subjective, and thus provides almost no guidance as to how to determine what uses should be regarded fair.

III. RIGHTS, FAIR USE, AND CORRECTIVE JUSTICE

A. Rights and Fairness

To get a handle on the fair use problem, it is useful to begin with a rights-based theory of copyright law—that is, a theory that treats rights in intellectual works seriously. A copyright is a property right in original works of authorship. That the author has a property right in her works is of both normative and moral significance. The defining characteristic of rights is that they erect moral barriers that others are not at liberty to cross.⁸⁹ Robert Nozick, for instance, refers to rights as “side constraints” that “reflect the underlying Kantian principle that individuals are ends and not merely means.”⁹⁰ Ronald Dworkin characterizes rights as “political trumps held by individuals” that protect individuals from unbridled pursuit of collective goals.⁹¹ Indeed, according to the liberal tradition, the point and purpose of rights is to demarcate a domain of autonomy and control.⁹² Rights command respect even when doing so would preclude the attainment of otherwise desirable consequences. Thus, as David Lyons points out “[i]f one accepts moral rights, one cannot accept absolute guidance by welfare arguments.”⁹³ The same holds true for communitarian considerations. Accordingly, rights in intellectual property cannot be constrained just because doing so will enhance overall welfare or promote communitarian values.⁹⁴ My point here is not that con-

89. Loren E. Lomsky, *Rights without Stilts*, 12 HARV. J. L. & PUB. POLY 775, 777 (1989). See also David Lyons, *Utility and Rights*, 24 NOMOS 107, 111 (1982).

90. Robert Nozick, *ANARCHY, STATE AND UTOPIA* 30–31 (1974).

91. Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* xi (1977).

92. See Jules L. Coleman & Jody Krauss, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1339 (1986).

93. Lyons, *supra* note 89, at 112.

94. The Second Circuit adopted this view in *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (1980) (“the fair use doctrine is not a license

straints on rights in works of authorship are never justifiable, but rather that such constraints must be rooted in considerations that respect rights. That is, constraints of rights must be defended in terms of fairness. This, after all, is why copyright law allows a “fair use” exception and not an “efficient use” or a “community benefit” exception. Implicitly, copyright law recognizes that to the extent that rights can be constrained, the legitimacy of doing so is a matter of fairness.

In the following sections I develop a concept of fair use that is sustainable on grounds of fairness and is, thus, compatible with a rights-based view of copyright law. Since I maintain that the fair use doctrine has always been, and still is, inextricably related to the concept of corrective justice, I begin my exposition by explaining the demands of corrective justice.

The basic rights in property are typically perceived as the domain of distributive justice. We turn to distributive justice to determine whether our holdings are fair. But whether or not they are fair, we recognize the need for a distinction between legitimate and illegitimate ways of moving resources around. Even if the existing allocation of resources is not perfectly compatible with any scheme of distributive justice, the law will not tolerate certain involuntary takings of property. After all, the very concept of property implies security against the actions of others. Property restricts the freedom of others and limits the ways in which resources can be transferred. To determine how property can be legitimately transferred we have norms governing transfer, taking, or use. These are the norms of transactional justice, which includes corrective justice. These norms not only determine the legitimate ways of transferring resources but also what ought to be done about transfers that are illegitimate. Therefore, these norms ensure respect for rights in that they protect rights against illegal transfers. So, the concept of property rights invariably invokes the idea of corrective justice. But to give corrective justice a meaning we need an account of what makes a taking or a transfer illegitimate. That is what the principle of reciprocity of risk provides.

B. Corrective Justice and Distributive Justice

Corrective justice is concerned with rectification of losses that are brought about by private wrongs. By contrast, distributive justice is concerned with the general allotment of entitlements, resources, and opportunities. Accordingly, corrective justice gives rise to an agent-specific duty to repair, and distributive justice imposes agent-general duties to repair.⁹⁵

for a corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance”).

95. A duty in corrective justice is agent-specific because only the wrongdoer, and no other, is obliged to make good the losses one caused. A duty in distributive justice is agent-general in the sense that every member of society is required to comply with the demands of the just allocation. See generally Coleman and Ripstein, *supra* note 54, at 91.

Aristotle was the first to distinguish between corrective justice and distributive justice.⁹⁶ In his view, however, corrective justice is ineluctably related to distributive justice. For him the purpose of corrective justice is to restore the proportionate distribution of entitlements that existed between the parties before a wrong has occurred. Thus, the need to return to the preexisting entitlements imposed a duty to rectify the loss on the injurer. The Aristotelian view of corrective justice encounters considerable difficulties in two kinds of situations. First, it does not account for situations where the loss of the victim differs from the gain of the injurer.⁹⁷ Second, and more importantly, in the Aristotelian view, corrective justice is devoid of meaning when the prevailing distribution is incompatible with the demands of distributive justice. Departures from an unjust distribution of entitlements need not be rectified as rectification will only serve to restore the preexisting injustice. Thus, the Aristotelian view fails to provide an adequate moral basis for the legal duty imposed on injurers to make good the losses they caused.

A different view of corrective justice is associated with Jules Coleman. In Coleman's view, the purpose of corrective justice is to sustain real rights. Rights are real, and hence sustainable by corrective justice, if they "are worthy of protection against infringement by the actions of others," even if they are not defensible within the best scheme of distributive justice.⁹⁸ The right to improve upon the existing allocation of resources is reserved to the state—not to individuals. Thus, the existing allocation of rights should only be sufficiently defensible on grounds of distributive justice to warrant defense against individual infringements.⁹⁹ For Coleman, corrective justice is in a sense "transactional justice" as it acts to protect against violations of the prevailing transactional norms.¹⁰⁰ In that capacity the role of corrective justice is to ensure that resources are transferred in ways that are compatible with the relevant norms of the specific community. The point of corrective justice, according to Coleman, is not to restore the preexisting allocation of resources but rather to annul the distortions caused by wrongful or unjust transfers.¹⁰¹ The importance of Coleman's view lies in the fact that it provides a moral basis for many of the existing legal practices, while the Aristotelian view fails to do so. Consequently, the following analysis is based on Coleman's view of corrective justice.

96. Aristotle, *THE NICHOMACHEAN ETHICS*, book V, 293–302 (W.D. Ross trans., 1925).

97. As Coleman points out, only seldom do the losses of victim and the gain of the injurers overlap. Jules L. Coleman, *MARKETS, MORALS AND THE LAW* 186–87 (1988).

98. Coleman, *Risks and Wrongs*, *supra* note 49, at 352.

99. *Id.*

100. Jules L. Coleman, *Intellectual Property and Corrective Justice*, 78 VA. L. REV. 283, 287 (1992) [hereinafter: Coleman, *Intellectual Property*].

101. *Id.*

C. The Scope of Corrective Justice and Copyright Infringements

Corrective justice generates a duty to repair wrongful losses. In Coleman's lexicon, losses are wrongful when they are the result of wrong or wrongdoing.¹⁰² Wrongdoing occurs whenever someone impermissibly and unjustifiably harms the legitimate interests of others.¹⁰³ Wrongs consist of actions that harm or invade rights, regardless of whether the conduct that caused the harm is wrong in itself.¹⁰⁴ Thus, even in private necessity cases, the injurer has to rectify the losses he or she imposed on the victim.¹⁰⁵ In Coleman's view, a person who in order to save her own life breaks into someone else's house will have to compensate the owner for any losses. Rendering compensation is a way of acknowledging and respecting the rights of others.¹⁰⁶

Under this set of definitions a copyright infringement falls in the category of wrongs. As Justice Story stated in *Folsom*, "[t]he entirety of copyright is the property of the author,"¹⁰⁷ and, hence, it is no different from real property.¹⁰⁸ Generally, every unauthorized taking of private property¹⁰⁹ is a violation of the owner's right. Unauthorized taking of intellectual materials constitutes a copyright infringement. By availing herself of a copyrighted work, the infringer violates the property right of its author and, as is the case with real property, a copyright infringement gives the author a claim to repair in corrective justice against the infringer. This moral claim to make repair translates into a legal claim in torts. Recast in legal terms, an unauthorized use of copyrighted works is generally a tort that entitles the

102. Coleman, Risks and Wrongs, *supra* note 49, at 329–332. See also Jules L. Coleman, *Tort Liability and the Limits of Corrective Justice*, in IN HARM'S WAY 139, 141 (Jules L. Coleman & Allen Buchanan eds., 1994) [hereinafter: Coleman, Tort Liability].

103. Coleman, Risks and Wrongs, *id.* at 331.

104. *Id.* See also Coleman, Tort Liability, *supra* note 102, at 141.

105. The classic case of private necessity is *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910). In this case the defendant left his ship moored at the plaintiff's dock during a two-day storm. As a result the ship was battered against the dock, causing \$500 in damages. The Minnesota Supreme Court held that keeping the ship moored to the plaintiff's dock was reasonable under the circumstances, but nevertheless it granted compensation to the plaintiff because the defendant availed himself of the plaintiff property. But see *Ploof v. Puntam*, 81 Vt. 471, 71 A. 188 (1908) (a dock owner whose servant unmoored the plaintiff's ship during a storm was held liable for the damage that was caused to the ship and its passengers).

106. Coleman, Risks and Wrongs, *supra* note 49, at 340–41. See also Joel Feinberg, *Voluntary Euthanasia and the Right to Life*, 7 PHIL. PUB. AFF. 93, 102 (1978).

107. *Folsom*, *supra*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) citing *Bramwell v. Halcomb* 3 My. & Cr. (Ch.) 737 (1836).

108. See, e.g., Frank H. Eastbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 118 ("Except in the rarest cases, we should treat intellectual property and physical property identically in the law—which is where the broader currents are taking us in a sweep no hull protection will stop"). For a comprehensive discussion of the similarities and the difference between intangible and real property, see Gordon, An Inquiry, *supra* note 36.

109. It is a longstanding principle of American constitutional law that taking of private property cannot serve private ends. See *Calder v. Bull* 3 U.S. (3 Dall.) 368, 388 (1798) (seriatim opinion); also Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 9–2 at 457–58 (1978).

owner to legal remedies.¹¹⁰ This basic principle was clearly articulated by Lord Chancellor Eldon in *Mawson v. Tegg*, who stated that "he who has made an improper use of that which did not belong to him must suffer the consequences of so doing."¹¹¹ Yet, in copyright law, not every unauthorized use of a copyrighted work constitutes an infringement. Unauthorized uses that come under the aegis of fair use are specifically excused by the Copyright Act. Fair unauthorized uses are noninfringing. But what distinguishes unauthorized fair uses from unfair ones? Why should the latter be regarded as wrongs while the former should not? Is this distinction justified in corrective justice? I posit that these difficulties can be resolved only by recourse to the paradigm of reciprocity of risk that underlies the fair use doctrine.

D. The Paradigm of Reciprocity of Risk

The paradigm of the reciprocity of risk is generally associated with George Fletcher.¹¹² For Fletcher the nature of the risk that agents impose on each other is the benchmark of liability. Central to his scheme is the distinction between reciprocal and nonreciprocal risks. Under this paradigm, liability in torts attaches whenever a harm results from a nonreciprocal risk taking by the injurer where the injurer has no excuse for taking the risk.¹¹³ A risk is nonreciprocal when the injurer's activity creates an excessive risk of harm relative to the risks the victim imposes on the injurer. Reciprocal risks, by contrast, do not give rise to liability as they offset each other. The test for reciprocity is one of both degree and kind. Nonreciprocal risks differ in degree or kind from the risks prevailing in the relevant community. For example, in a community of motorists, the risk of an automobile accident is reciprocal. By contrast, in a mixed community of motorists and pedestrians, the risk of a car accident between a motorist and a pedestrian is nonreciprocal. In the former case, no liability will attach should the risk materialize; in the latter, the motorist will have a duty to indemnify the pedestrians for the harm she caused them unless she has an excuse.

Accordingly, liability in copyright law should arise whenever an unauthorized user imposes a nonreciprocal risk on authors. To determine which risks fall under this category one has to look to the relationship among members of different communities of risk. In the context of copyright law the relevant communities are those of authors and of users (nonauthors). The relevant risk is the one of unauthorized taking. Put this way, it is straightforward that as between authors and users the latter impose a nonreciprocal risk on the former and thus should be held liable for copyright infringement for

110. On the relation between corrective justice and tort law, see generally Coleman, Risks and Wrongs, *supra* note 49, at 361–429, and Coleman, Tort Liability, *supra* note 102. Richard A. Epstein, *Property and Necessity*, 13 HARV. J. L. & PUB. POLY 2 (1990).

111. 2 Russ (Ch.) 385, 390–91 (1826).

112. Fletcher, *supra* note 13.

113. *Id.* at 551. Excuses are highly irrelevant to copyright infringement cases.

unauthorized uses of copyrighted works. As between authors, one has to turn to the prevailing norms and customs of the relevant community to decide which unauthorized takings constitute reciprocal risks and which do not. Thus, as between authors, harms that result from reciprocal risks should be deemed fair. The preceding analysis can be encapsulated in a two-principle test of fair use. The first principle holds that only authors, but not copycats, should be entitled to the fair use privilege. The second maintains that, as between authors, only uses that comport with the prevailing customary practices in the relevant community of authors should be regarded fair.

The first principle, by distinguishing between different communities of risk, identifies the potential contenders for fair use. The second, by focusing on customary practices and social conventions in the relevant community of risk, provides the fine-tuning. Conventional notions and local norms are pivotal to the concept of corrective justice.¹¹⁴ Having been created and sustained by behavior, many of these norms and practices are not only fair but also efficient.¹¹⁵ By generating expectations—both epistemic and normative—they form a basis for coordination that benefits the entire community. These expectations provide a basis for individuals to pursue their plans and promote their welfare. Because individuals typically benefit from the existence of such norms and practices, each bears a moral duty to comply with them and sustain them even in situations where doing so will be to one's detriment.¹¹⁶

The two-step test proposed here has several important virtues. First, it provides a principled method of deciding fair use cases—one that enhances both fairness and group efficiency. Second, by sustaining and reinforcing prevailing expectations, this test creates a basis for further coordination and planning. Finally, this test is relatively easy to apply. It does not require courts to perform intricate cost-benefit analyses. Nor does it require courts to determine the importance of various uses of intellectual works. Courts only need to decide whether a certain use is compatible with the pertinent conventions and practices of the relevant community.¹¹⁷ In so doing, courts can harness the knowledge of the litigating parties, who are generally well aware of the content of the prevailing norms and practices. To be sure, disputes and disagreements as to the content of such norms and the exact boundaries set by them will sometimes arise. But based on the evidence

114. Coleman, *Risks and Wrongs*, *supra* note 49, at 358.

115. *Id.* at 358–59; Fisher, *supra* note 10, at 1681 n.100 and the sources cited therein.

116. Coleman, *id.* at 359–60. See also Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 86 (1992) [hereinafter: Epstein, *Custom and Law*] (“All persons who gain from the use of the custom generally may lose from its application in a particular case. Therefore, when a dispute arises, the outcome effectively binds the litigant, who now has every incentive to deviate from it”).

117. Customs and conventions play an important role in various areas of the law. See, e.g., U.S.C. § 1–102 (providing that the aim of the Code is “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties”).

adduced by the parties, courts should be able easily to resolve such disagreements.

IV. APPLICATIONS

This part sets out to demonstrate how the suggested fair use test can be squared with the text of the statutory provision and to illustrate its application in various cases involving the fair use defense. My contention here is neither that the statutory text was tailored to fit my proposed test nor that courts consistently apply it. I do argue, however, that both the text of section 107 and outcomes of many of the cases echo the two-step test of fair use offered here.

A. The Statutory Text

The preamble of section 107 of the Copyright Act contains a list of illustrative uses such as criticism, comment, news reporting, scholarship, research, and teaching that might be regarded as fair. All these uses share two common features. They are all referential and, moreover, they are all transformative. Central to the very essence of these uses is the principle of drawing upon existing intellectual works in order to create new ones.¹¹⁸ In other words, all those who engage in these activities impose reciprocal risks on each other. Scholars, researchers, commentators, news reporters, teachers, and critics expose each other to risks of the same order. Building upon existing works or at least referring to them is the point and purpose of most of the illustrative uses. It is impossible to imagine a scholarly work, research, or review that does not address preexisting works. To be sure, these activities do not require reproduction of copyrighted materials. Necessity hardly ever arises in the context of copyright law. After all, copyright protection subsists in the expression and does not extend to ideas.¹¹⁹ Hence, subsequent authors are free to use the underlying ideas of a copyrighted work as long as they do not copy the expression.

Moreover, when there is only a limited number of ways to express an idea, copyright protection will be withheld altogether.¹²⁰ Commentators, critics,

118. As Chafee pointed out "[t]he world goes ahead because each of us builds on the work of our predecessors. A dwarf standing on the shoulders of a giant can see farther than the giant." Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).

119. 17 U.S.C. § 102(b) (1994) ("[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"). The idea/expression dichotomy is a longstanding principle in copyright law. It was first introduced in the celebrated case of *Baker v. Selden*, 101 U.S. 99 (1879). See also Goldstein, *Copyright: Principles*, *supra* note 5, § 2.3 at 2:23.

120. This principle is known as the "merger doctrine": When there are only a few ways to effectively express an idea, the idea and its expression merge and no copyright protection attaches. See, e.g., *Baker v. Selden*, 101 U.S. 99 (1879); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

and scholars are not compelled to quote copyrighted materials or otherwise reproduce them in their works, yet there is a widespread custom that allows doing that. The use of copyrighted materials lends credibility and accuracy to the new works. Often, it is the most effective way to create something anew. Virtually all scholars quote from other scholarly works; all researchers make copies to carry their research further; and all critics make reference to the works they criticize. Such uses are sanctioned by the prevailing conventions in the relevant community of risk. The only use that might appear incongruent is reproduction "of multiple copies for classroom use." However, Robert Ellickson reports in this regard that "professors' substantive norms seem to permit the uncontested copying for class use, year after year, of articles and minor portions of books."¹²¹ Thus, insofar as the academic community is concerned, the risk of copying articles and minor portions of books may be reciprocal.

But the fact that members of the relevant communities of risk impose on each other risks of the same order is not enough. The risks should be also of the same magnitude. That is why the illustrative uses are only presumptively fair. For example, I cannot copy Coase's classic article "The Problem of Social Cost," add a concluding remark, and publish it just by dint of being an academic. Doing so would violate the pertinent prevailing norms in the community of academics. A further limiting principle is required. Hence, the four statutory factors.

The first factor requires courts to consider the purpose and character of the unauthorized use. In considering this factor, the premium should be put on the transformative nature of the subsequent work. This factor should be used to distinguish works that involve "intellectual labor and judgment" from mechanical reproductions of existing works. In effect, this factor singles out authors and creators from copycats. The commercial nature of the subsequent use should be accorded very little weight under the proposed test. As Justice Souter astutely observed in *Campbell*, "[i]f indeed commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all the illustrative uses listed in the preamble paragraph of § 107. . . ." ¹²²

The second factor to be considered is the nature of copyrighted work. Courts typically use this factor to ground a distinction between works of fact and works of fiction.¹²³ But aside from that, this factor has received scant attention.¹²⁴ Under my interpretation the nature of the work is important because it determines the conventions and customs to which courts should

121. See Ellickson, *supra* note 1, at 260. But see *Princeton University Press v. Michigan Document Service Inc.*, 99 F.3d 1381 (6th Cir. 1996) (*en banc*) cert. denied 117 S. Ct. 1336 (1997); also *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

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

123. See, e.g., *Harper & Row*, 471 U.S. at 564 ("[t]he law generally recognizes a greater need to disseminate factual works than works of fantasy or fiction"); also Patry, *supra* note 3, at 504-7.

124. See, e.g., Leval, *supra* note 2, at 1116 ("The nature of the copyrighted work is a factor that has been only superficially discussed and little understood"), and Patry, *id.* at 505.

look. Customs and conventions vary along different intellectual goods. Conventions and practices that apply to musical works may be out of phase with regard to literary or visual works. The second factor directs courts to the germane conventions of the relevant community of risk.

The third factor focuses on the amount and substantiality of the portion taken relative to the work in its entirety. In determining whether too much has been taken, courts should resort to the norms and customs of the relevant community. If the subsequent user has not exceeded the permissible, fair use should be granted. Only against the backdrop of the pertinent community norms would courts be able to decide whether the taking was excessive.

Finally, the fourth factor concerns the effect of the unauthorized use on the potential market for the original work. Under my interpretation, this factor should serve as a safeguard against excessive taking. An unauthorized use that impairs the marketability of the original work is also likely to be in violation of the relevant customary practices. This is because the norms and conventions that govern activities are typically designed to enhance the welfare of the individual community members.

B. Sony Corp. of America v. Universal City Studio Inc.

In this case the Supreme Court was asked to decide whether the manufacture and sale of videotape recorders by Sony constituted a contributory infringement¹²⁵ of the respondents' copyrights in their television programs. Justice Stevens, writing for the majority, held that Sony was not liable for contributory infringement on two different grounds. He began by stating that the sale of copying equipment would not constitute a contributory infringement if the equipment could also be used for legitimate, noninfringing purposes. In this regard Justice Stevens found that videotape recorders were capable of noninfringing uses, namely noncommercial time-shifting by private users. He added that it was possible that other television program producers stood to gain from the practice of time-shifting, and thus enjoining Sony from marketing its equipment would harm them. Justice Stevens could have stopped here, but instead he went on to analyze whether private recording of copyrighted television programs was excused under the fair use doctrine. Central to his fair use analysis was the assumption that home users record programs solely for purposes of time-shifting and not in order to establish private videotape libraries. This assumption led Justice Stevens to pronounce, after discussing the first fair use factor, that any private noncommercial use is presumptively fair.

125. The respondents chose to start a copyright infringement suit against Sony, which merely manufactured the equipment that could have been used in violation of their rights, but not against Sony's customers, who performed the actual copying. Because Sony itself did not reproduce the protected works, the respondents could only sue Sony for a contributory infringement.

After paying short tribute to the second and third factors, Stevens turned to the fourth factor—the effect of the unauthorized use on the market for the copyrighted work. Reverting to the fact that private recording for purposes of time-shifting was a noncommercial use of the work, he reasoned that, typically, noncommercial uses would not adversely impact the market for the original work and thus, in order to prevail, the copyright owner has to prove “either that the particular use is harmful or that if it should become widespread it would adversely affect the potential market for the copyrighted work.”¹²⁶ He then concluded that in the case at hand the copyright owners failed to carry this burden with respect to time-shifting.

Justice Blackmun, writing for the dissent, stressed the fact that under the Copyright Act the practice of unauthorized home videotaping constitutes an infringement. In rejecting the fair use defense he reasoned that recording for private purposes is an unproductive use that generates no benefits to the public, and that it involves the reproduction of copyrighted works in their entirety.¹²⁷ He then cautioned that granting fair use in this case might erode “the very basis of copyright law by depriving authors of control over their works and consequently of their incentive to create.”¹²⁸

Under the test proposed here, the majority’s fair use finding in *Sony* was clearly erroneous. In this case, the first prong of the test that requires the unauthorized users to be creators themselves was not satisfied. Videotape recording constitutes a typical example of mechanical reproduction of copyrighted materials that involves neither intellectual labor nor creative judgment. Thus, home users could not qualify as possible candidates for fair use. By imposing on the producers the risk of unauthorized taking of copyrighted materials, the users created a risk of harm to which they were not subject themselves. As the risk at bar was nonreciprocal, the court should have held the unauthorized use unfair and hence infringing.

Although Congress has not taken any measures to change the outcome of *Sony*, it obliquely evinced its dissatisfaction with the outcome of the case by enacting the Audio Home Recording Act of 1992. The legislation of this act was triggered by the emergence of an advanced recording medium—digital audiotapes—that allows consumers to perform multiple recordings of musical works without degenerating the original quality of the sound.¹²⁹ The act strikes an interesting balance between the interests of copyright owners and those of users. On the one hand it prohibits infringement suits for home audiotaping.¹³⁰ On the other it levies royalty charges

126. *Sony*, 464 U.S. at 451.

127. *Id.* at 478–82 (Blackmun, J. dissenting).

128. *Id.* at 489.

129. Goldstein, Copyright’s Highway, *supra* note 39, at 158.

130. It is important to note that the act does not state that home audiotaping for private purposes is not a copyright infringement. Instead, it provides that “no action may be brought under this title alleging infringement of copyright.” 17 U.S.C. § 1008 (1994). According to Goldstein the distinction between “exemption against infringement and a prohibition against suing for infringement”—although fine—has a “powerful symbolic effect for copyright owners.” *Id.* at 163.

on sales of digital audio recorders and tapes. Once collected, the royalties are to be divided among composers, lyricists, music publishers, record producers, and performers.¹³¹ In effect, this legislation sanctions the copyright owners' right to be indemnified for harms that result from private unauthorized copying. Thus, *Sony* should be considered an anomaly rather than the rule.

C. Harper & Row Publishers Inc. v. Nation Enterprises

In this case, *The Nation* magazine got hold of a purloined manuscript of President Ford's then unpublished autobiography that was scheduled shortly to appear in *Time* magazine. Extensively quoting from this manuscript, *The Nation* published a short piece on Ford's memoirs that "scooped" the forthcoming publication in *Time*. This publication led *Time* to cancel its contract with the petitioners—Harper & Row—who owned the copyright in Ford's autobiography. Harper & Row then brought an action for copyright infringement against *The Nation*. The question before the Supreme Court was whether extensive quotations from a public figure's unpublished manuscript come under the ambit of fair use.

Critical to the majority denial of fair use was the fact that the manuscript was unpublished. In evaluating the statutory factors, Justice O'Connor, writing for the majority, reiterated numerous times that the unpublished nature of the work tends to negate fair use. Also significant was the fact that *The Nation's* publication evidently caused an economic setback to Harper & Row. Justice O'Connor did not, however, confine the fair use inquiry to the four statutory factors. Custom and fairness played a key role in her finding that *The Nation's* use was unfair. Her opinion conveys a clear message that conformity with customary practices and notions of fair dealing are to weigh heavily in favor of a fair use finding. She even suggested that the fair use inquiry could be reduced to the question "would the reasonable copyright owner have consented to the [particular unauthorized] use?"¹³² Along the same line, Justice Brennan in his dissent suggested that *The Nation's* conduct was in line with the prevailing customs of the press industry.¹³³

The Supreme Court's recourse to customary norms and prevailing conventions should be commended.¹³⁴ Having found that *The Nation's* use was arguably productive and not merely a mechanical reproduction of the copyrighted materials, the Supreme Court had to decide whether the use

131. For a more detailed description see 17 U.S.C. §§ 1003–1007 (1994).

132. *Harper & Row*, 471 U.S. at 550 (citing A. Latman, FAIR USE OF COPYRIGHTED WORKS 15 (1958)).

133. *Id.* at 593.

134. For another example of resort to industry practices see *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980). But see Fisher, *supra* note 10, at 1680 (arguing that if courts ought to look beyond positive law they will not be able to identify the relevant conventions and standards); and Leval, *supra* note 2, at 1126 (arguing that there is no justification for considering morality as part of the fair use inquiry).

was compatible with the customary practices and conventions of the news publishing industry. Both the petitioner—Harper & Row—and the respondent—*The Nation*—were publishers and thus belonged to the same community of risk. Moreover, they were both vying for the right to publish first a news item—the memoirs of President Ford. Therefore, the Court had to decide whether *The Nation's* appropriation of the copyrighted materials violated the customary practices governing news publishing.

A recent article by Richard Epstein may lend some support to the majority's finding that *The Nation's* use was excessive relative to the prevailing customs. Epstein contends that in the 1920s there appeared a customary practice in the news industry that prohibited misappropriation of news items from rivals.¹³⁵ The status of this practice at present is unclear, however. My aim here is not to defend the majority opinion in *Harper & Row*, but rather to champion the recourse to customs and community conventions as a yardstick for fairness.

D. With a View to the Future: Electronic Mail Correspondence

Paul Goldstein colorfully dubbed copyright law "the child of technology."¹³⁶ Indeed, no other legal discipline has been affected by technological changes as much as the law of copyright. Throughout the history of copyright law, introduction of new technologies has created both opportunities for authors and copiers and shaped the contours of copyright protection. At present we are in the middle of an unprecedented information revolution wrought by computerization and innovative communication technologies. These new technologies pose challenges for the law of copyright in general and the fair use doctrine in particular.

One such challenge is presented by electronic mail. Assuming that for purposes of copyright protection E-mail messages are no different from regular letters,¹³⁷ then "addition" or "interspersing" reply messages are in violation of the original author's copyright.¹³⁸ However, under my proposed test such uses would invariably be fair. Everyone who uses E-mail for corre-

135. Epstein, Custom and Law, *supra* note 116, at 97.

136. Goldstein, Copyright in the New Information Age, *supra* note 61, at 1.

137. To qualify for copyright protection an expression must be fixed in a tangible medium of expression. According to § 101 of the Copyright Act, this requirement is satisfied when the embodiment of the expression is sufficiently permanent to permit the expression to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. While it is clear that saving a work in the memory of a computer is fixation for purposes of copyright protection, *Stern Elec. Inc. v. Kaufman*, 669 F.2d 852, 855 (2d cir. 1982), it is still uncertain whether brief fixation in a computer's random access memory (RAM) satisfies the statutory requirement.

138. See, e.g., Maureen O'Rourke, *Propriety Rights in Digital Data*, 41 FED. BAR. NEWS & J. 511, 514 (1994). More specifically, such uses may violate the author's exclusive right to prepare derivative works based on the original copyrighted work. Ilene Knable Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 HARV. J. L. & TECH. 275, 318 (1996).

spendence is essentially an author. Electronic mail is simply a medium through which users exchange messages that may qualify for copyright protection. Thus, insofar as E-mail messages are concerned there is no distinction between authors and nonauthors. Every user is also an author. Accordingly, the risk of copying is reciprocal by nature in the community of E-mail users. Moreover, the practice of reproducing the original message in the reply is commonplace in E-mail correspondence. Consequently, with regard to electronic mail correspondence, copying of whole messages is a reciprocal risk, and harms that may stem from it should not give rise to copyright liability.

V. CONCLUSION

My aim in this article has been to demonstrate that the fair use doctrine should be understood and interpreted within the framework of corrective justice. In doing so, I have shown that all attempts to explicate the doctrine on other grounds have failed. The thrust of this article is that the paradigm of reciprocity of risk should guide courts and users of intellectual works in deciding what uses are fair. Specifically, I have proffered a two-prong test for determining what uses are fair. The first prong provides that in the sphere of unauthorized uses only the ones that are productive or transformative can possibly qualify as fair. The second holds that, of the group of productive uses, only the subset that does not violate the customary practices and conventions of the relevant community of creators be awarded fair use.

Understood properly, the fair use doctrine is a relatively coherent doctrine that aims to do justice between authors and unauthorized users of their works. Striking the balance between authors and subsequent users according to the proposed test will lead to an outcome that is both fair and efficient. Furthermore, by creating conformity between the law and the expectations of the party, the proposed test will enable authors and users to plan and pursue their creative endeavors, thereby enriching the culture and knowledge of us all.