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**IN THE SHADOW OF THE LAW:
THE ROLE OF CUSTOM IN INTELLECTUAL PROPERTY**

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Custom encompasses many different things, from regularly occurring industry practices, to social norms, to ongoing practices that have existed from time “immemorial.” Custom in all these senses has had a tremendous influence on intellectual property (“IP”) law, from affecting what happens outside of the courts in the trenches of the creative, technology, and science-based industries, to influencing how courts analyze infringement and defenses in IP cases. For decades, many scholars overlooked or dismissed the impact of custom on IP law in large part because of a belief that the dominant statutory frameworks that govern IP left little room for custom to play a role (Long, 2004, p. 484; Carter, 1992, p. 131). In the last ten years, however, the landscape has shifted and more attention has been given to considering how custom affects IP entitlements both outside and inside the courtroom. Scholars like myself have brought attention to the profound impact custom has in IP. My work has particularly focused on the theoretical frames that inform the incorporation of custom into the law, as well as on documenting some of the practices and norms of various communities that use IP (Rothman, 2007).

In this chapter, I provide an overview of the role of custom in IP, and the scholarship in the field. I first situate the discussion in the broader context of the treatment of custom outside of IP, and then consider some of the dominant practices and norms within IP, focusing particularly on those involved in copyright law. I discuss the incorporation of custom by the courts and criticize the often unreflected reliance on custom. After providing this background, I question the relevance of most customs to set legal standards in IP disputes, and suggest limits on custom’s role in IP cases. Finally, I suggest implications that flow from this analysis, as well as recommend future areas of research for scholars.

I. THE ROLE OF CUSTOM OUTSIDE IP

To understand the role of custom in IP, one must first contextualize the treatment of custom in the law more broadly. The importance of custom in

* © 2017 Jennifer E. Rothman. I consider many of the issues raised in this chapter in greater detail in “The Questionable Use of Custom in Intellectual Property,” 93 *Virginia Law Review* 1899 (2007).

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determining governing law has a long tradition in Anglo-American law. One of the foundational features of English common law was its use of custom to set legal rules. Prior to the institution of an organized legal system, practices and norms regulated local behavior and facilitated the resolution of disputes. As more formal legal systems developed in England, custom shaped and sometimes defined the law. The incorporation of custom by courts served an important role in getting communities to support the authority of the growing judiciary.

Under common law dating back to at least the late 1400s in England, “general customs” formed the basis of the law. William Blackstone (1765), one of the foremost commentators on the early common law, defined the common law in his influential 18th century *Commentaries on the Laws of England* as “[t]hat ancient collection of unwritten maxims and customs [that] had subsisted immemorially.” The two main advantages of using longstanding community customs (either local or kingdom-wide) were that they were thought to be “universally known” and were viewed as originating with the communities and people rather than being imposed by the king. Communities therefore were more willing to defer to custom-based legal rules that largely reflected their prior understanding of appropriate conduct (pp. *17, *45, *63-64, *67-68, *76-78; Baker, 2002, pp. 1-10; Postema, 1986, pp. 3-4).

Much of the Blackstonian discussion of custom focused on its role in defining the scope of public use and access rights to private land. In contrast to property doctrines like prescription, custom permitted access and use not by a particular person but by the public at large. In a number of instances, the public obtained access and use rights to private property on the basis of prior customary uses of that land. English courts held that the public could hold annual dances, conduct horse races, play cricket, fish, gather wood, and graze animals on private lands because they had customarily used the land for those purposes (Blackstone, 1765, *76-78; Rose, 1986, pp. 739-41, 758-59). Carol Rose has described some of these customary uses as “recreational” in nature and preferred because they supported social engagement and connections within a community (Rose, 1986, pp. 723, 767-70, 779-81).

Many of the customary uses were also related to providing basic subsistence needs. During the enclosure movement in England beginning in the sixteenth and seventeenth centuries, landowners increasingly excluded citizens from land that they had previously relied on for food and fuel. The English historian E.P. Thompson (1991) describes custom during this period as a response to this enclosure of the land. The customary use arguments challenged efforts by property owners to move property in the direction of a virtually absolute right of the landowners with no permissible public use or access (pp. 106-84).

Rather than being the preferred starting point for legal rules, today the status of custom is contested and debated. Different areas of law (and different inquiries

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within those areas) treat custom differently. In tort law, for example, there are longstanding debates about whether the development of customary safety precautions by a particular industry should be an absolute defense to tort liability, no defense at all, or simply some evidence of negligence or lack thereof. The dominant contemporary principle is that custom should be some evidence of reasonable care, but not its measure. (The T.J. Hooper, 1932; Landes and Posner, 1987, pp. 132-33; Epstein, 1992a; Morris, 1942). In contract law, there is a developed literature analyzing whether industry practices should be read into contracts as implied terms and also, less controversially, whether such practices should inform the interpretation of existing contract terms (Bernstein, 1999; Epstein, 1999). In property law, custom primarily arises as a basis to assert public access to land that has long been used despite competing private property claims, often in the context of beaches (Thornton v. Hay, 1969, pp. 676-78; Rose, 1986, pp. 713-14).

Scholars who have considered custom and the law largely have focused on how custom can govern various communities without regard to formal laws or adjudicatory mechanisms. Robert Ellickson's (1991) influential book *Order without Law: How Neighbors Settle Disputes* considered the ranching practices of cattle ranchers in Northern California, and determined that social norms and longstanding practices trumped more formal legal rules and discouraged resort to the legal system. The political scientist Elinor Ostrom (1990), in her book *Governing the Commons: The Evolution of Institutions for Collective Action*, similarly analyzed the way various communities develop systems of self-government and self-organization to manage and control the use of common-pool resources. Lisa Bernstein (1992; 2001), in a series of articles, documented a variety of industry practices that govern relationships in different commercial fields, including the diamond and cotton industries.

Over the last decade, scholars have begun to recognize that IP is not an exception to these narratives about custom, but instead yet another example of the influence of custom on both de facto and de jure rights. Custom has a powerful impact on what is happening in the trenches of creative and other IP-dominated industries and also influences the governing legal regimes. Just as the enclosure movement in England sparked arguments in favor of granting customary use rights to the public, concerns over the increased propertization of intangible works that can form crucial pieces of our identities and culture has generated efforts to articulate similar justifications for public use of these works.

II. INDUSTRY PRACTICES AND SOCIAL NORMS IN THE IP SPACE

Numerous industry practices and norms govern how IP and quasi-IP rights function as a de facto matter. In copyright law, custom has affected determinations

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of authorship, ownership, copyrightability (such as whether something is original), and whether a use is infringing—especially whether something is an idea or expression, or a *scène à faire* (an unprotectable stock or commonplace element). Uncertainties in IP law incentivize the creation of custom. Some of this uncertainty is generated by the significant impact that changing technology has had on the production and distribution of IP. Other uncertainties in IP law are generated by flexible, and sometimes unpredictable, legal standards. The best example of this is copyright’s fair use defense. A four-factor analysis is used to evaluate whether a use is fair and therefore not infringing. The multi-factor analysis has often been criticized as “muddled,” “troublesome,” and “ad hoc.” (Weinreb, 1990, pp. 1138-40; *Dellar v. Samuel Goldwyn, Inc.* 1939, p. 662; Leval, 1990, p. 1105). Because of the unpredictability and expense of litigating fair use defenses, many players in the IP industries prefer to agree among themselves on some boundaries of fair use or play it safe by conforming to industry practices, such as licensing, rather than risk adverse court decisions if they guess wrong about a potential fair use (Rothman, 2014, pp. 1602-05). I consider a variety of practices that have developed in the IP space, particularly those that have arisen in the context of copyright law, and the navigation of its fair use defense.

A. Informal Industry Practices and Social Norms

1. Clearance Culture

One of the most influential set of practices is the common licensing of works, marks, inventions, and identities. Producers, publishers, and distributors often require creators and inventors to license or “clear” all potentially protected IP, even when there are strong defenses for the use of works, trademarks, or inventions, or when the protectability of the work, mark, or invention at issue is questionable. Instead of challenging the validity of the copyright, trademark, or patent, or relying on fair use, First Amendment, or other defenses, IP users often seek clearance. Patricia Aufderheide and Peter Jaszi (2004) have dubbed this preference for licensing the “clearance culture.” (p. 22; Heins and Beckles, 2005, pp. 5-6). The clearance culture is primarily motivated by efforts to avoid litigation and operates without regard to what IP law requires or what, as a normative matter, should be protected by IP rights. As the Sixth Circuit has observed, it is “cheaper to license than to litigate” (*Bridgeport Music v. Dimension Films*, 2005, p. 802). When works, marks, or people’s identities cannot be licensed, gatekeepers often demand their removal.

These clearance practices are firmly entrenched in all media, including music, fine arts, and publishing. Clearance culture can be seen, for example, in limits on the content of biographies. Even though courts have traditionally given

great latitude to authors to refer to individuals, trademarks, and copyrighted works without permission in historical, nonfiction works, publishers routinely demand clearance of a subject's copyrights, trademarks, and publicity rights (Max, 2006, pp. 34, 37-38). Many of the potential IP claims in such circumstances are facially meritless, but risk-averse publishers and authors nevertheless abandon projects or follow the restrictions set forth by alleged property holders (Max, 2006, pp. 34, 37-38; Max, 2007, pp. 54, 66). The film and television industry similarly clears potentially copyrighted or trademarked works or marks, as well as images and references to individuals, especially well-known public figures, even when the uses would likely be determined fair if litigated (Rothman, 2007, pp. 1912-15). Inventors and developers also often license patents when the validity of a patent is questionable or the infringing status of an inventor's product is uncertain. Companies license to avoid costly patent litigation and hold-up problems with a product that has already been developed or marketed (Farrell and Merges, 2004, pp. 955-60; Lemley and Shapiro, 2007, pp. 1992-93).

Clearance culture practices have a profound influence on what gets made and the content of such works. When licensing is not an option, either because it is cost-prohibitive or an IP owner does not like the way its IP will be used, creators and inventors often alter their works or forgo some projects altogether. Clearance culture practices are enforced extra-judicially by fear of litigation costs, in-house policies mandating clearance, concerns over forfeiting large investment or start-up costs, and by limits on funding, insurance, and distribution.

2. IP-Adjacent Norms

Several recent scholarly works have analyzed communities in which traditional IP law does not function well or participants choose not to pursue legal remedies, even when they are available. Much of this literature focuses on critiquing the incentive rationale for protecting IP by demonstrating that creative works and inventions are produced in the absence of IP protection (Raustiala and Sprigman, 2006). But this scholarship also reveals the myriad ways in which communities can erect customary protections for creative and inventive works outside the judicial system and enforce them using community norms.

Economists Emmanuelle Fauchart and Eric von Hippel (2008) have documented norms to protect food recipes in the absence of effective formal IP law. They found that a variety of customs govern French chefs, including norms that the chefs should not copy or share recipes without permission. The chefs also encourage and seek attribution for their recipes and innovations. Shaming and ostracizing serve to enforce these norms. Christopher Sprigman and Dotan Oliar (2008) have identified similar practices in the world of stand-up comedy. They found norms that discourage joke-stealing and encourage originality. These norms

are enforced by obstructing employment, shaming, and the occasional use of violence. David Fagundes (2012) has studied norms surrounding the adoption and policing of roller derby names using a master roster kept by community members and enforced by positive reinforcement and shaming. Drawing on the work of Elinor Ostrom in the world of common-pool resources, Brett Frischmann, Michael Madison and Katherine Strandburg (2010) have surveyed a variety of IP-based communities, such as those that use open-source software, or that contribute to Wikipedia and the Associated Press. They identify practices that help manage these “cultural commons.”

Norms governing the use of IP have also developed in a variety of subcultures that rely on uses of others’ IP. In the world of online fan fiction, for example, norms require that attribution be given when material is borrowed from another fan’s website. Copyright laws have little sway in fan-fiction communities. Instead, fan-fiction authors conform to their own social norms, such as that the sites be nonprofit, add creative material to the original material, and provide appropriate credit. Deviation from the fan fiction norms may lead to shaming within that subculture, which is usually enough of a deterrent to keep the norms intact (Tushnet, 2007).

B. Formalized Practices and Guidelines

More formal customary practices have also been used in an effort to avoid litigation. Many of these guidelines and agreements have developed in the context of copyright’s fair use doctrine. Some industries and user groups have sought to insulate themselves from liability for copyright infringement by agreeing in a more formal manner to a set of standard copying practices. I highlight some of the most influential of these policies, guidelines, and “best practices” statements.

1. Classroom Guidelines

The most influential of the extra-legal copyright guidelines is the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions,” commonly referred to as the “Classroom Guidelines.” While drafting the fair use section of the 1976 Copyright Act, Congress recruited industry representatives, in particular publishers, to develop their own guidelines for what constituted fair use of writings and music in educational settings. The chairman and other members of the subcommittee working on the copyright revision “urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material” (H.R. Rep. No. 94-1476, p. 67). Congress contended that “workable voluntary arrangements” were the preferable solution to questions regarding the scope of fair use, at least in the

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context of educational uses. (H.R. Rep. No. 90-83, pp. 33, 36; H.R. Rep. No. 94-1476, pp. 67-68).

The Classroom Guidelines take a narrow view of what sort of uses of copyrighted works are permissible in the educational context. The Guidelines provide that single copies may be made for or by teachers for use in teaching or research. These copies are limited to those of “a chapter from a book, an article from a periodical or newspaper, a short story, short essay or short poem [and a] chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.” Multiple copies, not exceeding one copy per enrolled student, are permitted under limited circumstances in which such uses meet tests for brevity, spontaneity, and cumulative effect. Brevity is defined as less than 250 words of a poem and 500-2500 words of a prose work. The copies must also include a notice of copyright (H.R. Rep. No. 94-1476, p. 68-69). Although the Guidelines purport to set forth the minimum allowable uses, many universities, other educational institutions, and libraries have followed them as if they represent the maximum allowable uses (Rothman, 2007, pp. 1920-22). Many universities have handed out the Guidelines to their professors and mandated conformity with them. In 2006, William W. Fisher and William McGeeveran (2006) have estimated that 80% of American universities comply with the Guidelines (p. 57). Recently, a few universities have moved away from this conservative approach. The University of Minnesota, for example, recently agreed to defend professors if they reasonably believe that their use of a copyrighted work is fair, even if the use exceeds the Classroom Guidelines (University of Minnesota, 2017). At the beginning of 2014, New York University also withdrew its requirement that faculty comply with the Classroom Guidelines and now allows its faculty to conduct an independent fair use analysis (Compare New York University, 2014 with New York University, 1983).

2. In-House Guidelines

Many companies and organizations have developed internal guidelines that govern the treatment of IP within their own institutions. In both the public and private sectors, guidelines have been developed to control internal copying and the use of others’ inventions, works, marks, and identities. The clearance practices that occur as an informal practice are often specifically mandated by in-house guidelines. In the film and television industry, for example, networks, studios, and production companies develop “Standards and Practices” which control content, including the use of copyrightable works, trademarks, names, and images. Most film studios mandate the clearance of all copyrighted works regardless of the manner in which they appear, the elimination of any references to trademarks in dialogue, the removal of or blurring of trademarks that appear on screen, and the

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clearance or removal of proper names. Many libraries also have developed in-house guidelines to regulate photocopying, inter-library loans, and journal purchases. The primary purpose of these guidelines is to reduce the likelihood of a lawsuit, and, if sued, to reduce the likelihood of findings of bad faith or “willfulness” on the basis of compliance with such internal guidelines. In the context of the entertainment industry, some of these practices also facilitate product placement and advertising deals. (Rothman, 2007, p. 1922.)

3. Best Practices Statements

Scholars and various use communities have recently sought out custom as a way to define and establish fair use. This interest in custom is not only driven by efforts to persuade courts to accept defenses in individual cases, but also by efforts to encourage individuals and organizations to assert fair use rather than to conform with the dominant, risk-averse clearance culture. Most notably, the best practices statements developed by Peter Jaszi, Patricia Aufderheide, and others at American University and its Center for Social Media seek to establish boundaries of fair use in the context of communities that frequently use copyrighted works owned by others.

The Documentary Filmmakers’ Statement of Best Practices (“Filmmakers’ Statement”) (2005) is the most well known of these statements. This statement was the first one released by the Center and sets forth categories of uses of others’ copyrighted works that its drafters consider fair in the context of documentary films. The privileged categories are critique or commentary, illustrative quoting, incidental uses (those captured during the filming process), and uses in historical sequences. Each of these categories contains a number of “limitations.” In the context of the illustrative category—in which uses are generally considered fair if the use “illustrate[s] an argument or point”—such preferred uses are limited to instances in which documentarians “assure that the material is properly attributed . . . [; that] quotations are drawn from a range of different sources[; that] each quotation . . . is no longer than is necessary to achieve the intended effect; [and that] the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.” These and the other limitations dramatically contract the scope of permissible uses under these statements.

The Filmmakers’ Statement appears to have encouraged more reliance on fair use. After its adoption, various film industry gatekeepers, such as Errors & Omissions (“E & O”) insurers and production companies, reconsidered their policies and have become more willing to insure and distribute documentary films that have not licensed all copyrighted material used in the films (Aufderheide and Jaszi, 2007). It is difficult, however, to know exactly how much influence the statements had, given that a number of other changes in the IP landscape occurred

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during this same time period. For example, legal clinics at major law schools and nonprofit organizations offered to provide free legal representation to those asserting fair use, and advocacy groups lobbied E & O companies to change their procedures. (Rothman, 2010a).

4. Creative Commons

Some efforts to encourage the use of copyrighted works have focused on creators, rather than users. A subsection of creators prefer a more permissive copyright regime than the default—one that makes it easier for third-parties to use and share works. One of the most successful of these creator-focused efforts is Creative Commons, a nonprofit organization formed in 2001 with the idea of layering an alternative, formalized licensing regime on top of existing copyright law. Hundreds of millions of works have been licensed using Creative Commons licenses. Major bands and recording artists, such as Nine Inch Nails and David Byrne, have used these licenses, as have Al Jazeera, Google, the California Digital Open Source Library, and the White House. (Brief of *Amici Curiae* Creative Commons et al. in Support of Plaintiff-Appellant, *Jacobsen v. Katzer*, pp. 1-2; Creative Commons, 2015; Rothman, 2014, p. 1625. The most common Creative Commons licenses require attribution, but allow noncommercial derivative works or adaptations if the new work is distributed in a share-alike manner—meaning under the same Creative Commons licensing regime under which it is licensed (Creative Commons, 2015). Thus, these licenses alter the usual baseline of copyright protection which does not require attribution for uses to be determined fair, and does not allow uses of noncommercial works that do not otherwise meet the criteria for finding that they are a fair use of the work.

III. THE ROLE OF CUSTOM IN FORMAL LAW

These customary practices have not only affected how things operate on the ground, but also the formal law, largely by influencing courts in IP cases. Courts often point to nonconformity with industry practices as a basis to find infringement or to reject defenses to infringement. Only rarely have courts referred to conformity with industry practices as a possible basis for a defense. When courts incorporate custom, either implicitly or explicitly, they often use customary practices as proxies for other considerations, such as what constitutes a “reasonable” or “ethical” use of another’s IP or what will be the market impact of allowing such uses. I consider here the primary ways that courts use custom when deciding IP issues, and raise some concerns with the current treatment of custom.

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A. Custom as Evidence of Market Effects, Commerciality, and Damages

Courts often consider what is customarily done as evidence of whether there is a negative market effect caused by the use of another’s IP. The most prominent example of this is when courts look at “customary pricing” in evaluating copyright’s fair use defense. Two of the four statutory factors for determining fair use involve consideration of the market for a copyrighted work. The first factor looks at the character of the use and in particular whether the use is commercial. A nonprofit or noncommercial use weighs in favor of a finding of fair use, while a commercial use weighs against such a finding. The fourth enumerated factor also considers the market by asking courts to consider how the relevant use will affect the market for the copyrighted work (17 U.S.C. § 107). Courts view both existing and potential licensing markets as an indication of whether a use is for profit (or “commercial”) and also whether a given use is likely to harm the market for the work at issue. Courts have sometimes used custom to determine the existence of such markets.

In *Ringgold v. Black Entertainment Television* (1997), for example, the U.S. Court of Appeals for the Second Circuit rejected a fair use defense when a television sitcom used the plaintiff’s artwork in the background of a set without permission. The court pointed to the custom in the TV and film industries of licensing copyrighted works used as set-dressing. If not for the consideration of these industry clearance practices, Black Entertainment Television (“BET”) had a convincing fair use defense—the poster containing the plaintiff’s artwork was visible for less than thirty seconds, was never the focus of any shot, and was not referred to in the dialogue. The *Ringgold* court, however, concluded that BET had failed to pay the “customary price” for using Ringgold’s work by not licensing her art and therefore could not avail itself of the fair use defense.

Courts have relied on similar industry licensing practices to evaluate the legitimacy of photocopying for educational and research purposes. In *Princeton University Press v. Michigan Document Services* (1996), the Sixth Circuit Court of Appeals rejected a fair use defense in the context of university course packets in large part because the defendant did not follow the industry practice of licensing works used in such packets. Similarly, in *American Geophysical Union v. Texaco* (1994), the Second Circuit rejected Texaco’s fair use defense largely because of noncompliance with industry custom. The court was persuaded that the copying of journal articles by Texaco’s research scientists was unfair at least in part because many major corporations got licenses for similar copying. Nonconformity with industry practices in both cases convinced the courts that the uses were commercial and caused market harm.

These courts’ analyses stem in part from the Supreme Court’s decision in *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985). In *Harper & Row*,

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the Court concluded that: “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price” (p. 562). When a defendant is found to have not paid the “customary price,” the defendant’s use is often judged “unfair.”

There are numerous problems with relying on the customary pricing analysis. The fact that licensing may be common should not be used to determine that a use is for profit. Even “educational” and religious uses can be viewed by courts as commercial under such a “customary price” analysis (*Soc’y of Holy Transfiguration Monastery v. Gregory*, 2012, p. 61; *Cambridge Univ. Press v. Patton*, 2014, pp. 1261-68). Several scholars, including myself, and a number of jurists have criticized this reliance on licensing evidence and have warned of the circularity dangers inherent in considering licensing opportunities as a basis for market harm. If a use is fair, there will be no licensing market, and if a use is not fair, a licensing market will develop. When courts rely on such licensing markets, particularly in an era of clearance culture, they abdicate their role as independent evaluators of what uses are fair (Rothman, 2007, pp. 1933-34; Princeton Univ. Press, pp. 1397, 1400-04, 1407-10; *Am. Geophysical Union*, pp. 929 n.17, 931, 936-39; Gibson, 2007, pp. 895-98; Pallas Loren, 1997, pp. 38-41).

B. Custom as a Proxy for What Should Be Done

Courts often view failure to conform with industry practices as both unethical and unfair. In *Roy Export Co. Establishment of Vaduz v. CBS* (1980, 1982), both a district court and the Second Circuit Court of Appeals held that failing to license film clips when it is industry custom to do so was unethical and a basis for rejecting both fair use and First Amendment defenses to copyright infringement. In *Roy Export*, CBS aired a retrospective on the great film actor and director Charlie Chaplin soon after his death. CBS incorporated in its broadcast footage from Chaplin’s films. In upholding a \$700,000 jury verdict against CBS, the district court found persuasive the fact that “CBS’ conduct violated not only its own guidelines but also industry standards of ethical behavior.” The court pointed to the industry’s licensing practices as evidence of harm to the potential market for the plaintiffs’ copyrighted works and of “bad faith.” (1980, pp. 1146-47). Although the issue of fair use was not raised on appeal, the Second Circuit, in affirming the district court decision, pointed to CBS’s violation of its in-house guidelines and industry licensing practices as evidence of “commercial immorality” and a basis for rejecting its First Amendment defense against unfair competition and copyright infringement claims (1982, pp. 1100, 1105 (emphasis added)). The Supreme Court in *Harper & Row* cited *Roy Export* when it set forth its “customary price” standard, suggesting

that the customary price analysis is more of a normative concept than an economic one (p. 562).

Even though the Classroom Guidelines are not legally binding and were intended to state a minimum floor of allowable educational uses of copyrighted works, courts have often viewed copying exceeding the Guidelines as unfair and done in bad faith. In *Basic Books v. Kinko's Graphics* (1991), a federal district court considered the copy shop Kinko's infringement in bad faith partly because Kinko's in-house handbook conceded that its copying practices for course packets exceeded those permissible under the Guidelines (pp. 1544-45).

Defendants are also sometimes found to have acted willfully or recklessly when they fail to conform with customary practices. Such findings can generate higher statutory damages, punitive damages, and possibly criminal liability under U.S. copyright laws. By contrast, conformity with custom often provides a basis for a finding of good faith even if infringement is ultimately found, thereby limiting damages and avoiding the danger of criminal penalties.

C. Custom as a Proxy for What Is Reasonable

It is not easy to define what constitutes a reasonable use of another's IP. A reasonable use is not the same as a just or moral use; instead, like the reasonable person standard in tort law, such a consideration asks more generally what is appropriate in a given circumstance. Because it is difficult to determine when a use of another's IP is reasonable, courts often use custom as a shortcut or proxy for such a determination. Nowhere is this approach more evident than in copyright's fair use doctrine. The traditional common law fair use standard asked courts to evaluate whether a use was "reasonable and customary" (Shapiro, Bernstein & Co. v. P.F. Collier & Son Co., 1934, p. 42; Harper & Row, p. 550; De Wolf, 1925, p. 143). Although this traditional formulation of fair use asks courts to consider both what is reasonable *and* what is customary, modern courts often conflate the two inquiries so that what is customary becomes what is reasonable.

Courts have judged uses fair solely on the basis that such uses have customarily been practiced. This approach turns on a court's conclusion that a use that has long been allowed is reasonable. One example of this analysis is the common acceptance of the use of copyrighted works in biographical works because such uses are considered "customary" (New Era Publ'ns Int'l v. Carol Publ'g Grp., 1990, p. 157; Rosemont Enters. v. Random House, Inc., 1966, p. 307). Another area where courts have relied on custom is in the context of copyright's work-for-hire doctrine. Many universities expressly allow faculty members to retain copyrights over their lectures, course materials, and scholarly works. In the few instances in which such faculty ownership has been contested, courts have often concluded that such ownership is an appropriate exception to the usual work-for-hire rules given

the longstanding nature and commonality of the norm allowing faculty to retain such rights (*Hays v. Sony Corp. of Am.*, 1988, pp. 416-17; *Weinstein v. Univ. of Ill.*, 1987, p. 1094; but see *Forasté v. Brown Univ.*, 2003, pp. 238-39; *Pittsburg State Univ. v. Kan. Bd. of Regents*, 2005, pp. 345-47). Courts have also looked to customary practices as an indication of what uses reasonable authors would permit of their works—a consideration that some courts treat as highly indicative of whether a use is fair (*Harper & Row*, pp. 550-51).

D. Custom as Evidence of What Is Usually Done

Sometimes courts look at evidence of custom simply to determine what is usually done in a particular industry without using custom for second-order evaluations of what is reasonable, ethical, or optimal. A number of legal issues in IP law legitimately require consideration of industry practices. For example, whether something is an unprotectable *scène à faire*—a common stock or standard element—is driven in part by customary practices. Whether one can use copyright law to protect characters that are mutant superheroes with special powers turns on the conventions of the superhero genre. Because it is customary for superheroes to have such qualities, a copyright holder cannot prevent others from also creating superheroes who are mutants with extraordinary powers. (*Twentieth Century Fox Film v. Marvel Enters.*, 2001, pp. 37-38, 42-43). Similarly, in the context of computer software, the doctrine of externalities denies copyright protection to aspects of software that are standard programming features. Custom determines what programming practices are considered standard programming features. (*Dun & Bradstreet Software Servs. v. Grace Consulting*, 2002, pp. 214-16; *Computer Assocs. Int'l v. Altai, Inc.*, 1992, pp. 709-10). Custom also matters in trademark infringement and false endorsement cases, which turn on consumer confusion. Consumer perceptions about whether permission is usually required for a particular use of a trademark or celebrity name will likely influence whether consumers will think the use was sponsored or endorsed.

E. Custom as Evidence of What Parties Intended

Finally, courts consider custom when determining parties' intentions in explicit and implied contracts related to IP rights, in claim construction of patents, and when interpreting statutory language (*May v. Morganelli-Heumann & Assocs.*, 1980, pp. 1367-68; *Jim Henson Prods. v. John T. Brady & Assocs.*, 1997, pp. 262, 267-77, 282, 285-86 & n.6, 288-90). Such straightforward uses of custom are appropriate and not controversial (*Rothman*, 2007, pp. 1945-1946, 1974, 1978-1979).

IV. QUESTIONING RELIANCE ON CUSTOM

Given courts frequent consideration and incorporation of custom, it is important to consider both whether and when it is appropriate to rely on industry practices and social norms to determine the scope of IP rights. Three main justifications have been advanced for incorporating custom into other areas of the law: First, that a given industry can best determine its optimal governing rules; second, that incorporating custom fulfills parties' expectations; and finally, that individuals or industries should establish their own rules to further their autonomy-based interests. To the extent that these are legitimate bases to incorporate custom elsewhere, they are less convincing in the context of IP. I will briefly consider each of these justifications, and how well they fit with considerations in the IP realm.

A. The Questionable Optimality of Industry-Driven IP Practices

If an industry or community is likely to establish optimal practices, or at least rules preferable to those that would independently develop in the courts or through legislation, it makes sense to defer to industry practices. In the IP context, however, practices are likely to develop in suboptimal ways and ultimately be inferior to court or legislative resolutions.

Defining what is meant by optimal practices in the context of IP is challenging. Nevertheless, any IP regime requires a balancing of IP owners' interests and those of users. The incentive rationale (one of the primary justifications for IP) has a built-in argument for allowing access to and use of works. Under the incentive-rationale theory, copyrightable and patentable works, inventions, and discoveries are protected in part to encourage their production and distribution. This justification rests not on authorial or inventor rights, but instead on the encouragement of production for the public's benefit. Under this rubric, IP ownership rights should not be absolute, because then the goal of promoting broader progress for the public good would be thwarted. The incentive rationale also has a built-in ceiling—there is no need to provide additional protection once no further incentive to produce is created. Accordingly, fulfilling the goals of the incentive rationale requires consideration of the interests of both IP creators and users.

Moral and personality-based justifications for IP protection also require the allowance of some use of others' copyrighted works both for creative, artistic purposes, and because users and subsequent creators have their own personality-based interests in using others' IP to adequately express themselves and to describe their own reality (Rothman, 2010b). When the integrity of the underlying work is not damaged and the creator's interests are satisfied through attribution, these personality-based approaches encourage the use of others' IP.

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Perhaps a pure labor-reward rationale—based solely on compensating creators or distributors—would exclude all uses done without permission if it were the only justification for IP laws. But it is not a stand-alone theory. In addition, under the logic of the labor-reward rubric, users who exercise their own labor when reworking others' creations and inventions, should reap the rewards of their own labor. Even if a labor-reward analysis adequately explained IP laws and was the only justification for such laws, IP rights must still be limited by free speech, free expression, and liberty interests. Accordingly, some uses of others IP would be allowed.

The question then of how best to allocate IP centers on whether a decentralized, industry-governed IP system is likely to adequately incentivize the production and distribution of inventions and works and protect and reward authors and inventors, while at the same time guaranteeing adequate use and access to other's IP by authors, inventors, and the public. Trademark protection similarly must balance the protection of businesses' goodwill and the prevention of consumer confusion, with the need for both consumers and competitors to reference and use others' trademarks. In the context of publicity rights, the law must balance both the need for the public to comment on and refer to public figures with the rights of those individuals to control and profit from the use of their identities. How exactly one would divide up these rights is a matter of much debate, but most people would agree that an optimal allocation of IP rights requires consideration of these sometimes competing interests.

Given this model of optimal IP rules, customary practices on their own are not likely to best reflect when exclusive rights should yield to permit access and use. Many of the prevalent customs have developed to avoid litigation or preserve relationships by avoiding conflict. These practices (such as those of the clearance culture) are not developed to be optimal governing rules, but instead simply to promote harmony outside of the legal system. The danger of allowing such risk-averse customs to define the scope of IP rights should be apparent. As discussed, incorporating such behavior can greatly expand infringement findings. Industry practices can establish a restrictive IP regime—one in which virtually nothing is free and no uses are fair. IP owners and users do not view most licensing practices and copying guidelines as optimal, nor as an expression of their preferred allocations of rights. Instead, even those who routinely license want the latitude to contest, and sometimes litigate, when a license is not granted or is prohibitively expensive.

Inequalities in IP markets and the underrepresentation of the public increase the likelihood that suboptimal practices will develop. One of the main arguments against the incorporation of custom into tort law is that the market cannot adequately protect the interests of third parties or the public because they have no role in the production of the practices. Even plaintiffs who are in a direct

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relationship with a potential defendant, such as a consumer for a defective product or an employee, may still lack bargaining power or sufficient market options to exert pressure on potential tortfeasors. When parties do not have equal bargaining power and are not in reciprocal positions, suboptimal practices and norms are likely to develop. As Eric Posner has observed in his critique of the reliance on norms as a source for legal rules, “once one abandons the unrealistic assumption that parties have symmetrical positions, traditional theories of the efficiency of norms lose their power” (Posner, 1996, p. 1709). He suggests that “highly unequal endowments of group members may be evidence of inefficient norms. The more powerful members may prefer and enforce norms that redistribute wealth to them, even when those norms are inefficient” (Posner, 1996, p. 1727).

Incorporation of custom also can prevent the continued evolution of custom by producing a lock-in effect—the incorporation of custom further entrenches the same suboptimal customs. James Gibson, among others, has identified the troubling “doctrinal feedback” and rights accretion that stems from the consideration of licensing practices in the context of IP. When courts consider licensing evidence, parties are more likely to license, which makes courts more likely to once again rely on licensing evidence. As more and more companies and individuals follow the licensing and other litigation-avoidance practices, these customs drive conformity rather than the evolution of optimal practices (Gibson, 2007, pp. 884-85; Rothman, 2007, p. 1955).

Even if various practices are efficient between the parties when weighing litigation versus licensing costs, they should not be extrapolated to define IP rights more generally or even in future transactions between the same parties. This is similar to the situation that arises when parties to a contract wish to be bound by gap-filling terms based on custom for efficiency’s sake. These gap-filling terms will not bind nonparties or outsiders, and even the parties themselves can opt out of the custom in future contracts.

Some of the scholarly support for preferring custom over congressional and court-made law is driven by reasonable concerns over the influence of special interest groups in the drafting and passage of legislation. Richard Epstein, for example, contends that reliance on custom “provides an effective bulwark against [the] bias and corruption” that pervade the legislative system (Epstein, 1992b, p. 86). Unfortunately, the same powerful parties who often influence legislation often also control the creation and development of customary practices. Worse yet, the development of industry practices lacks the established procedure for encouraging open debate and public commentary that exists in the context of pending legislation. As Lloyd Weinreb has observed, the result of reliance on custom is that “the better financed private interest” will prevail, rather than that a “careful, systematic” rule will develop to “serve the community as a whole” (Weinreb, 1992, pp. 146-47).

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Many of the practices and norms that I have discussed demonstrate this skewed development. The Classroom Guidelines, for example, were negotiated and drafted primarily by publishers and therefore unsurprisingly forward the agenda of publishing companies rather than those of scholars, educators, students, or research institutions. The Guidelines were adopted over the opposition of major universities and scholarly organizations, such as the American Association of Law Schools. (H.R. Rep. No. 94-1476, p. 72; Basic Books, p. 1535 n.10). Similarly, the clearance culture is driven by large corporations.

To the extent optimal customs have been identified in other areas of law, they usually have developed in the context of close-knit communities in which community members have ongoing relationships and in which the same types of transactions are repeatedly conducted. Richard Epstein (1992b) has advocated that “custom should be followed in those cases in which there are repeat and reciprocal interactions between the same parties, for then their incentives to reach the correct rule are exceedingly powerful” (p. 126). Robert Ellickson (1991) has similarly concluded that close-knit communities are most likely to develop welfare-maximizing norms (pp. 167, 187, 228, 267, 283). Henry Smith (2009), using his information-costs model of property law, has also contended that custom’s value dissipates outside of the close-knit communities in which it develops because parties are no longer familiar with the practices. In criticizing the enforcement of norms in the context of the Internet, Mark Lemley (1998) has emphasized that “[i]t is no accident that virtually all of the empirical work on norms has taken place in small, close-knit communities with little change in membership over time.” As a community becomes larger and more diverse, there is less likely to be a “commonality of interest” and norms are both less likely to develop and more likely to develop without uniform agreement (pp. 1267-69).

IP markets are exactly these sorts of disaggregated spaces. Many IP transactions do not involve repeat players or individuals who have any relationship with one another. A documentary filmmaker likely has no relationship with the Elvis estate or Disney Studios, and neither Disney nor the Elvis estate are likely to subsequently want to license or use any material created by a documentary filmmaker. Nor does a person sitting at home making a mix tape, CD, or MP3 playlist usually have a relationship with particular bands or record companies, other than as a generic consumer. Those who argue that the private sector is superior at allocating rights because it is free to “independently” develop ideal rules also overlook the legal shadow in which IP transactions take place. In the context of IP, the governing customs are often generated in response to legal regimes rather than on a clean slate.

Despite such concerns, some, such as Richard Epstein (2007), have argued in response to my work, that the reliance on custom in copyright cases involving negotiated licenses and other clearance culture practices sometimes does reflect

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optimal private ordering based on mutually-agreed-upon pricing. Epstein is more optimistic than I am that the clearance culture and other private-ordering mechanisms will result in optimal delineations of use rights and pricing in the context of copyrighted works. Negotiating licensing agreements is challenging, especially for smaller players or when a potential user has a limited amount of time to obtain permission for the use. Content owners sometimes cannot be located or do not respond (or at least not in a timely manner) to requests. These challenges lead to significant transaction costs that warp the market for these licenses. Content owners sometimes refuse to license at any price or charge a prohibitively high or simply unreasonable fee for use. In addition, because copyright furthers the overall public interest in generating more works and more knowledge, we cannot simply look at an individual transaction and evaluate the optimality between the owner and user, as compared to litigation costs—we must also consider the costs to society more generally. Optimality in the sense of maximizing wealth is also not the only consideration at issue. We must also maximize creativity, knowledge, and liberty. In short, custom is unlikely to independently establish optimal allocations of IP, or to provide the best balance between the exclusionary rights of owners and the use rights of other creators and the public.

B. Expectations Should Not Determine IP Rights

A second justification for incorporating custom is that doing so satisfies parties' expectations. In tort law there has been significant scholarly debate about this very issue with regard to the standard for negligence and, in particular, whether the negligence standard should be governed by parties' expectations or by a more objective standard. Judge Richard Posner views tort law not as furthering broad public policy goals, but instead as a mechanism for fulfilling parties' expectations when no formal contract governs a transaction. "[T]he principle function of tort law," he has written from the bench, "is to protect customers' reasonable expectations that the firms with which they deal are complying with the standard of care customary in the industry" (*Rodi Yachts v. Nat'l Marine*, 1993, p. 889). Epstein similarly contends that customary practices should be the standard of negligence when parties have some relationship to one another, even when the relationship is inequitable, such as between employer and employee and retailer and consumer (Epstein, 1992a, pp. 4-5 n.14).

In the context of tort law, conformity with an industry practice may best reflect parties' expectations, but as a matter of public policy there is concern that safety precautions will lag if an expectations or custom-based standard is adopted. The fact that a plaintiff was on notice of a danger should not in and of itself end the inquiry. Tort law, like IP law, is not another form of contract law in which individual parties' expectations drive the law. Instead, both bodies of law are in

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service to a higher purpose. Tort liability is not solely about the parties before the court but is also about making society safer, protecting third parties, and deterring bad or dangerous behavior. Given the bargaining power and knowledge base of potential tort victims, it makes sense to protect consumers from the race to the bottom that may result from deference solely to industry standards. As a result, in most instances tort law requires an objective, external evaluation of what is a reasonable standard of care.

Much of the literature supporting the incorporation of custom into contract law reflects the goal of furthering contracting parties' intentions and expectations. It makes sense to incorporate custom into contracts, if it reflects the contracting parties' understanding. As Lisa Bernstein (1999) has noted, however, the mere existence of practices does not indicate that parties would expect or want them to govern in “end-game” disputes when both a contract and relationship are breached.

In the context of traditional property rights, scholars have similarly debated whether expectations should drive property rights. Property rights often have been justified on the basis of expectations of entitlement to particular property. Carol Rose (2000a; 2000b) has highlighted, however, that even though a party may expect certain property rights, those rights should yield when they are unjust or otherwise not deserving of enforcement. Rose emphasizes that expectations must often be frustrated to manage or protect scarce resources or to promote social justice, tasks that often require limits on property rights (2000a, pp. 485-86; 2000b, pp. 19, 22).

An analysis of IP law supports the views held by scholars critical of relying on expectations-based models for tort, contract, and property law. Neither the expectations of IP owners or risk-averse IP users should govern the scope of IP rights. Patent and copyright protection are provided by constitutional grant and explicitly require consideration of the public interest separate from the property rights of IP owners. Copyright and patent laws do not have as their primary purpose the promotion of authors' rights, but instead the promotion of the public interest more broadly. The U.S. Constitution expressly states that the “exclusive Right to . . . Writings and Discoveries” is granted for the purpose of “promot[ing] the Progress of Science and useful Arts” (U.S. CONST. art. I, § 8, cl. 8). Accordingly, courts have often noted that they must “subordinate the copyright [or patent] holder's interest in maximum financial return to the greater public interest in the development of art, science and industry.” (Rosemont Enters., p. 307).

IP law, more so than many other areas of the law, requires consideration of negative externalities worked on third parties. An IP holder might expect, especially given the clearance culture, that no unlicensed uses would be made of her work, yet public policy demands the use of some material for commentary, scholarship, or other creative or useful works. If the public or IP owners have a narrow view of the scope of IP rights, these expectations should not alter the congressional or constitutional judgment about how best to balance IP holders' rights with the

public's right to use and access IP. For example, the *New York Times* licenses its news stories for use in television shows and movies (Manly, 2006). The *Times*' expectation that it can extract compensation for news, however, should not alter copyright law's guarantee that facts remain in the public domain.

The more attenuated nature of the IP markets also suggests that there are fewer shared expectations between the likely parties in IP disputes. Most IP cases involve parties who have no direct relationship with one another and often no shared set of expectations. One only needs to listen to the U.S. Patent and Trademark Office's roundtables on the legitimacy of mash-ups to see the lack of common expectations. Large content-providers, such as Disney, think virtually no uses are fair, while some user-focused groups, such as the Organization for Transformative Works, think virtually all uses are fair. (Department of Commerce Internet Policy Task Force, 2014, pp. 64-142)

Expectations also are driven by customs and therefore lock in existing property regimes, even when they are unjust and even if the parties would prefer alternative rules. In sum, furthering parties' expectations does not justify the wholesale incorporation of custom into IP law.

C. Autonomy Interests Do Not Justify Reliance on Custom

The final common justification for incorporating custom is the furtherance of autonomy interests. Early justifications for the common law expressed a preference for communities being governed by their own customary laws that had evolved over a period of time. These laws not only furthered parties' expectations, but also promoted self-governance and autonomy in a world that otherwise was dominated by rules instituted by the monarchy without any community input. Today, the democratic process allows communities to contribute in a more orderly fashion to the creation of governing laws, so there is less of a need to rely on private ordering to protect citizens in the law-making process.

Most importantly, autonomy interests do not support reliance on custom because there are conflicting autonomy interests at stake. It is not just initial creators and inventors who have autonomy interests. Users, and subsequent creators and inventors also have liberty and autonomy-based interests. In the context of copyright, for example, copyrighted works become a part of the personal and cultural world of others. The autonomy interests of an author must therefore sometimes yield to the competing autonomy and liberty-based interests of her audience (Rothman, 2010b).

V. Valuing Custom

The foregoing analysis suggests that custom should rarely, if ever, be dispositive of questions involving the scope of IP rights. Nevertheless, custom may provide some guidance about what is reasonable or appropriate in a particular context. In the past, I have developed six vectors that courts and scholars should consider when evaluating practices or norms in the context of IP (Rothman, 2007, pp. 1967-80). Here, I will focus only on four primary areas of evaluation: (1) the certainty of the custom; (2) the motivation for the custom; (3) the representativeness of the custom; and (4) the implications of adopting the custom.

A. Certainty of the Custom

To have any value, a custom must be identifiable, in terms of what constitutes the practice itself, and the practice must be widely accepted and followed. This analysis tracks the traditional common law requirement that practices be certain before meriting judicial consideration (Blackstone, 1765, *78; Browne, 1875, pp. 21-24; Lawson, 1881, pp. 32-36, Rothman, 2013). Several considerations help to evaluate how certain a particular custom is. First, if there is unanimity as to the contours of the custom among diverse parties it is more likely to exist and to have definable boundaries. Such agreement about the practice also likely indicates the consent of the community. Second, customs that are longstanding are more stable and have weathered the test of time.

Because the best practices statements, such as the Filmmakers' Statement, are more wishful than descriptive and have fuzzy boundaries, they are not particularly certain. Although the best practices statements purport to set forth the practices of the relevant communities, they instead set forth what the drafters think the community should be doing. In the context of the Filmmakers' Statement, the report leading up to the statement and the statement itself both reveal that the dominant practice was to license or cut out copyrighted materials from documentaries. Additionally, many of the inquiries in the Filmmakers' Statement and other best practices statements do not provide certain guidelines. Instead, they leave the same ambiguities of the existing fair use system, but add an additional layer of complexity to the already convoluted fair use analysis. For example, the OpenCourseWare Code requires evaluations of whether the "extent of the use is appropriate," quotes are no "longer than necessary" and attribution is "reasonably possible" (Center for Social Media, 2009, pp. 13-14).

In other instances, conflicting customs are at work. For example, in the *Roy Export* case—in which a court rejected fair use and First Amendment defenses for the use of clips of Charlie Chaplin films in a TV obituary of Chaplin—the court rejected fair use on the basis that the defendant did not conform to custom. The

court failed to consider, however, that there was more than one custom at work. Clips were not usually licensed for obituaries even though they were often licensed in other contexts for news projects with more lead time or in scripted series. Such conflicting customs suggest either that the court needed to more carefully scrutinize which custom was applicable or that there was no single, dominant, and widely-accepted custom worthy of consideration.

B. Motivation for Custom

Although motivation was not a common law limit on custom; custom was long thought to reflect the preferences of a particular community. In other words, if the community had been asked to sit around and agree to what the rule should be, this is likely the rule they would have come up with—or at least if such a rule had been suggested to them they would have agreed to it. In the context of copyright, the most valuable practices and norms reflect preferred allocations between copyright holders and users, rather than litigation-avoidance or relationship-preservation strategies. Reactive and risk-averse customs, like those of the clearance culture, are not the sort of aspirational, independently developed customs that we should adopt.

When customs develop with aspirational motives they are better indications of what is appropriate. In the context of fair use, practices and norms should primarily be relevant only to the extent that they are indicative of what is actually deemed “fair” by the relevant community, rather than what that community thinks is colorable or safe under the law, or simply “cheaper.”

When considering the motivation for a particular custom, courts should particularly identify whether the custom was intended to provide a reasonable balance between competing interests. As a check on this analysis, courts should independently evaluate whether reasonable people would agree to such rules if they knew neither whether they would be powerful or minor players in the market, nor whether they would own or instead want to use the relevant content.

C. Representativeness

Customs that represent only one party’s or one group’s interests are suspect. By contrast, when a custom develops with input and participation of both owners and users, and large and small players, it is more valuable. Practices and norms should also only apply to those within the community that developed them. The Classroom Guidelines and best practices statements were both developed in an unrepresentative way. They are therefore less valuable guidelines and should not be wielded against those who did not participate (or at least were not represented) in their development. Like the Classroom Guidelines, none of the best practices’

statements included representation by the most affected parties—the content providers whose work is most likely to be appropriated. The fact that some of the participating users were also authors does not remedy this one-sidedness. Even though the Department of Commerce has stated its support of such use guidelines in theory, it has appropriately noted that such guidelines need to be developed with the participation of a variety of parties on different sides of the issues before such guidelines deserve serious consideration (Department of Commerce Internet Policy Task Force, 2013, p. 23). Although the proponents of the best practices statements are likely correct that if they invite major content owners to participate very little would be agreed to, the fact that the parties cannot agree to any common principles should raise serious flags about using the best practices statements to affect entitlements outside of the community that developed them. Even within various use communities, there have been reasonable objections to applying the standards against any party who was not directly involved in their development (Rothman, 2014, pp. 1620-22).

D. Implications

Courts must also independently scrutinize the implications of adopting any customary practice or norm as a legal rule. When evaluating the worth of a particular custom, a court must consider what the end result of incorporating that custom would be. If followed to its logical conclusion, will the custom result in a slippery slope, such that no uses will be allowed, or, alternatively, that too many uses will be allowed? Consider, for example, two extremes. If it is customary to license everything, then no fair uses remain. On the flipside, consider the peak of peer-to-peer file-sharing in which the custom was not to pay for any music downloaded from the Internet. Such a custom could destroy the market for music online.

In the best practices statement related to user-generated content (“UGC”) (in the context of online video) virtually any use is deemed fair because the commentary and critique category is read very broadly. In the report supporting the Online Video Code, the drafters suggest that a mash-up titled Clint Eastwood’s “The Office”—which mixed together clips from the television series *The Office* with the movie *Evan Almighty*—falls within the favored category of negative or critical commentary. This category and its exemplars suggest that all mash-ups are fair (Center for Social Media, 2008, pp. 7-9). This means that there can be no market for licensing such mash-ups; a conclusion that limits new media markets and makes copyright law largely irrelevant in the context of UGC. Many mash-ups may well be fair ones, but one cannot simply wish them all to be so.

In sum, if custom is certain, representative, motivated by aspirational purposes, and would result in a reasonable allocation of use and ownership rights,

then that custom provides meaningful guidance. Otherwise, such practices and norms should be met with skepticism and little deference.

VI. Lessons for IP Policy

Despite the many reasons discussed to be cautious about jumping on the custom bandwagon, custom provides a number of lessons for IP policy. First, massive disobedience of IP laws can signal market failure or overreaching by IP owners. The IP system needs public buy-in to work. Public support requires people to think that on some level the law is fair. When laws are wildly out of sync with community practices, there sometimes will be value in interpreting the law to conform to those understandings or amending the laws to better reflect some of those norms.

Second, customary uses may demonstrate a consensus about preferred rights that may not currently be recognized under the law. Such locations of commonality are promising areas for legislation. For example, many norms in the copyright world favor giving attribution to authors when their work is used, but the law does not generally recognize such a right. Similarly, it may be worth addressing the potential conflict between the work-for-hire provision and the widely accepted norms of faculty ownership of scholarship and teaching materials.

Third, custom may demonstrate areas of need by users and creators that should be accommodated either through a reasonable market mechanism or through fair use. Finally, because the value of custom is based on its reflection of a commonly-agreed-upon norm, it is important to dissent from dominant and restrictive practices in IP markets.

Although IP laws should continue to provide room for private ordering, these private efforts should not alter IP's boundaries. The clearance culture in the publishing and film worlds should not influence courts' independent analyses of whether particular uses are fair. Nor should a small cross-section of documentary filmmakers decide when fair use applies in that context. Creative Commons licenses can encourage the use of copyrighted works in ways that creators support, but the fact that a use breaches such a license should not weigh against a finding of fair use.

Recent scholarship has turned a prying eye on the worlds of fashion, chefs, comedians, roller derby, fan fiction, and many other IP-based or IP-adjacent communities in which creativity sometimes flourishes without reliance on the governing formal IP structures (Raustiala and Sprigman, 2006; Fauchart and von Hippel, 2008; Fagundes, 2012; Tushnet, 2007; Madison et al., 2010). Sometimes these industries are categorized as producing “creativity without law” and used to support arguments that creativity can take place without needing IP rights and enforcement (Darling and Perzanowski, 2017). But the law influences even these

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purportedly IP-free zones. The scope of IP laws determines when and how alternative protection schemes develop. Aspects of recipes not protected by copyright law will by necessity be protected by alternative mechanisms—such as attribution enforced by shaming. Fashion designs that are not protected by trademark or copyright law will be protected through other mechanisms or will be altered (for example, through a cycle of rapid change, or so they can obtain trademark or copyright protection). Those within communities that use alternative regimes to protect their creations do not always shun more formal IP protection. Roller derby players, for example, use a community-based registry of derby names, but also try to register their names with the Patent and Trademark Office when they become better known, and such registrations have also become more common as roller derby has become more popular. Chefs and comedians sometimes rely on copyright law, when they write cookbooks and produce recordings of their routines (Fauchart and Von Hippel, 2008; Oliar and Sprigman, 2008). The norms of these various communities develop with an awareness of IP law, operate in its shadow, and often are efforts to work around its contours.

As we look back on nearly a decade of robust attention to custom, norms, and practices in the context of intellectual goods and IP laws, and celebrate many of them, it is important to contextualize them in the broader framework of the interplay of law with these extralegal activities. Those who favor expansive use rights cannot simply point to all the practices that they like without acknowledging the practices that they do not like—those that promote owners’ interests—as well as the way courts have long considered custom. Courts are just as likely—often more likely—to incorporate restrictive practices (such as clearance culture norms and restrictive use guidelines, like the Classroom Guidelines) rather than more permissive ones. To the extent that we want to distinguish between customs, we cannot do so based on a gut instinct about which practices are preferable. Instead, a detailed framework like the one set forth here must be used to evaluate the worth of each custom to determine if it merits incorporation into the law.

As the project of documenting norms in various creator, inventor and user communities continues, it would be helpful to gather data about what knowledge or awareness (accurate or not) community members have about the law and to what extent those understandings influence their practices and norms. It would also be useful to collect information about whether the characteristics that make custom more or less worthy of consideration are present. For example, are the practices uniformly known, certain, and longstanding? Are the practices motivated by efforts to set appropriate boundaries for use and ownership, or by risk-aversion, relationship-preservation, or wishful thinking (by owners or users)? Are the practices representative of a variety of parties, or only of one particular group?

Custom can provide valuable information, but its usefulness depends on independently evaluating the worthiness of the custom and particularly scrutinizing

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its reasonableness. The unarticulated incorporation of custom threatens to swallow up IP law and replace it with industry-led IP regimes that give the public and other creators more limited rights to access and use IP. If we take seriously the notion that IP is protected in the public interest, then we cannot abdicate the boundaries of IP rights to delineation by privately developed customary practices. This does not mean that we cannot appreciate community norms that have developed in the IP space; but it does demonstrate that we cannot simply bask in their glory without recognizing their place in a larger ecosystem of custom in the IP world and beyond.

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