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Fair Use and Privatization in Copyright

STEPHEN M. MCJOHN

The fair use doctrine of copyright law permits use of a copyrighted work without permission of the copyright holder. Fair use authorizes one to tape a television program for later viewing, to write a parody of a copyrighted song, or to photocopy a law review article for research. It does not permit a magazine to publish key passages from a forthcoming autobiography of President Ford, or permit a television station to copy and tele­vide a news service’s videotape of an assault, or permit a corporation systematically to make copies of academic articles in lieu

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5. See Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th. Cir. 1997).
of subscribing to the journals. As digital technologies expand the possibilities for creative works, the breadth of the fair use doctrine will affect the control given copyright holders. Although attempts have been made, the fair use doctrine has not been reduced to a single form susceptible of straightforward application. Authorities regularly call fair use so malleable as to be indeterminate. For example, the application of fair use to photocopying is unsettled despite decades of litigation. Fair use cases seem to produce a disproportionate share of reversals and divided courts. Accordingly, the demand is great among courts and commentators for a clear approach to fair use.

In recent years, increasing support has coalesced for a view that promises to reduce fair use to a simple, elegant conceptual framework, which will be termed the “transaction cost approach.” Under that approach, the benefits and costs of using a copyrighted work are compared to determine whether the use is fair.

6. See American Geophysical Union v. Texaco, 37 F.3d 881 (2d Cir. 1994).


8. NIMMER & NIMMER, supra note 1, at § 13.05 [A], 3-156 to 3-159 (describing fair use’s “infinite elasticity” and noting that it may not be applied predictably); see also Fred H. Cat, The Technological Transformation of Copyright Law, 81 IOWA L. REV. 1395, 1457 (1996) (describing fair use as an “already murky provision”); Fisher, supra note 1, at 692-94 (criticizing fair use as vague, ambiguous, and fragmented); Lloyd L. Weinreb, Fair’s Fair: A Comment on the Fair Use Doctrine, 103 HARV. L. REV. 1137, 1137 (1990) (stating that fair use has baffled judges, lawyers, scholars, journalists, critics, historians, and publishers); William F. Patry & Shira Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 CARDOZO ARTS & ENT. L.J. 667, 667-68 (1992) (collecting descriptions of fair use that describe it as “intricate and embarrassing,” “troublesome,” and full of “thorniness”).


11. Id. at 1106-07.

view, fair use should only apply to overcome certain narrowly defined cases of market failure—settings where transaction costs impede voluntary licensing agreements.13 That approach would narrow the application of fair use—and further narrow it with increasing use of networked communications, on the grounds that transaction costs shrink as the links between parties increase in number and speed.14 That narrower view of fair use is reflected in judicial decisions,15 academic commentary16 and proposed amendments to adapt the copyright statute could be interpreted as giving a considerably different scope to fair use. For an economic argument at the opposite end of the copyright protection spectrum, see Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyrights in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970) (questioning the need for copyright as an incentive for publication of many types of works). See also Barry W. Tyerman, The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer, 18 UCLA L. REV. 1100 (1971) (arguing copyright is necessary to protect publishers against freeriders). For a general analysis of the need for copyright law, see Wendy J. Gordon, An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 STAN. L. REV. 1343 (1989) [hereinafter Inquiry] (comparing a hypothetical legal regime of no copyright law with present regime).


15. See, e.g., Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995) (discussed infra at text accompanying notes 198-205); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (6th Cir. 1978) (discussed infra at text accompanying notes 215-19).

to the world of networked digital communication. Even commentators less sympathetic to expanded copyright have noted an apparent narrowing of fair use.

The transaction cost view of fair use, as Part I explains, takes the "tragedy of the commons," a celebrated insight about real property, and seeks to apply it to intellectual property. Where property is held in common, with unlimited access to all, individuals may use it wastefully, because they do not bear the costs. In addition, because access is free, no market mechanisms form to channel resources toward the highest valued use. The transaction cost approach takes a similar view of the intellectual property created by copyright. In this view, permitting fair use of a copyrighted work is, to the extent of that use, tantamount to holding the work in common, leading to inefficient overuse of the resource and blocking pricing signals. Accordingly, fair use should be limited to situations where transaction costs impede licensing transactions. In one elegant conceptualization, fair use serves simply as "a compulsory license provision with a royalty of zero," applicable in situations where the copyright holder would not have received a royalty anyway because of transaction costs. Such situations, in the view of many, will become fewer and fewer as technology lowers transaction costs by facilitating the dissemination and licensing of copyrighted works. In a world where copies can be distributed worldwide and software can be used to form licensing contracts (such as

17. The policies underlying proposed legislation to adapt copyright to such media as the Internet are set forth in the White Paper, supra note 12. The White Paper suggests that fair use should be narrowed in light of copyright management technology and further states that the burden of showing fair use should rest on the user. See id. at 73, 82.

18. See, e.g., Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 MICH. L. REV. 1197 (1996) (suggesting copyright expansion is due to both interest-group politics and rhetoric that enforces consolidation of entitlements); Cate, supra note 8, at 1423 (arguing fair use as currently applied is unlikely to mitigate "the technological extension of the exclusive right to reproduce"); Glynn S. Lunney, Jr., Reexamining Copyright's Incentives—Access Paradigm, 49 VAND. L. REV. 483, 546 (1996) ("As Congress and various courts have expanded the scope of the author's protected interest, so too have they narrowed the scope of the fair use doctrine."). Professor Robert P. Merges has recently suggested that, because the market failure approach leads to a narrowing of fair use with new technologies, fair use analysis should shift to emphasizing redistribution, seeing fair use as a means to subsidize certain classes of uses. See Robert P. Merges, The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce, 12 BERKELEY TECH. L.J. 115, 133-35 (1997).

19. See Hardy, supra note 12, at 218.

20. See DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 28-32 (1992) (discussing inefficient incentives that can be created by common property rights).

21. Hardy, supra note 12, at 240.
clicking on an icon to accept terms), the need to apply fair use will shrink.\textsuperscript{22} Accordingly, fair use would gradually give way to licensed uses.\textsuperscript{23} Such reliance on market-oriented economic theory has been termed a "neoclassical" view\textsuperscript{24} or a "property rights" approach to copyright.\textsuperscript{25} Because it holds that extending copyright protection as far as markets can reach will ultimately benefit all, it has been called the view of "copyright optimists."\textsuperscript{26} Considering this Article will be primarily interested on its effect on public domain, the term "privatization" will be utilized.

This Article argues against a narrowing of the fair use doctrine. Part II discusses how differences between real property and intellectual property undercut the application of the tragedy of the commons to the fair use setting. While real property is a limited resource, intellectual property is not. The same parcel of land may not support an unlimited number of grazing sheep. But making one more copy of a book does not destroy other copies (although it may reduce their market value).\textsuperscript{27} The ideas in the book, indeed, may gain value from use, refinement, and propagation. Thus, the same public good\textsuperscript{28} nature of works of authorship that justifies intellectual property also differentiates it from real property. Moreover, the boundaries in copyright are far more uncertain than those around a parcel of land. Copyright demarcates protected


\textsuperscript{23} See also Cate, supra note 8, at 1425 (discussing how digital payment technologies and proliferation of markets may reduce the scope of fair use doctrine).


\textsuperscript{26} See Goldstein, supra note 1, at 14-18.

\textsuperscript{27} See Breyer, supra note 12, at 288-89 (distinguishing copyright from tangible property on the basis that concepts such as congestion and limited amounts are inapplicable).

\textsuperscript{28} The general justification for intellectual property is that public goods may be underproduced. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 112-15, 141-44 (1988). On implications of the public good approach for software copyright, see Dennis S. Karjala, Copyright and Misappropriation, 17 U. DAYTON L. REV. 885, 921-22 (1992).
subject matter with elusive distinctions—originality, abstraction, and functionality.

Part II further addresses the theoretical underpinning of the transaction cost approach, the idea that copyright should be maximally privatized. 29 Under that view, concentrating control in the hands of the author by constricting fair use would most efficiently exploit the resource. But this view overlooks factors that can prevent copyright holders from permitting many uses. First, transaction costs are not the only obstacle to licensing valuable uses. Issues of status, 30 risk aversion, and other obstacles to negotiations could obstruct licensing of many productive uses. 31 Second, increases in electronic commerce and communications will lower some types of transaction costs, but many components are likely to remain unaffected. Accordingly, the Internet will not yield the frictionless marketplace postulated by the transaction cost view.

Reducing the scope of fair use could create deadweight loss to productive uses. 32

29. See GOLDSTEIN, supra note 14, at 229 (arguing for "extending copyright into every corner of economic value"); Hardy, supra note 12, at 217 (arguing that copyright should be employed to privatize intellectual property as much as possible). Copyright property theorists draw from such ground-breaking work in economics as Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967) and Edmund W. Kitch, The Nature and Function of the Patent System, 20 J.L. ECON. 265 (1977). For a broad critical analysis of the implications of property rights theory for intellectual property law, see Lemley, supra note 25, at 1044-47. See also Laurie Stearns, Comment, Copy Wrong: Plagiarism, Process, Property and the Law, 80 CAL. L. REV. 513 (1992) (criticizing application of property metaphor to words).


32. The public domain is itself a key resource for the further production of creative works. See Keith Aoki, Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain, 18 COLUM.-VLA J.L. & ARTS 1, 191 (1994-1995);
Part III discusses an alternative, the balancing view of fair use, which relies on a different view of the property created by copyright. The transaction cost view conceptualizes intellectual property as a single resource that can be split up in pieces and identified with the copies of the work. But the rights under copyright are not coextensive with the physical copies. Others remain free to copy the ideas expressed in a copyrighted work, the functional aspects of the work, and the facts from the work. Fair use has served as a device to ensure that the copyright owner's control over the expressive aspects of her work do not extend to the noncopyrightable aspects.

Part IV compares the transaction cost view and the balancing view of fair use in the context of a number of live issues: whether a temporary copy in a computer's memory infringes copyright, how much legal protection should be afforded copy protection technology, how broad the exclusive right to make derivative works should be, whether one could archive the World Wide Web, and the application of fair use to photocopying and other means of reducing the costs of disseminating copies. This Article will conclude that, although the transaction cost approach might simplify fair use analysis, it would do so by undercutting certain core limitations on copyright. Rather than shrinking away in the digital age, fair use should continue to be a means to implement the balances struck by copyright law.


33. See infra text accompanying notes 144-88.


I. THE TRANSACTION COST APPROACH TO FAIR USE

As the following parts will discuss, the scope of fair use depends on the relationship between fair use and the other limitations on copyright. The transaction cost approach views fair use as an autonomous doctrine, which functions only to rectify certain market failures. This Article will argue that fair use plays a more integral role in copyright law, giving effect to the other limitations. As a prelude to that discussion, this Part sketches the doctrinal place of fair use in copyright law and describes the transaction cost approach to the doctrine's proper scope. A number of works describe the historical development of fair use in case law and legislation. Accordingly, this Part focuses on the place of fair use among the various limitations on the subject matter and exclusive rights of a copyright.

A. Fair Use and the Other Limitations on Copyright

The privatization approach would make fair use independent of the other limitations on copyright, by making transaction costs the primary focus of fair use analysis. Because this Article will argue that fair use is more closely related to the other limitations, this section first outlines the overall structure of copyright law. The author of an original work of authorship receives the copyright in the work. Copyright's broad scope extends to the entire range of creative works: letters, history books, paintings, songs, video games, movies, and computer programs. The copyright holder has a number of exclusive

36. See sources cited supra note 1.
41. See, e.g., Arnetin v. Porter, 154 F.2d 464 (2nd Cir. 1946) (involving an infringement action of Cole Porter compositions "Begin the Beguine" and "My Heart Belongs to Daddy").
42. See, e.g., Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992) (applying fair use to a device that made various changes in play of video game).
44. The extent of copyright protection afforded computer programs is subject to evolving case law. See Mark A. Lemley, Convergence in the Law of Software
rights. Only the holder of the copyright may make copies of the work, make derivative works, distribute copies of the work to the public,

Copyright?, 10 HIGH TECH L.J. 1 (1995); Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527 (5th Cir. 1994) (joining "consensus" among courts that non-literal elements programs were protectable, but not defining the extent of such protection); Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823 (10th Cir. 1993); Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., 807 F.2d 1256 (5th Cir. 1986) (holding copyright not applicable to the functional structure of a computer program); Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3rd Cir. 1986) (an early case, frequently criticized, that held "structure, sequence, and organization" of computer programs were copyrightable expression). For sharply different views on how broad copyright protection for software should be, compare Dennis S. Karjala, Copyright, Computer Software, and the New Protectionism, 28 JURIMETRICS J. 33 (1987) (arguing that copyright law should forbid only near-literal copying) and Anthony L. Clapes, et al., Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs, 34 UCLA L. REV. 1493 (1987) (arguing that computer programs should receive protection as broad as literary works generally). See also Steven R. Englund, Note, Idea, Process or Protected Expression?: Determining the Scope of Copyright Protection of the Structure of Computer Programs, 88 MICH. L. REV. 866 (1990); David C. Tunick, How to Avoid Infringing the Copyright of a Computer Program: From the Perspective of a Computer Programmer Turned Attorney/Law Professor, 4 J. INTELL. PROP. L. 49 (1996) (discussing permissible borrowings from existing programs under recent interpretations of software copyright); Annotation, Copyright Protection of Computer Programs Under Federal Copyright Laws, 70 A.L.R. 2D 176 (1997). Copyright analysis could benefit by more precise attention to computer science concepts. See Randall Davis, The Nature of Software and Its Consequences for Establishing and Evaluating Similarity, 5 SOFTWARE L.J. 299 (1992); Marcia Hamilton & Ted Sabety, Computer Science Concepts in Copyright Cases: The Path to a Coherent Law, 10 HARV. J.L. & TECH. 239 (1997); see also William F. Patry, Copyright and Computer Programs: It's All In The Definition, 14 CARDOZO ARTS & ENT. L.J. 1 (1996) (calling for courts to be stricter in applying statutory terms in software cases).

45. Title 17 of the United States Code section 106 provides that:

[T]he owner of the copyright under this title has the exclusive rights to do and authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

or publicly display the work or perform the work in public. 46 Thus, if an author has written a play, then others may infringe the copyright by making copies of the play, making a movie derivative of the play, distributing copies of the play, performing the play in public, or displaying the text to the public. But the control over the work granted by copyright is far from total. The prerogatives granted are limited to the exclusive rights listed in the statute. Others may make use of the copyrighted work in ways that do not fall within the exclusive rights. One does not need permission to read a copyrighted book or write about a copyrighted painting.

A number of subject matter limitations also cut into the scope of the copyright. A copy of a play contains copyrighted expression subject to the author's exclusive rights, but the copy also embodies much that is not subject to protection. First, copyright protects only original expressive elements. 47 Accordingly, the United States Supreme Court held there was no infringement where the maker of a telephone directory copied another directory's factual listings of names and numbers because an author does not create facts. 48 The originality requirement also limits the protection given fictional works, which necessarily use elements that are not the author's original expressions. 49 To the extent a work incorporates nonoriginal elements such as commonplace plot devices, others are free to copy such elements without the permission of the copyright holder. 50

Another profound limitation is the rule that copyright does not restrict the use of ideas. 51 The author's copyright protects only expression; others are free to copy or apply the author's ideas. 52 A pair of opinions by Judge Learned Hand best illustrate the rather elusive distinction. In Nichols v. Universal Pictures Corporation, 53 Judge Hand held there was no infringement where the second author copied such elements as a quarrel between Jewish and Irish fathers, marriage of their children, reconciliation, and some stock characters. By contrast, in Sheldon v.

49. See Litman, supra note 32.
50. Id.
52. See generally Alfred C. Yen, A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's Total Concept and Feel, 38 EMORY L.J. 393 (1989).
53. 45 F.2d 119 (2nd Cir. 1930).
Metro-Goldwyn Pictures Corporation, the copying was more specific. The second author took more than the plot of the play, in which a young woman poisoned an overly ardent lover but won acquittal after some friendly perjury, the author took the specific events and details of various scenes such as the use of a gaucho song as an aphrodisiac, conveniently mislaid poison, and a thwarted attempt to make a telephone call for aid.

The distinction between copyrightable expression and noncopyrightable ideas carries over to the line of cases under Baker v. Selden, now codified in the copyright statute. These cases hold that the functional aspects of a work are unprotected by copyright, but its aesthetic, expressive aspects are protected. The lower level of protection afforded works with functional aspects has become especially important as copyright law has been extended to computer software. It is established that one cannot simply copy every byte of a copyrighted program and sell copies, but how much protection copyright affords beyond that is unsettled.

The originality requirement and the nonprotection of ideas are limits on each of the copyright holder's exclusive rights. The Copyright Act further provides specific limits applicable to only some of the exclusive rights. The copyright owner's exclusive rights to distribute and display the work are subject to the first sale doctrine, which provides that the

54. 81 F.2d 49 (2nd Cir. 1936).
55. 101 U.S. 99 (1879).
owner of a lawfully made copy may display or dispose of that particular
 copy. Thus, the owner of a painting may display the painting or sell
 it. The public display and performance rights are subject to a number
 of specific exceptions. Although the author of a song generally has the
 exclusive right to perform it in public (whether live or through a
 recording), the statute authorizes performances in face-to-face nonprofit
 teaching, in religious services, during charitable events, or by playing a
 modestly sized radio in a business. Some limitations are geared to
 specific types of copyrightable works. The copyright in an architectural
 work is not infringed by taking a picture of a building visible to the
 public. The copyright in a computer program is not infringed if the
 owner of a copy of the program makes a copy in order to use the
 program or to have a back-up copy.

The fair use doctrine is a general limitation on all the copyright
 holder’s exclusive rights. Without the author’s permission, someone
 may make copies (or make derivative works, or perform the work, or
 display or distribute copies) if the activity qualifies as fair use. Rather
 than attempt to define fair use, the copyright statute lists
 particular uses likely to qualify as fair use: criticism, comment, news
 reporting, teaching, scholarship, and research. Whether a use falls
 into one of the favored categories, however, does not determine whether
 it is a fair use. A use outside the categories may qualify as fair use, and
 a use within a favored category may fail to qualify. The statute further
 requires a court to consider four factors drawn from a nineteenth century
 opinion by Justice Story:

 been partially excepted from the first sale doctrine, for fear of rampant copying.
 § 109(b); see Kenneth R. Corsello, The Computer Software Rental Amendments Act of
 could use fair use to fashion a digital equivalent of the first sale doctrine, on the grounds
 that it is fair use to make a new copy provided that the first copy is destroyed. Cf. Mark
 Stefik, Shifting the Possible: How Trusted Systems and Digital Property Rights
 (1997) (discussing the conceptual difference between copying to reproduce and to
 transfer).

62. Id.
63. In short, we must often, in deciding questions of this sort, look to the
 nature and objects of the selections made, the quantity and value of the
 materials used, and the degree in which the use may prejudice the sale, or
 diminish the profits, or supersede the objects, of the original work.
(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. 64

The provision does not provide particularly clear guidance in deciding whether a particular use qualifies. A court must first decide whether the use falls into one of several broad and vague categories. The court is then to apply four factors, but not told how to weigh any of the factors against each other. Accordingly, fair use is considered difficult and unpredictable.65

The greatest uncertainty of fair use is where it fits in the overall framework of copyright law. The next section discusses how the privatization approach to copyright would make fair use independent of the other limitations on copyright by making transaction costs the primary focus of fair use analysis.

B. The Transaction Cost Approach to Fair Use

Although this Article will argue that the transaction cost approach results in an unsatisfactory and narrow view of fair use, the approach does have some merit in that it reduces a tangled doctrine to a clear conceptual framework. Under the transaction cost approach, the primary question would be whether defendant's use could have occurred by obtaining a license from the copyright holder. If defendant could have sought permission from the copyright holder, then fair use would be unlikely to apply. If transaction costs or other narrowly defined market failures would have prevented a voluntary transaction, then fair use would be more likely to apply.

The transaction cost approach rests on the paradigmatic justification for private property, the "tragedy of the commons," which demonstrates how dividing resources into privately owned parcels can lead to greater

65. See, e.g., Lemley, supra note 25, at 992 (describing fair use as "fraught with uncertainty").
social welfare than holding the resources in common. One might think
that public ownership of property with unrestricted access to all would
permit the greatest social benefits. But where property is held in
common, meaning everyone may use it freely, there are great incentives
for inefficient behavior. \(^{66}\) Individuals are likely to consume resources
without taking into consideration the costs. Classic examples are
littering, over-grazing, and pollution. Where property is privately held,
an individual both receives the benefits and bears the costs of a
particular use, so the individual has an incentive to use the property as
efficiently as possible. If another individual can get greater benefit from
that particular piece of property, then the second individual may
purchase it. Thus, privatization of property has two primary functions.
First it internalizes costs and benefits, increasing the chances that
resources will be used efficiently. \(^{67}\) Second, it permits markets to form,
permitting resources to flow, through voluntary transactions, to the
highest-valued use. \(^{68}\) The transaction cost view of fair use takes a
similar view of the intellectual property created by copyright. Under
that approach, copyright privatizes intellectual property by according the
copyright holder the bundle of exclusive rights. Concentrating the rights
in one place gives the copyright holder an incentive to exploit them in
an effective manner. If someone else can make more valuable use of
any or all of the rights, then the other may pay for an assignment of the
copyright or a license of some of the rights. Indeed, permitting others
to use the work without the copyright holder’s permission would
interfere with the formation of market mechanisms. \(^{69}\)

Fair use, under that view, is a narrow exception to the “privatization”
of intellectual property. \(^{70}\) Fair use would apply only where transaction
costs interfere with the centralized control through licensing with the
copyright holder. Such applications of fair use have been put into two
categories. \(^{71}\) In the first, no agreement is reached because the transac-

(discussing how creation of exclusive property rights provides incentives for efficient use
of resources).

\(^{67}\) See id., at 33-35.

\(^{68}\) See id., at 33 (discussing how transferability of property rights permits
allocative efficiency).

\(^{69}\) Cf. Inquiry, supra note 12, at 1393 (“The entitlement package is more than just
a way to give the author incentives to produce in the first instance. It also organizes the
way already-produced works are rationed and coordinated.”); Hardy, supra, note 12, at
234-40, 252-53 (arguing that concentrating entitlement in copyright holder facilitates
efficient transactions and use of work).

\(^{70}\) Hardy, supra note 12, at 240-42 (explaining that transactions that are usually
amenable to fair use are trivial or undertaken for unusually worthy purposes).

\(^{71}\) Goldstein, supra note 1, at 10.1.
tion costs to arrange the license would exceed the potential benefit. For example, a daily newspaper seeks to print two paragraphs from a textbook in a book review.\textsuperscript{72} The costs of arranging to get permission from the textbook author (delay, communication, and negotiation) would likely exceed the benefit of the use, meaning that if permission were necessary the newspaper might likely forego the use. The second category of uses that might be obstructed by transaction costs occur when the user does not capture the entire benefit of the use, and thus might not be able to pay for a license.\textsuperscript{73} Some uses of a copyright work, such as teaching, criticism, or research, benefit not just the immediate users but society generally. But a teacher, a critic, or a researcher may not be able to get the rest of society to pay for the diffuse benefits flowing from their use of the work; the transaction costs of dealing with all members of society and figuring out how much each benefitted would be prohibitive. A license might be available, but the fee might be prohibitive because it could not be recovered from the ultimate beneficiaries. In both categories, allowing the use under fair use would not harm the copyright holder, because by hypothesis a licensing transaction was not feasible. Conversely, the transaction cost approach would deny fair use even to valuable uses if they could have been licensed. In many such cases, voluntary licensing would result in both the realization of the social value and compensation to the author.\textsuperscript{74} As one influential law review article framed it, fair use would apply only where three conditions are met: "(1) market failure is present; (2) transfer of the use to the defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner."\textsuperscript{75}

So viewed, fair use is analogous to various real property doctrines that have also been justified by the existence of transaction costs.\textsuperscript{76} The owner of real property normally has the right to exclude others from her property. Others who enter must have her permission, or commit trespass. In a situation of necessity, however, such a voluntary transaction may be impossible. Accordingly, the doctrine of necessity

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} at 10.1.1.
\item \textsuperscript{73} \textit{Id.} at 10.1.
\item \textsuperscript{74} \textit{Fair Use, supra} note 12, at 1615.
\item \textsuperscript{75} \textit{Id.} at 1614.
\item \textsuperscript{76} \textit{See Inquiry, supra} note 12, at 1392.
\end{itemize}
permits entry without the permission of the landowner. Fair use, under the transaction cost approach, is considered to play a role similar to necessity: it applies where transaction costs block a beneficial, voluntary license. By the same token, fair use, under such a view, would be as strictly limited as the privileges to use others’ real property. If the doctrine of necessity were too widely applied, then people could use the property of others without seeking permission. Such externalities would lead to the same inefficiencies as the tragedy of the commons. Likewise, if fair use is applied where permission could have been sought, then intellectual property would be used inefficiently.

The transaction cost approach diverges dramatically from the traditional approach to copyright law, which has generally seen copyright law as setting a balance between the incentives given to authors and the costs of access to the public. The greater protection copyright law gives copyright holders, the greater the cost of access to those works for consumers and other authors who use copyrighted works. Thus, analysis of copyright law frequently speaks of striking a balance, whether it be between authors and the public, or between authors and subsequent authors. Along the same lines, analyses of the fair use doctrine have often spoken of the need to balance competing interests. The transaction cost approach would generally eschew such balancing analysis, leaving choices about resource allocation to be answered by market mechanisms. A defendant would not be able to argue for fair use by showing that the benefits from her use outweighed the detriment to the copyright holder. Rather, under the transaction cost approach, if such a surplus existed, then presumably the defendant would be able to pay for a license. Only if the transaction costs were greater than the potential surplus might fair use be applicable—and even then, only if it did not harm the plaintiff.

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77. POSNER, supra note 66, at 174.
79. See, e.g., Landes & Posner, supra note 12 (analyzing copyright law in terms of weighing incentives to authors against costs to other authors).
80. See, e.g., Paul Heald, Federal Intellectual Property Law and the Economics of Preemption, 76 IOWA L. REV. 959, 972 (1991) (“Whereas the fulcrum of the economic balance struck by patent law is the standards for patentability, the most important economic pressure point in copyright law is not the question of copyrightability but the question of fair use.”); see also Mark A. Lemley, Romantic Authorship and the Rhetoric of Property, 75 TEX. L. REV. 873, 889-90 (1997) (discussing fair use as analogous to patent law mechanisms that balance incentives of intellectual property).
81. See supra text accompanying note 75.
The transaction cost approach thus seeks to shift the balancing from the province of the courts to that of the market. Rather than having judges decide whether the benefits of a use outweigh the decreased incentives to authors, allocation would be left to market mechanisms. Under this view, someone who believes they have a valuable use for a creative work would presumptively back up their belief with a willingness to pay (or ability to persuade the copyright holder to permit the use without requiring a fee). Accordingly, fair use would be applied as sparingly as possible, because permitting people to use copyrighted works without a license interferes with the ability of market mechanisms to allocate resources through pricing information. From the copyright holder’s point of view, how much others are willing to pay for particular uses provides the information necessary to decide how best to make use of the creative work.

Such a view also represents a shift from the traditional view of the role of copyright law. The conventional view is that copyright served as an necessary incentive for authors to produce creative works; the transaction cost approach extends the role of copyright law to providing a baseline for the efficient exploitation of works that have already been produced. Such a view has implications for copyright beyond fair use. A brief discussion of copyright duration will serve to contrast the privatization and balancing approaches. Proposed legislation before Congress would extend the duration of a copyright by some twenty years. Under the present statute, an individual author’s copyright lasts for the life of the author plus fifty years, and the copyright in a work-for-hire lasts seventy-five years from the year of publication. Pending legislation would extend those terms to life-plus-seventy and ninety-five years respectively. Such extensions would apply to

82. See, e.g., Kitch, supra note 29 (early formulation of the incentive analysis of intellectual property); Landes & Posner, supra note 12, at 357-58 (setting up framework for incentive analysis of copyright law doctrines).
83. For information on the proposed legislation, together with criticism of the bill, see Dennis Karjala, Opposing Copyright Extension (visited Feb. 3, 1998) <http://www.public.asu.edu/~dkarjala/> . For trenchant criticism, on the grounds that extension would benefit mainly “a very small group: children and grandchildren of famous composers whose works are beginning to fall into the public domain,” see William Patry, The Failure of the American Copyright System: Protecting the Idle Rich, 72 NOTRE DAME L. REV. 907, 932 (1997).
copyrights presently existing, as well as future copyrights. 86 Under the incentive-to-produce approach, applying the extension to existing copyrights would be unnecessary; no additional incentive is necessary where the works have already been produced. 87 Moreover, the lengthened term for future copyrights also has little justification from the incentive point of view. Whether an author’s copyright will outlive her by fifty or seventy years will have little effect on her decision on whether to write a book or create a painting. If one accepts the privatization rationale, however, such legislation would seem more justified. Extending the term of copyright leaves it in private hands longer before it falls into the public domain, meaning that the copyright holder retains an incentive to find the most productive use of the copyright. Under such a view longer copyright terms would provide incentives for investment in new uses and for allocation of works to the highest-valued use.

The transaction cost approach to fair use would similarly support increasing the scope of copyright protection. One way to effectively increase the scope of the copyright holder’s exclusive rights is to narrow the limitation provided by fair use. An increase in copyright duration would require legislative action. The narrowing of fair use, however, has been begun by more restrictive judicial opinions among the lower courts, underpinned by academic commentary. 88 Two Supreme Court opinions, Harper & Row Publishers, Incorporated v. Nation Enterprises 89 and Campbell v. Acuff-Rose Music, Incorporated 90 can be interpreted to support the transaction cost approach, 91 although this Article will argue in Part III for a broader reading of the opinions. 92 Harper & Row held fair use inapplicable where the defendant magazine, the Nation, had printed several hundred words of former President Gerald Ford’s autobiography without permission shortly before it was to be

86. See ld.
87. See Karjala, supra note 83.
88. See sources cited supra note 12.
91. See Netanel, supra note 24, at 307 n.98 (arguing that Harper & Row adopted a neoclassical economic view that would restrict fair use to “highly circumscribed instances of bilateral market failure.”).
92. See infra text accompanying notes 144-88.
published. The Court observed in a footnote that some economists have written that fair use should apply only where the market will not function. The Court also quoted a noted study of fair use that concluded the core issue was, “would the reasonable copyright owner have consented to the use?” One can interpret that as supporting the proposition that fair use should apply only where a reasonable copyright holder would have permitted the use, had transaction costs not interfered.

The support Campbell lends to the transaction cost approach is more indirect. Campbell held that 2 Live Crew’s parody version of “Oh, Pretty Woman” could be a fair use of the original version of the song. Such a result is consistent with the transaction cost interpretation of the parody cases. Making a parody of a copyrighted song constitutes making a derivative work, which would normally be within the prerogatives of the copyright holder. But, just as transaction costs can block a licensing agreement, so could the fact that the parody makes fun of the original song. An author is unlikely to license another song that parodies their work, and is also unlikely to write a parody of their own work. Permitting the parody under fair use permits a use without costing the author any revenue (because the author would not have granted a license), the same reasons that justify applying fair use in settings of prohibitive transaction costs generally. Although permitting the parody does undercut the owner’s ability to control productive uses, it does so only in an area where the owner is unlikely to exploit the work. So Campbell’s result can be seen as agreeing with the transaction cost approach. But the next section raises the objection that the author’s reluctance to permit a parody seems inapt to cases, like Campbell, where the copyright was no longer held by the original author. More generally, this Article will argue the transaction cost


94. Id. at 550 (quoting ALAN LATMAN, FAIR USE OF COPYRIGHT WORKS (1958), reprinted as Study No. 14 in Copyright Law Revision Studies Nos. 14-16, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 15 (1960)).


approach underestimates both the complexities of the boundaries of copyright and the obstacles to obtaining permission to use copyrighted works.

II. A CRITIQUE OF THE TRANSACTION COST APPROACH

The transaction cost approach to fair use relies on a view of copyright that creates easily traded parcels of intellectual property. In order to see that such property is used by the highest valued use, the parcels are allocated to the copyright holder, who can sell any or all to the highest bidder. By analogy to real property, thorough privatization of intellectual property is a necessary condition to permitting market mechanisms to a form that will facilitate the most efficient exploitation of intellectual property. This Part first argues that the analogy to real property is undermined by the nature of the boundaries of copyright, which are far more difficult to determine than those of physical property. It may be easy to identify copies of a copyrighted work, but a copy is not coextensive with the property right. The Part next argues that the transaction cost approach overestimates the fluidity of markets for intellectual property. Although some transaction costs may be reduced in an era of networked communications, others will increase. Moreover, other obstacles to transactions exist beyond the basic costs of arranging licenses.

A. Boundaries

The rationale for privatizing property relies on readily identifiable borders. The boundaries of physical property are generally rather straightforward to determine. The boundaries of real property are

97. For a critique of the economic conceptualization of property, see MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).
98. See Hardy, supra note 12, at 219; see also Wendy J. Gordon, Of Harms and Benefits; Torts, Restitution, and Intellectual Property, 21 J. LEGAL STUD. 449, 472-73 (1992) (arguing that concentrating rights in copyright owners facilitates efficient use by requiring prospective users of the work to bargain with copyright holders).
99. The arguments and assumptions of the property rights argument, as applied to treatment of improvements of copyrighted works, have been criticized on the grounds that various obstacles to market transactions exist. See Lemley, supra note 25, at 1048-69 (discussing difficulties of identifying and organizing improvers, and obstacles imposed by transaction costs, uncertainty, externalities, strategic behavior, noneconomic incentives, and problems of market power and hold-ups).
100. See Hardy, supra note 12, at 234-36.
readily described by metes and bounds or other methods. The boundaries of a piece of physical personal property are readily apparent. The owner of a car can tell where the car ends and the pavement begins. Conversion and nuisance, the core torts involving property rights, are both notoriously difficult to define. But the material that is the subject of the property right is itself usually easy to identify. Boundary drawing problems are the exceptional cases, such as in concepts of commingling or accessions, where personal property has been mixed together.

The transaction approach to fair use assumes that property boundaries in copyright are readily identifiable, but this assumption misses the distinction between the physical copies of a work and the property rights afforded by copyright. For example, the notion that the Internet will drastically reduce transaction costs rests on the assumption that a copy of a copyrighted work, encoded with information on contacting (or just paying) the copyright holder will readily identify the copyrighted property to be licensed. But a copy of a copyrighted work is not like a parcel of property. Rather, every copy unavoidably contains both copyrightable elements and noncopyrightable elements that are not the copyright holder's to sell. Rather than the readily ascertainable boundaries of physical property, the intellectual property afforded by copyright is demarcated by the notoriously indeterminate boundaries of the originality requirement and the idea/expression distinction. The nonoriginal elements in the copy and any ideas (or functional elements, or facts, or methods of operation, and so on) are not part of the copyright holder's interest. One can hardly discern those by examining the copy in isolation. Where commingling and accessions are relatively uncommon problems in dealing with physical property, intellectual property's lack of "thingness" compared to tangible property.


103. See U.C.C. §§ 9-314, 9-315 (1997) (complicated statutory scheme attempting to address competing interests where goods become accessions, i.e., goods installed in or affixed to other goods).

104. But see Hardy, supra note 12, at 246-47, 260 (acknowledging boundary-drawing problems posed by the idea/expression dichotomy, but concluding that the cost of drawing borders will be no higher for informational property than for real property).

105. See, e.g., Heald, supra note 32 (discussing the difficulty of determining how much of a published new arrangement of a musical work is public domain material and how much is protected).
analogous problems inhere with every copyrighted work, because each work combines original expression with unprotected elements. The boundaries are abstract and vague. With respect to originality, the boundary may be so uncertain as to be impossible to draw. Every creative work necessarily incorporates nonoriginal elements. The line between copyrightable expression and noncopyrightable ideas is likewise elusive. In the leading case on the distinction between ideas and expression, Judge Learned Hand stated that it was necessarily an ad hoc determination: “Nobody has ever been able to fix that boundary, and nobody ever can.”

It is no easier to determine which aspects of a work are noncopyrightable functional aspects. Courts have faced difficult decisions in drawing that line, holding that an artistically appealing belt-buckle is copyrightable, but that a model of a human torso used to model clothes was not. A light stand with fanciful dancing figures serves a function but has sufficiently separate aesthetic aspects to be copyrightable, but a light fixture with an abstract shape was held to be functional and thus noncopyrightable. Courts have similar problems with computer programs. The recent cases, culminating in the Supreme Court’s indeterminate four to four split in Lotus v.

106. See Litman, supra note 32, at 1023 (“Copyright law purports to define the nature and scope of the property rights it confers by relying on the concept of originality. In fact, originality is an apparition; it does not, and cannot, provide a basis for deciding copyright cases.”); see also Boyle, supra note 13, at 163-64 (discussing how intellectual property law has manipulated the concept of originality).

107. See, e.g., Yen, supra note 90. It is also difficult to decide how much original contribution is required to qualify for copyright. A court recently held that the West Publishing Company’s versions of federal court opinions did not qualify as “original works of authorship,” where West had added minor changes to the case captions, the names of judges and attorneys, and other factual material. See Matthew Bender & Co. v. West Pub’g Co., No. 94,0589 (S.D.N.Y. May 19, 1997). The court thus did not follow a heavily criticized opinion that had accorded West protection in its arrangement of cases and internal pagination, and denied fair use. See Oasis Pub’g Co. v. West Pub’g Co., 924 F. Supp. 918 (D. Minn. 1996).

108. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).


110. See Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985).


113. See, e.g., John W.L. Ogilvie, Note, Defining Computer Program Parts Under Learned Hand’s Abstractions Test in Software Copyright Infringement Cases, 91 MICHL. L. REV. 526 (1992). Leading cases in the area include: Apple Computer v. Microsoft, 35 F.3d 1435 (9th Cir. 1994); Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1991); Apple Computer v. Formula Int’l, 725 F.2d 521 (9th Cir. 1984) (holding that an operating system program may be copyrighted, because there are many ways to express the same functions).
Borland, have given little definitive guidance.\textsuperscript{114} Courts readily agree that the functional aspects of a computer program are not protected, but have been unable to formulate any clear guide for separating the functional aspects from the expressive aspects.\textsuperscript{115} The leading case on point, Computer Associates,\textsuperscript{116} formulated a test that simply restates the abstractions analysis.\textsuperscript{117} Indeed, some commentators have argued that software's inherently functional aspect makes it sufficiently different from other creative works to require a new form of intellectual property protection.\textsuperscript{118} The fact that copies of works necessarily contain both copyrightable and noncopyrightable elements leads to another a problem that Part III will suggest is addressed by fair use.\textsuperscript{119} The copyright


\textsuperscript{115} On the difficulties courts have faced, see Peter G. Spivack, Comment, Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software, 35 UCLA L. Rev. 723 (1988). See also Dennis M. Carleton, A Behavior-Based Model for Determining Software Copyright Infringement, 10 High Tech. L.J. 405 (1995).


\textsuperscript{118} See Samuelson et al., supra note 56.

\textsuperscript{119} See infra text accompanying notes 144-88 (regarding fair use).
holder’s control over copies of the work may lead to control over noncopyrighted aspects of the work, especially with respect to digital works that are generally disseminated as undifferentiated copies.

The uncertainties of boundaries in copyright counsel against expanding the exclusive rights by narrowing fair use. The privatization rationale is sharply undercut if property boundaries are unclear. Privatizing property is a means to provide the owner an incentive to find the most efficient use of the property. To the extent that the owner is unsure where the boundaries lie, or unaware of how broadly the boundaries have been extended, the incentive to exploit that intellectual property is undercut. At the same time, to the extent others are unsure whether certain uses are protected by copyright or whether they fall in the public domain, potential users are discouraged by the chance that their activity may be infringement. Expanding copyright would likely exacerbate boundary drawing problems. To the extent that the exclusive rights of copyright holders are expanded at the expense of the public domain, uncertainties about the borderline cases will also increase.

B. Transaction Costs

The other premise of the transaction cost approach is that voluntary transactions will lead to more efficient exploitation of creative works than permitting fair use. Markets, whether for copies of works or for licensing uses and derivative works, indeed play the primary role in disseminating creative works, both with respect to the copyrighted aspects “belonging” to the author and to the noncopyrighted elements unavoidably carried along. But the transaction cost approach, which would rely almost exclusively on voluntary transactions as long as transaction costs were no obstacle, greatly underestimates the obstacles to voluntary transactions in some settings. First, even world-wide networked communications will not diminish many aspects of transaction costs were no obstacle, greatly underestimates the obstacles to voluntary transactions in some settings. First, even world-wide networked communications will not diminish many aspects of transaction costs. More important, other impediments remain, such as risk aversion, status considerations, and information costs.


121. See infra text accompanying 144-88 (regarding fair use).

122. One can question the validity of applying fair use only in situations where transaction costs prevented a license. Because litigation costs are even greater:
The transaction cost approach suggests that increased use of digital technologies will dramatically lower transaction costs, which would justify a narrowing of fair use. In the near future, many or most copyrighted works could be in digital form for dissemination over communications networks, or networks of networks such as the Internet. Copyright holders could readily post the terms on which works could be licensed, including various prices for different uses and conditions on use. Thus, a potential user would often need to do little more than click a mouse to license a use. In such a world, the argument runs, transaction costs will be so low as to drastically reduce or even eliminate fair use and other exceptions to the copyright holder's exclusive rights. But that argument views transaction costs narrowly, from the view of the copyright holder. It contemplates that the copyright holder will set a schedule of charges and offer it to potential users. A user who did not fall into one of the listed categories, or had a potential use that the copyright holder had not contemplated, would still have to attempt to contact the copyright holder and negotiate an individualized license. In a world where copyright holders increasingly rely on mechanical licensing, such individualized requests may indeed be less likely to receive full consideration. A related problem is that expanding the prerogatives of the copyright holder permits the holder to appropriate all the surplus value from new uses of the work, even where part of such value arises from the independent contribution of others.

It is hard to imagine a plaintiff bringing a lawsuit (much less going all the way to the Supreme Court) over a use small enough that she would have been willing to license it but for transaction costs. The absurd implication of this theory is that in any case important enough to be litigated, fair use should never apply!

Lemley, supra note 25, at 1077 n.394.

123. See Goldstein, supra note 14 at 197-236; Hardy, supra note 1, at 259-60; see also Benjamin R. Kuhn, A Dilemma In Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed Over the Information Superhighways of Today and Tomorrow, 10 TEMP. INT'L. & COMP. L.J. 171 (1996); see also Cate, supra note 8, at 1425 (discussing how digital technologies could reduce the scope of fair use in licensing transactions).

124. See Goldstein, supra note 14, at 197-236.

125. Id.

126. Id. at 223-24.

127. Negotiating and executing a license for such intellectual property as software can be expensive and time-consuming. See Lemley, supra note 25, at 1053-54.
One initially appealing argument for stringent limits on fair use, particularly on the Internet, is that it would support publication of material for small, specialized audiences.\footnote{128} Considering there might only be a few people world-wide that are interested in an esoteric subject, if fair use allowed even a few people free access to the work, it would greatly reduce the necessary incentive to produce the work. Thus, the argument runs, restriction of fair use will permit much greater diversity of expression. But the argument goes too far. Restricting \textit{all} fair use in order to protect a few esoteric markets is unnecessary. The effect on the market for the copyrighted work is a key factor in fair use analysis, but one can distinguish between different markets. A small use that threatened to destroy an entire small market would be unfair; a small use that had little effect on a large market might be fair.

Other market failure explanations of fair use have similar flaws. As discussed above, parody is often seen as a classic example of fair use justified by market failure.\footnote{129} An author is unlikely to license another work that parodies their work, so the presumptive reliance on voluntary transactions will not work. But a closer examination undermines this analysis. \textit{Campbell} shows that parodies often could be licensed. In \textit{Campbell}, the subject of the parody was a song by Roy Orbison. By the time the parody was written, the copyright was in the hands of Acuff-Rose. This is not an exceptional case.\footnote{130} Because of the work-for-hire rule\footnote{131} and transfers of copyright,\footnote{132} many if not most significant copyrights are in the hands of corporate owners rather than individual creators.\footnote{133} The copyright in a work frequently is transferred by the author. In the case of works for hire, the copyright vests not in the actual author but in the employer. If making a parody of such a work is a viable commercial project, then the sensibilities of the copyright holder (as opposed to the original author), would often be no obstacle. Moreover, in the cases where the original author is the copyright owner

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\item \footnote{128} See \textit{Goldstein, supra} note 14, at 229-30.
\item \footnote{129} See \textit{supra} text accompanying notes 95-96.
\item \footnote{131} The copyright in a work made for hire rests in the employer, not in the individual that creates the work (unless otherwise agreed upon). 17 U.S.C. § 201(b) (1995).
\item \footnote{132} Copyrights may be transferred in whole or in part. 17 U.S.C. § 201(d) (1995).
\item \footnote{133} See Mark A. Lemley, \textit{Romantic Authorship and the Rhetoric of Property}, 75 TEX. L. REV. 873, 883 (1997); Lemley, \textit{supra} note 25 at 1033-34 n.212 (estimating that more than 40% of copyrights are works made-for-hire, on the basis of early study and recent trends in copyrighted works).}

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and refuses to license a parody, terming that market failure is too broad. A rational author might well refuse to take money in exchange for subjecting their creations to distortion and ridicule.\textsuperscript{134} So the transaction cost explanation of parody is both overbroad and too narrow.

The next Part suggests that a better explanation lies in using fair use to permit free flow of uncopyrightable ideas.\textsuperscript{135} More generally, the privatization rationale behind the transaction cost approach to fair use proves too much. If fair use should be narrowed in order to maximally privatize copyright, then the same reasoning would support narrowing other limitations on copyright. In particular, logical extension of the privatization argument would argue for narrowing the basic rule that copyright does not protect ideas. If intellectual products are most effectively exploited by converting them into property, then to some extent ideas should be copyrightable. But ideas are better developed by making them freely available for use, criticism, and development by all.

Before turning to an alternative conception of fair use, there are additional fundamental objections that might be made to the transaction cost approach. Even if privatizing copyright were more \textit{efficient} than permitting a broader scope for fair use, one could argue against it simply on distributional grounds, that granting greater initial entitlements to authors is sufficiently inequitable to overcome any efficiency justifications. Second, one could turn away from the incentive analysis of copyright law to other philosophical frameworks. The privatization approach to copyright, which logically supports considerable expansion of the right of copyright holders, has led some to reject economics as a basis for prescriptive analysis of copyright law. Such commentators argue instead for a natural rights approach\textsuperscript{136} or see copyright as

\textsuperscript{134} See Lemley, supra note 25; Yen, supra note 90. \textit{See also} Margaret Jane Radin, \textit{Property and Personhood}, 34 STAN. L. REV. 957 (1982) (discussing how personal value of property may be more important to the owner than financial aspects).

\textsuperscript{135} \textit{See infra} text accompanying notes 172-78.

intended to foster a utopian society\textsuperscript{137} or a civil democratic society.\textsuperscript{139} This Article will argue in a more pragmatic fashion that arguments for maximal privatization of copyright (which support the transaction approach to fair use) fail on their own terms. Natural rights analysis might provide a more satisfactory philosophical basis for copyright than economics does, but consideration of natural rights is less likely to provide a guide to specific applications of fair use. It seems rather unlikely that sufficient consensus will form any time soon on the content of natural rights or even on whether natural rights are simply "nonsense upon stilts."\textsuperscript{139} One could also construct an argument against the privatization approach on constitutional grounds. Congress is authorized to promote knowledge by granting copyrights to authors and patents to inventors.\textsuperscript{140} One could interpret that provision as limiting copyright to measures providing an incentive to produce works.\textsuperscript{141} The Supreme Court has stated that Congress lacks power to authorize patents that remove knowledge from, or restrict access to, the public domain.\textsuperscript{142} The same limitation could be applied to the copy-

natural rights analysis to the issue of copyright duration). Other critics of the broad approach of copyright law have relied on literary theory rather than natural rights to argue that copyright places too much emphasis on an illusory view of the creative contribution of individual authors. \textit{See Boyle, supra note 13; Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of "Authorship," 1991 Duke L.J. 455.}  

\textsuperscript{137.} \textit{See Fisher, supra note 1.}  


\textsuperscript{139.} \textit{Steven D. Smith, Nonsense and Natural Law, in AGAINST THE LAW I 04 (1997) (quoting Jeremy Bentham in the discussion of a natural rights framework for discussing the Constitution). A basis for a critical theory of copyright might be a Lacanian analysis, which has to date been employed much less in legal than in literary theory. \textit{See David S. Caudill, Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory 3-25 (1997) (discussing barriers to and benefits of applying Lacanian framework to legal theory).}  

\textsuperscript{140.} \textit{The Constitution authorizes Congress "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, § 8, cl. 8. \textit{See Heald, supra note 32, at 251 (suggesting that it may be unconstitutional to use copyright other than to provide incentives for new creations); see also Margaret Chon, Postmodern "Progress": Reconsidering the Copyright and Patent Power, 43 DePaul L. Rev. 97 (1993) (suggesting that the Constitution grants a right of access to knowledge).}  

\textsuperscript{141.} \textit{Cf. Cate, supra note 8, at 1396 ("The Copyright Clause requires the government to carefully tailor those rights to not provide excessive incentive to the creation and dissemination of expression.").}  

right power, which is in the same clause of Article I of the Constitution.143 Expanding fair use at the expense of the public domain would arguably violate that limitation. Until such time as the Court speaks to potential constitutional or philosophical arguments, however, the fair use doctrine will play the primary role in determining the extent of the privatization of copyright.

III. FAIR USE AS A MEANS TO IMPLEMENT OTHER COPYRIGHT LIMITS

This Part argues that the fair use doctrine has a broader role than conceived by the transaction cost approach. Certainly, fair use can be justified by prohibitive transaction costs in many settings where a potential user could not reasonably locate, contact, and negotiate with the copyright holder and other affected parties. Thus, the existence of transaction costs may justify as fair use many de minimus uses that the copyright holder would not object to, such as copying a story from the day's newspaper to send to a friend. But this Article will argue that the role of fair use is broader and more central to the overall structure of copyright law. Under the transaction cost approach, the balance between the interests of copyright holders and potential users is set by the requirements of originality, the idea/expression distinction, and the other limits on copyrightable subject matter. Fair use, under that view, serves only as an exception to the property right under exigent circumstances. This Article will argue that fair use has served a broader, more flexible role to implement the other limitations. This will be termed the "balancing approach" to fair use. In this view, fair use should apply not just where transaction costs obstruct licensing, but also where mechanical enforcement of the copyright holder's exclusive rights would grant the holder excessive control over noncopyrightable elements of the work. This approach is consistent with the common conception of fair use as balancing competing interests, and contrary to the view that fair use should wither away as technology lowers the costs of disseminating

143. See Patry, supra note 83, at 914-15 (arguing that copyright extension may be unconstitutional because it would not serve the purpose of inducing production of new works); see also Yen, supra note 52, at 393 (discussing possible constitutional limits).
works. Under this rule, fair use would serve the same policies as copyright infringement analysis generally.

The balancing approach to fair use would not simply balance the benefits from a particular use against the possible detriment to the author. This would result in an unnecessarily broad view of fair use. Copyright exists to provide authors returns that exceed marginal cost. The balancing role of fair use, rather, is the same as the balancing function of the originality requirement, the idea/expression distinction, and other limitations on copyright. Each of those limitations serves to protect authors against free-riders (and thus provide incentives for authors to produce otherwise piratable public goods), but also avoids granting authors excessive returns. This Part will discuss how the case law under fair use can be broadly construed as attempting to implement that balance. The next Part then discusses how fair use will fit into the rapid expansion of digital technologies. As discussed above, some transaction costs will be reduced and accordingly copyright holders may justifiably seek revenue in settings that might have been fair use. But digital technologies will also lead to broader application of fair use. Because digital technologies involve copying as part of use, some uses that might have been outside the copyright holder’s exclusive rights may now involve making a copy. Fair use may thus be necessary to prevent the copyright holder’s exclusive right to make copies from undue control over the noncopyrightable aspects of her work.

This conception of fair use is both broader and less unified than the transaction cost approach. Fair use, under this view, is analogous to the good faith doctrine in contract law. Cases finding bad faith are not susceptible of a single theoretical justification. Rather, they resemble each other in a more general way that has been compared to

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144. Fair use analysis by courts and commentators has long been framed in terms of balancing, although the elements described are frequently different. See, e.g., Heald, supra note 80, at 972 (describing fair use as the key pressure point in copyright’s economic balance); David A. Rice, Sega and Beyond: A Beacon for Fair Use Analysis . . . At Least as Far as it Goes, 19 U. DAYTON L. REV. 1131 (1994) (arguing that fair use is a safety valve for settings where mechanical application of copyright’s exclusive rights would run contrary to the fundamental principles of copyright); Kreiss, supra note 78, at 9 (arguing copyright generally and fair use in particular strike a balance between incentives and access to works); see also Landes & Posner supra note 12, at 326 (arguing copyright should strike a balance between incentive to authors and costs to authors of access to existing works).

145. Cf. KAPLAN, supra note 1, at 68 (discussing how fair use can play a similar role in the infringement analysis).

146. Cf. FAIR USE, supra note 12, at 1615.

147. See STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 88-94 (1985). See also INQUIRY, supra note 12, at 1392 (suggesting that fair use may serve several purposes, analogous to the various privileges in property law).
Wittgenstein’s notion of family resemblance.\(^{148}\) Similarly, the resistance of the fair use doctrine to simple definition, which courts and commentators have long bemoaned, may be key to its flexible role. Accordingly, this section will discuss how courts have applied fair use to prevent copyright owners from restricting use of copyrighted works, protecting functional aspects of works, controlling facts, even shielding governmental expenditures from criticism. In each case, transaction costs would not have prevented a licensing agreement; rather, applying fair use diminished the ability of the copyright holder to realize revenue from the work. This Article will further argue that such a balancing approach provides a more satisfying interpretation of the parody cases and is consistent with the Supreme Court’s fair use opinions.

Where some copying is necessary in order to use a work, courts have applied fair use.\(^ {149}\) Under the transaction cost approach, permission from the copyright holder would have been required, but judicial decisions have been to the contrary. The classic example is Crume v. Pacific Mutual Life Insurance, in which the copyrighted book set out step-by-step guidelines for reorganizing corporations, complete with wording of model legal documents.\(^ {150}\) The court held that fair use authorized such copying as was necessary to implement the plans.\(^ {151}\) Accordingly, there was no infringement where defendant copied the wording from the book into the documents drafted to implement such transactions. Similarly, Stone & McCarrick v. Dugan Piano Company\(^ {152}\) held that fair use permitted copying from an advertising manual, which had provided forms and model advertisements.\(^ {153}\)

Perhaps the best example of using fair use to permit access to uncopyrightable aspects of works is its application to computer software. Courts have applied fair use to authorize copying to exploit the unprotected functional aspects of digital technologies.\(^ {154}\) Such deci-

\(^{148}\) BURTON, supra note 147, at 91-94.

\(^{149}\) Cf. Litman, supra note 32, at 983-84 (discussing cases holding that copyright does not protect a way of doing things).

\(^{150}\) Crume, 140 F.2d 182, 183 (7th Cir. 1944) (citing Baker v. Selden, 101 U.S. 99, 103 (1879)).

\(^{151}\) Id. at 183-84.

\(^{152}\) 210 F. 399 (E.D. La. 1914).


\(^{154}\) See DSC Communications v. DGI Tech., 81 F.3d 597 (5th Cir. 1996); Sega Enters. Ltd. v. Accolade, 977 F.2d 1510 (9th Cir. 1992); Atari Games Corp. v. Nintendo
sions have held that fair use authorized reverse engineering, which entails making a copy of a program in order to study the operational aspects of the program. Again, the transaction cost approach would have yielded a different result. A license could have been negotiated that authorized such copying for limited purposes. But presumably the licensing fee would have been high, because the software copyright holder would often prefer to keep such functional aspects from disclosure, in order to maintain a competitive advantage. So if copyright prevented making copies necessary to figure out the unprotected functional aspects, then the copyright would in effect extend to the functional aspects of the program. By permitting reverse engineering, fair use thus serves to restore the balance struck in the rule that copyright protects only expressive, not functional aspects.


President Kennedy illustrated its theories by borrowing from a copyrighted work, the home movie of the event made by a spectator, Abraham Zapruder. Working from frames of the movie (which were publicly available as exhibits to the Warren Commission report on the assassination), defendants made charcoal sketches representing the scene as portrayed in the movie.

Courts have also used fair use in a more subtle way to balance the incentives of copyright by distinguishing between “productive” and “reproductive” uses. A reproductive use simply makes copies that compete with the copies authorized by the copyright holder. Where a use is productive, however, defendant goes beyond copying to contribute some independent value. Productive uses have been more likely to qualify for fair use. Making a copy of a computer program in order to study it as a process of writing other programs would be a productive use. Copying a program in order to sell it in competition with the copyright holder would be a less favored reproductive use. The transaction cost approach would give much less weight to the productive nature of the use. If the new use was productive, then presumably an appropriate licensing fee could be paid from the surplus created. Moreover, requiring licensing fees would enable the copyright holder to determine which uses were the most productive and

157. Id.
158. Id. Commentators have argued that fair use should apply where some copying is necessary to get at uncopyrighted aspects of a work. See Cate, supra note 8, at 1455 (arguing that fair use should apply where the user reproduces facts and ideas from a copyrighted work); Heald, supra note 32, at 262 n.121 (arguing fair use would permit copying of a copyrighted English translation of a public domain Latin hymn in order to extract the public domain aspects).
160. See Lape, supra note 159.
161. Id.
162. See Bateman v. Mnemonics, 79 F.3d 1532 (11th Cir. 1996); Sega Enters. Ltd. v. Acclaim, 977 F.2d 1510 (9th Cir. 1992); Atari Games Corp. v. Nintendo of Am., 975 F.2d 832 (Fed. Cir. 1992).
164. See GOLDSTEIN, supra note 1, at 10.43.
license them accordingly. But such failure to recognize the productive nature of some uses permits the copyright holder to capture as much as possible of the new value created by such uses. It could also have perverse effects on the incentives created by copyright. If copyright holders have a greater ability to capture the value created by their work than do other activities, than resources could be channeled toward creation of copyrightable works and away from other productive activities not protected by such a monopoly.

Fair use can also serve to implement the more narrow limitations on copyrightable subject matter. Works of the United States government are not subject to copyright protection. Because the government has funded the work, copyright is not necessary to provide an incentive for its creation. Moreover, granting the government exclusive rights to control dissemination of its products raises serious questions about accountability. The decision of Wojnarowicz v. American Family Association introduced such policy matters into the fair use balance. In Wojnarowicz, federal funds supported an art exhibit. Defendant, who objected to the content of the exhibit, published a pamphlet that reproduced parts of the supposedly objectionable works. Because federal funds had supported display and dissemination of the works, the court reasoned that fair use would be more broadly construed, to permit copying if it were necessary in order to object to use of tax revenues.

The previous Part discussed how the transaction cost approach provides an unsatisfactory explanation of the fair use parody cases. The ready application of fair use to parody is better understood as implementing the principle that the author has no control over the ideas expressed in their work. In order to free others to attack those ideas, a

165. 17 U.S.C. § 107 (Supp. 1995). Rather, the transaction cost approach would tend to limit favored uses to those categories specifically named in the statute: "criticism, comment, news reporting, teaching . . . scholarship, or research." See GOLDSTEIN, supra note 1, at 10.2-10.2.1.
166. See Lunney, supra note 18.
167. See KAPLAN, supra note 1, at 75 (warning that excessive copyright protection could attract "too much of the nation’s energy into the copyright-protected sectors of the economy"); Lunney, supra note 18, at 489 (proposing that, in order to prevent copyright from creating allocative inefficiencies, that copyright should "produce works of authorship if, and only if, such production would represent the most highly valued use of their resources").
170. Id.
171. Id.
parody may be permitted as fair use. Parody also illustrates the role of status considerations. In those cases where the author does control the copyright, the author is likely to refuse permission to a parody because of status considerations.

A contest between superheroes illustrates the ill fit of the transaction cost approach with parody. In *Warner Brothers, Incorporated v. American Broadcasting, Incorporated*, 173 ABC’s television program “The Greatest American Hero” parodied Superman with a more diffident superhero. As discussed above, the transaction cost approach would justify the application of fair use by an author’s presumed unwillingness to license a parody. But this was not a setting where the author’s tender feelings would have prevented a voluntary licensing transaction. The original authors of Superman had sold their copyright in the cartoons many years ago, and were now living in modest circumstances. 174 The copyright to Superman was held by a corporation, which has shown considerable interest in maximizing the revenue from Superman. Indeed, the parties had considered a licensing agreement. Nor was the parody one which would have so offended the author as to prevent permission. Rather, the program very gently poked fun at some of the standard parts of the Superman stories. So a better explanation of the application of fair use is that it permits authors to parody other works without permission because such freedom fosters the creativity that copyright exists to support.

The balancing approach also provides a more coherent basis for the recent fair use decisions of the Supreme Court. As noted above, *Harper & Row* has been interpreted as following the transaction approach to fair use. In holding that fair use did not authorize the Nation to print several hundred words of Gerald Ford’s autobiography, the Court indicated that fair use should apply where a reasonable copyright owner would have consented to the use. 175 *Harper & Row* is entirely consistent with a balancing approach to fair use. One could argue that fair use should have applied in order to prevent control over noncopyrighted facts. But the Nation could have reported the relevant facts without taking Ford’s

173. 720 F.2d 231 (2d Cir. 1983).
expression of them. Rather, the Nation quoted entire passages of Ford's writing. The Court stated that some direct quotation may have been necessary to convey the facts, such as Ford's "characterization of the White House tapes as the 'smoking gun,'" but most of the facts could have been paraphrased.

Harper & Row frames fair use as whether a "reasonable" copyright holder would have consented to the use. One can read that as asking whether the copyright holder would have agreed to license the use, had transaction costs not interfered. But that requires a departure from the normal understanding of the reasonable person standard. Judge Learned Hand, whose landmark opinions continue to set the terms for copyright analysis, certainly gave a different content to the test in the familiar formulation from United States v. Carroll Towing, which questions whether a reasonable person would take a precaution by asking whether the cost of the precaution is less than the expected damages to the potential victim. The test forces the actor to consider both the costs to themself and to the potential victim—a balancing test. Similarly, fair use can balance the incentives to the author against the costs to potential users. Thus, under Harper & Row, fair use analysis would certainly consider whether the copyright holder would have sought a licensing fee for the use. But where a fee would have included a premium traceable to protection of noncopyrightable material (such as functional or factual aspects of the work), a court could hold that a reasonable copyright owner would not have sought such leverage.

A recent case concerning a videotape of a notorious incident shows how the transaction cost approach is too narrow to address the necessary concerns. The Los Angeles News Service videotaped the assault of a truck-driver during disturbances in Los Angeles. The news service licensed other media outlets to show the tape for a fee. One local television station copied and showed portions of the tape without permission, and raised the defense of fair use. Under the transaction cost approach, the case is straightforward. Fair use would clearly be inapplicable, because the use could have been licensed. But the case, like Harper & Row raises issues of protection of facts and matters of

177. See Netanel, supra note 24, at 307 n.98.
178. 159 F.2d 169 (2d Cir. 1947).
179. Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997).
public concern that require a closer examination, although a balancing analysis might well reach the same result on those particular facts.

The other recent key Supreme Court decision on fair use, *Sony Corporation of America v. Universal City Studios,* reads much more consistently with a balancing approach than with the transaction cost approach. In *Sony,* the holders of copyrights in television programs sought to hold the manufacturers of videocassette recorders liable for contributory copyright infringement, for selling machines that consumers used to copy television programs. The Court held that fair use authorized individuals to "time-shift" programs, to tape programs for later viewing. Transaction costs would indeed prevent licensing in individual situations. It would be quixotic for a student to seek permission from Monty Python to tape an episode while the student was in class. But such transaction costs do not justify fair use where mechanisms exist for collective licensing. If *Sony* had denied fair use, then VCR manufacturers could have arranged to pay a royalty from VCR sales to organizations representing television copyright holders. Rather, *Sony* rests on the idea that a copyright holder's prerogatives should not give it control over markets beyond the market for its work. If the *Sony* court had denied fair use, then the television copyright holders would have effectively controlled not just the market for their work but also the market for video cassette recorders.

The transaction cost approach is also hard to square with the many cases holding that some types of harm to the copyright holder will be disregarded in the fair use analysis. *Hustler Magazine v. Moral Majority* held it was fair use for the Moral Majority to reproduce

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183. *Id.*
184. One can provide for such holdings by broadening the understanding of "market failure" to include settings where the copyright holder refuses to license a use out of "anti-dissemination" motives. *See Fair Use,* supra note 12, at 1632-35.
185. 796 F.2d 1148 (9th Cir. 1986).
material from Hustler magazine in its fund-raising circular. 186 Consumers Union of United States v. General Signal Corporation 187 upheld use in advertising of passages from the Consumer Report's product assessments, even if such use could arguably damage Consumer Report's credibility. National Rifle Association of America v. Handgun Control Federation of Ohio 188 held fair use authorized distribution of a list of legislators prepared by a lobbying organization. In such cases, transaction costs were not the obstacle to licensing. Rather, fair use was appropriately applied to prevent the copyright holder's exclusive right to make copies from becoming an instrument for controlling the flow of ideas.

Fair use can thus be interpreted as a tool to implement the core limitations on copyright, rather than simply a device to apply when transaction costs obstruct licensing agreements. The next Part contrasts the analysis of the balancing and transaction cost approaches in several settings.

IV. APPLICATIONS

This Part takes problems in fair use (from cases, proposed legislation, and life in the digital age) and compares the transaction cost and balancing approaches. Rather than a detailed application of the statutory factors, this Article will focus on the key differences between the two modes of analysis. The transaction cost approach (rooted in the privatization view of copyright) focuses on the question, whether the parties could have reached an agreement to license the use. The balancing approach (seeing fair use as balancing incentives) goes on to consider whether denying fair use would effectively grant the copyright


187. 724 F.2d 1044 (2d Cir. 1983); see also Arica Inst. v. Palmer, 970 F.2d 1067 (2d Cir. 1992); Mathiesen v. Associated Press, 23 U.S.P.Q. 2d 1685 (S.D.N.Y. 1992) (no showing that use by a new service harmed the market for copies of a photograph of a bulletproof vest endorsed by Oliver North).

188. 15 F.3d 559 (6th Cir. 1994).
holder a measure of control over noncopyrightable aspects of the work, such as ideas, functional aspects, or markets other than those to sell or license the work. The fair use issues discussed here involve quite different types of copying: copying a letter to comment on its author, copying a computer program in the process of using it, copying a digital work while circumventing anti-copying technology, copying cartoon characters to comment on their cultural place, copying a web page to include it in a massive archive, and photocopying scholarly works for students and researchers. The transaction cost approach would accord presumptive control over copying to the copyright holder, unless negotiating a license were impractical. The balancing approach would consider whether the type of use at issue should be beyond the control of the copyright holder. A case that encapsulates the contrast is Lish v. Harper's Magazine Foundation. 189 Harper's Magazine printed lengthy excerpts from the letter of a writing teacher sent to solicit students for a writing seminar. 190 The letter both reflected the unusually secretive nature of the seminars and showed the teacher's rather eccentric writing style. The court denied fair use in terms consonant with the privatization approach, holding that the teacher should be able to strictly control distribution of his writing. A balancing approach would have more given weight to the letter's status as a record of the writing style of someone holding himself out as a writing teacher. Publishing excerpts of the letter would not compete with sales of the author's work, although the implicit criticism might have hurt the teacher's reputation. Fair use, under a balancing approach, could serve to prevent such an author from controlling debate about his work.

Moving to a broader problem, fair use could help adjust copyright law to the prevalence of copying as an aspect of both use and dissemination of digital works. In particular, fair use can provide a tempered approach to the issue of whether a temporary copy in the working memory of a computer constitutes a copy for the purposes of copyright law. 191 At the risk of oversimplifying, a computer generally uses two types of

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190. Id.
memory: permanent memory and working memory. 

Suppose an individual owns a personal computer with various types of software loaded onto it. While the computer is turned off, the software will sit in the permanent memory (which could include the computer’s hard disk, ROM chips, the floppy disks distributed in its vicinity, compact discs or other media such as tapes). When the computer is turned on, it activates its working memory. Any software that the computer accesses must be copied from permanent memory into working memory, because the processor of the computer works primarily with that small, fast, dynamic memory. So the operating system software (which runs the computer) and any applications software (broadly understood, anything that the user uses or interacts with other than the operating systems software) all must be copied to the extent they are used. So to utilize a computer program, indeed even to turn on a computer, causes some software to be copied within the computer. Courts have held that making such a temporary copy constitutes making a copy for the purposes of copyright law.

Some have argued that a temporary copy within a computer’s working memory should not constitute a copy for the purposes of copyright law. In this view, one makes a copy only by making a permanent copy. Implementing that view might require a shift in judicial authority or an amendment of the present wording of the copyright statute. But, more fundamentally, excepting temporary copies from the scope of

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192. One could also use the terms random access memory and permanent storage. See IBM DICTIONARY OF COMPUTING 506, 554 (1994).


194. See Cate, supra note 8, at 1453 (“There is considerable logical support for finding that RAM is not fixed.”) (citing Pamela Samuelson, The NII Intellectual Property Report, COMMUNICATIONS OF THE ACM 21, 22-23 (Dec. 1994); Jessica Litman, The Exclusive Right to Read, 13 CARDOZO ARTS & ENT. L.J. 29, 42 (1994-95)). See also Lemley, supra note 25, at 1015-16 n.122 (collecting authority on the temporary copy issue).

195. Cf. Johnson, supra note 193. The issue of whether temporary RAM or screen “copies” are sufficiently fixed to qualify as copies for the purposes of copyright law has not been definitively settled. See Mark A. Lemley, Dealing With Overlapping Copyrights on the Internet, 22 U. DAYTON L. REV. 542 (1997) (discussing statutory issue and authorities on point).
Copyright law could threaten the legitimate rights of copyright holders, by permitting dissemination of copies if recipients did not save them in permanent form. On the other hand, mechanically treating a temporary copy made without permission of the copyright holder as infringement can swing the pendulum too far in the opposite direction. The case law on the potential liability of computer maintenance providers shows the hazards of such reasoning. The leading case, *Triad Systems v. Southeastern Express*, provides a good example. Triad Systems made computers used by automotive parts dealers for various bookkeeping tasks. Triad sold the software that ran the computers and performed the bookkeeping functions. Triad also sold its services to maintain Triad computers, in competition with an independent service organization. To service a Triad computer, the

196. See Michael D. McCoy & Needham J. Boddie, II, *Cybertheft: Will Copyright Law Prevent Digital Tyranny on the Superhighway?*, 30 WAKE FOREST L. REV. 169 (1995); see also David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL. F. 139, 151 n. 29 (1996) (discussing use of anonymous remailers to post documents that allegedly infringed copyrights). Even if temporary copies were not subject to the exclusive reproduction right, however, such dissemination might infringe the exclusive distribution right. See Lemley, supra note 195, at II. B (discussing application of distribution right in the network context). Several legislative attempts have, so far unsuccessfully, attempted relatively narrow authorization of copying for the purpose of using a program or servicing a computer. See *Bill Would Permit 'Rightful Possessor' of Program to Authorize Copying*, 49 PAT. TRADEMARK & COPYRIGHT J. 303 (1995) (analyzing proposed bill that would authorize rightful possessor, rather than just the owner, of a program to authorize loading into RAM). Legislation has also been proposed that would authorize the making of a copy of a program where such copy was made solely by activation of the computer for maintenance. See H.R. 1861, 104th Cong. § 7(3) (1995).


198. 64 F.3d 1330 (9th Cir. 1995). *Triad* has been criticized as extending the power of copyright holders beyond the market for the copyrighted work into the market for services. See Lemley, supra note 25, at 1025-26, 1025 n.179; Stephen M. McJohn, *Fair Use of Copyrighted Software*, 28 RUTGERS L.J. 593 (1997). See also Chad G. Asarch, *Note, Is Turn About Fair Play? Copyright Law and the Fair Use of Computer Software Loaded Into RAM*, 95 MICH. L. REV. 654 (1996) (concluding that consideration of the statutory fair use factors should authorize an ISO loading software into RAM).

199. *Triad*, 64 F.3d at 1333.

200. Id.

201. For other cases involving manufacturers and independent service organizations, see *Service & Training v. Data General*, 963 F.2d 680 (4th Cir. 1992) (rejecting
independent servicer would run the software provided with the computer, including the operating system, utilities and diagnostic programs, which would require that the software be copied from the permanent storage (either the computer's hard disk or a tape drive) into the computer's working memory. The Ninth Circuit held that such use did not constitute fair use, in terms that track the transaction cost approach. Under the balancing approach to fair use, however, the independent servicer would likely qualify for fair use. The servicer was making a productive use of the software that was copied. The use also sought to exploit the functional aspects of the work, to use it in order to service the very computer the software was provided with. Although the Ninth Circuit did not explore the issue, it is also likely that the servicer was employing nonoriginal as well as original aspects of Triad's work. It seems unlikely that Triad wrote operating system software and applications software without using other programs as models or even incorporating code from public domain sources. Applying fair use would prevent a computer manufacturer from having a monopoly on the market to service such computers, a market separate from the market for software to run on the computers.

The balancing approach also leads to less strict protection than has been proposed for digital "copyright management." Nascent technologies promise the ability to code copies of digital works to permit

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202. Triad, 64 F.3d at 1333.

203. For a discussion of how the application of fair use in Triad would prevent excessive copyright protection, see McJohn, supra note 198.

204. For a recent case holding that a plaintiff copyright holder could survive a motion for summary judgment without identifying the original components of the alleged infringed work, see Fonar Corp. v. Robert Domenick, 105 F.3d 99 (2d Cir. 1997).


copyright holders to closely monitor and control any use made of the copies:

Thus, for example, if I purchase a collection of essays online, the copyright owner can charge me for the file containing the essays, generate a record of my identity and what I have purchased, and insert pieces of microcode into the file that will: (1) notify the copyright owner every time I “open” one of the essays and specify which one I opened; (2) notify me when I must remit additional fees to the copyright owner—this much to browse the essay, this much to print it out, this much to extract an excerpt, and so on; and (3) prevent me from opening, printing, or excerpting the piece until I have paid.\textsuperscript{207}

One catch to using technological devices to prevent copying is that people can figure out ways around them. As a lexic of computer jargon puts it: “\textit{copy protection: n. A class of methods for preventing incompetent pirates from stealing software and legitimate customers from using it. Considered silly.”}\textsuperscript{208} Proposed legislation in Congress would give copyright holders considerable legal weapons against anyone who tried to circumvent such protections. It would be illegal to provide devices or services that “avoid, bypass, remove, deactivate, or otherwise circumvent” such copyright management systems.\textsuperscript{209} It would likewise be illegal to tamper with “copyright management information,” broadly defined to include not just the name of the copyright holder but any terms and conditions the owner proposes for use of the work.\textsuperscript{210} Because such works are precisely the ones for which fair use would no longer be available (transaction costs having been shrunk by the

\textsuperscript{207.} Copyright Management, supra note 206, at 981-82.
\textsuperscript{209.} Copyright Management, supra note 206, at 990. A closely related issue is the enforceability of such terms. See Lemley, supra note 22 (discussing enforceability of “shrinkwrap” terms proposed in network transactions); John E. Murray, Jr., The Emerging Article 2: The Latest Iteration, 35 DUQ. L. REV. 533, 550-65 (1997) (discussing proposed revision of the Uniform Commercial Code that would govern whether standard terms became part of the contract in many electronic transactions); Maureen A. O’Rourke, Copyright Preemption After the ProCD Case: A Market-Based Approach, 12 BERKELEY TECH. L.J. 53 (1997) (discussing tensions between federal copyright law and state contract law); Niva Elkin-Koren, Copyright Policy and the Limits of Freedom of Contract, 12 BERKELEY L.J. 93 (1997).
\textsuperscript{210.} Copyright Management, supra note 206, at 990.
copyright holder posting terms for use), fair use would presumably not
excuse any such tampering; nor does the proposed statute make these
strict protections subject to fair use. Such stringent protection follows
as a matter of course from the transaction approach. Copyright owners
may attach to each copy precise terms for any possible use and any user
must either agree to and abide by those terms or go elsewhere. The
balancing approach to fair use would suggest a more tempered approach.
Recognizing that the copyright protection code locks up not just
copyrighted expression but also unprotected ideas and nonoriginal
elements, a balancing approach would amend (or interpret) the proposed
statute to allow access in some settings, even if that involved circum-
venting the protective coding.

It is instructive to compare the proposed high level of protection for
copyright management technology with the present, considerably lower
level of protection for the artistic integrity of works. Under Section
106A, the author of a work of visual art may prevent others from
distorting, mutilating, or destroying the work. But these protections
are sharply circumscribed. The moral rights apply only to works like
painting, sculpture and limited edition photographs, and specifically
exclude works for hire. Moreover, the moral rights are specifically
made subject to fair use. So although it may be legal to distort or
mutilate a digital artwork, it may soon be illegal to fiddle with the
legalese attached to it. A balancing approach would avoid such an
incongruity.

211. 17 U.S.C. § 106A (1994). See also Jane C. Ginsburg, Copyright in the
101st Congress: Commentary on the Visual Artists Rights Act and the Architectural
Works Copyright Protection Act of 1990, 14 COLUM.-VLA J.L. & ARTS 477 (1990);
Henry Hansmann & Marina Santilli, Authors' and Artists Moral Rights: A Comparative
Legal and Economic Analysis, 26 J. LEGAL STUD. 95 (1997) (discussing whether
copyright doctrines in the United States perform a similar function to moral rights in
other jurisdictions in controlling reputational externalities); Geri Yonover, The
Precarious Balance: Moral Rights, Parody, and Fair Use, 14 CARDOZO ARTS & ENT.

212. 17 U.S.C. § 101 (1994) (The definition of “work of visual art” defines the
scope of the moral rights conferred under section 106A.). Moral rights could also be
based upon existing common law concepts. See Edward J. Damich, The Right of
Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors,
23 GA. L. REV. 1 (1988). The exclusive right to make derivative works can be seen as
equivalent to moral rights. See J. H. Reichman, Electronic Information Tools—The
Outer Edge of World Intellectual Property Law, 17 U. DAYTON L. REV. 797, 813

an artist’s moral rights has been questioned. See Dane S. Ciolino, Rethinking the
(arguing that “fair use and federal moral rights are inherently incompatible” and calling
for courts to ignore the statutory language).
Another area that would be treated differently under the transaction cost and balancing approaches is fair use in creating derivative works. The logic of privatization favors broad protection of the exclusive right to make derivative works (the right to recast the work into new forms). Concentrating the right to make derivative works in a single person would give an incentive to exploit that right in the most efficient manner. Along these lines, granting the copyright holder in a book the exclusive right to make a film based on the book is thought to avoid a "multiple taker" problem. Unless a single person has the right to make the film of the book, no one would have the incentive to invest the many millions of dollars now necessary to make a feature film. This claim is certainly debatable as an empirical matter. The recent spate of Jane Austen films, all based on public domain material, certainly shows that exclusive rights to a book are not essential to permit the necessary investment in a movie. More important, the logic of this approach would lead to a broad interpretation of the derivative right, in order to prevent unauthorized competitors. Such a broad interpretation would stifle not just commercial competition, but permit the copyright holder to control the cultural view of the work. Under the balancing approach, the copyright holder would still have the right to make derivative works, but the leeway afforded to comment, criticism, and other uses would be much greater.

To take an example, the privatization approach would support the holding in Walt Disney Production v. Air Pirates. The defendants in Disney produced a counterculture comic that portrayed various Disney characters engaged in distinctly nonDisney activities, such as drug use and bawdy behavior. The Ninth Circuit denied fair use. Such a result reflects the privatization rationale of the transaction cost approach, which would leave it to Disney to decide on the most effective commercial exploitation of its characters. If the public demand for works portraying Disney characters in such a light were sufficient, then Disney itself could produce them. If Disney were concerned that such comics could adversely affect its use of the characters in other areas, however, then Disney could prevent any such works. A balancing

214. See Netanel, supra note 24.
215. 581 F.2d 751, 758 (9th Cir. 1978).
216. Id.
217. Id.
approach to fair use, however, might reach a different result. Portrayals of Disney characters so engaged might well harm the sales of Disney products, but not in a way that would favor Disney in the balance of incentives. The comics would not substitute for Disney’s sales of its copyrighted work. Rather, the comics effectively brought into question the role that Disney characters play culturally.218

Air Pirates also shows another flaw in maximizing reliance on voluntary licensing to produce new works incorporating elements of existing works. The author of an existing work is likely to be considerably more risk averse than other authors who wish to incorporate it into new works. Thus, Disney would balance possible revenues from a new work against the risks to sales of previous works, thus considerably discounting the value to Disney of using its characters in new ways. An author with no vested interest in the existing works is more likely to try something risky. Willingness to take risks is often a key ingredient to creative work. Accordingly, granting authors expanded control over new uses of their work is likely to have considerable dampening effects on cultural flourishing. This certainly does not counsel depriving copyright holders of the control over markets for their work or of derivative works that spring from their work. But it does suggest that the bounds of fair use cannot be set simply by asking whether a use could have been licensed. The privatization view confuses the change in an idea with the depletion of a resource.219 As discussed above, a strong reason for privatizing physical property is that placing it in private

218. For another case in which use of Disney material was not protected as parody under fair use, see Walt Disney Productions v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975) (rejecting fair use of Disney’s “Mickey Mouse March,” performed by actors wearing nothing but Mouseketeer hats in the film The Life and Times of the Happy Hooker). The Ninth Circuit recently held fair use inapplicable to a parody of The Cat in the Hat, rewritten to be an account of the O.J. Simpson case. See Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F. 3d 1394 (9th Cir. 1997). The court held that the parody used copyrighted elements not in order to comment on the original but simply to gain attention. Id. The balancing approach would deny fair use where the parody form was used simply as a means of free-riding, as opposed to employing the ideas, or on criticizing or commenting on the style of the original. See also Castle Rock Entertainment v. Carol Publ’g, 955 F. Supp. 260 (S.D.N.Y. 1977) (denying fair use to a book of trivia questions about the television series Seinfeld, where the book used significant portions of copyrighted shows with relatively little additional material); David London, Comment, Toon Town: Do Cartoon Crossovers Merit Fair Use Protection?, 38 B.C. L. REV. 145 (1996) (arguing that fair use authorizes parody in cartoon of characters from other cartoons). At some point, using copyright to stop critical speech raises constitutional questions. See Paul Goldstein, Copyright and the First Amendment, 70 COLUM. L. REV. 985 (1970); E. Walter Van Valkenburg, The First Amendment in Cyberspace, 75 OR. L. REV. 319 (1996).

219. See Lemley, supra note 25, at 1049 (noting that ideas, unlike real property, cannot be subjected to ‘over-use’).
hands allows market forces to allocate it to the highest valued use. But informational works are not depleted, rather they are tested, propagated, and transformed through use.

The transaction cost and balancing approaches would also yield different results on whether copyrights are being infringed by a project currently underway to archive the Internet’s World-Wide Web. Under the transaction cost approach, such an effort would likely not qualify for fair use, particularly if such archiving exceeded any limitation stated expressly on the web page or elsewhere. The makers of such an archive are in a position to use market forces to capture the benefits of their effort, by charging access fees to anyone who wants to utilize the archive. The archivists would only have to pay web page authors who demanded payments, not everyone on the entire Internet. So if transaction costs were the guide, fair use might not authorize the project. By contrast, the balancing approach would likely hold the archiving to be fair use, even where it exceeded the permission granted by individual web page authors. The archive has considerable historical and research values and has little effect on the incentives of authors. Moreover, much of what the archive would capture would not be covered by copyright. Many web pages contain noncopyrightable facts on functional aspects, as well as copyrightable expression. So a balancing analysis would likely permit archiving as fair use.

In each of the foregoing examples, the transaction cost approach yields a simple but troubling analysis, because it excludes important policy considerations. The balancing approach may require a more complicated analysis, but that simply reflects the fact that the distinctions on which copyright relies are complex. Concepts like originality, ideas, and functionality have defied easy definition and will continue to do so.

The recent controversial decisions on photocopying illustrate how the balancing approach supplements, rather than displaces, the transaction

220. Brewster Kahle, Preserving the Internet, SCIENTIFIC AMERICAN, Mar. 1997, at 82. The archivists are presently addressing the issue simply by letting authors exclude their works. Id. On how networked communication may assist the law, see Michael Rustad, Legal Resources for Lawyers Lost in Cyberspace, 30 SUFFOLK U. L. REV. 317 (1996); Eugene Volokh, Computer Media For the Legal Profession, 94 MICH. L. REV. 2058 (1996).

cost approach. In *American Geophysical Union v. Texaco*, Texaco maintained a library of scientific and technical journals. Texaco regularly informed its researchers of recently published articles and provided photocopies of articles to the researchers upon request. In *Princeton University Press v. Michigan Document Services*, a copyshop received lists of book excerpts from university instructors, made photocopies of the excerpts and sold them bundled into coursepacks. Appellate courts ultimately denied fair use in both cases. Both cases involve uses favored in fair use analysis, research and education. Nonetheless, neither appears to be a case where the copyright holder was seeking protection of unprotected aspects of the work. Had this been a competitor trying to impede Texaco’s research, an author seeking to keep critical students from reading the work, or a software producer worried that young hackers might figure out its programs and write better ones, then fair use would be more apt. But, at the risk of oversimplifying, both cases boiled down to a commercial entity systematically providing a cheaper source of copies than the copyright holder. Certainly, fair use would likely apply if the potential user could not otherwise get copies at a reasonable price. But if Texaco could fund copies from the revenues following from its research, or if students could purchase copies at a reasonable price (or, more likely, if the publishers would license photocopies of excerpts to be made), then denying fair use could simply be enforcing the balance struck by the general outline of copyright law.

V. CONCLUSION

The transaction cost approach might simplify fair use analysis. But the clarification of the doctrine would only distort the overall effect of copyright law. Mechanical enforcement of the exclusive rights in some settings could effectively give copyright holders a measure of control over noncopyrightable ideas and functional aspects of their work. Such a prospect, in turn, would simply shift the balancing concerns to the infringement analysis. Clarifying fair use by surgically narrowing it would only complicate other areas of copyright law. The difficulty in

222. 37 F.3d 881 (2d Cir. 1994).
224. One might argue for applying fair use on redistributive grounds, on the basis that students and researchers are favored classes of users. See Merges, supra note 18. See also Anna M. Budde, Comment, *Photocopying for Research: A Fair Use Exception Favoring the Progress of Science and the Useful Arts*, 42 WAYNE L. REV. 1999 (1996) (arguing that fair use authorizes photocopying of scientific research articles in both industry and universities).
fair use simply reflects the difficulty in defining the boundaries of copyright. Fair use originally arose as part of the infringement analysis in copyright cases. Fair use has served to adapt copyright to several generations of technology, but has become a tangled doctrine in the process. The transaction cost approach bids to reduce fair use to a simple, quantifiable analysis and remove it from the core issues of copyright. But copyright law will adapt to digital technologies best by retaining its flexibility. Fair use can serve as a means to implement the other limits on copyright. The works subject to copyright are increasingly being created and disseminated in digital forms, and digital technologies copy works repeatedly for many functions. A balanced approach to fair use can help protect the copyright holder’s prerogatives while preserving the limitations on those exclusive rights.

225. See Fair Use, supra note 1, at 18-64 (discussing early development of fair use in United States case law); see also Kaplan, supra note 1, at 67-70.
226. See Kaplan, supra note 1, at 69-70 (arguing that fair use analysis invokes policy considerations just as much as the rest of the infringement analysis).