

2010

Some Optimism About Fair Use and Copyright Law

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Recommended Citation

Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 *Journal of the Copyright Society of the U.S.A.* 351 (2010).

Available at: https://scholarship.law.pitt.edu/fac_articles/348

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SOME OPTIMISM ABOUT FAIR USE AND COPYRIGHT LAW

by MICHAEL J. MADISON*

I.

It is neither possible nor desirable to design a legal regime that maps precisely onto lived experience. A perfectly detailed map of the law would function therapeutically, looking at all that has happened in the world and trying in some way to fix it,¹ and aspirationally, looking to what lawmakers would like to see happen and bridging gaps between the present and the future. That load — life in all of its historical and ideational details, past, present, and future — is too much for any institution or discipline to bear in full. An image from the work of Jorge Luis Borges captures law's dilemma. Borges's *Of Exactitude in Science*² described a mapmaking project that eventually grew so vast — “a Map of the Empire that was of the same Scale as the Empire and that coincided with it point for point” — that the project was abandoned by later generations, being “Less attentive to the Study of Cartography,” on account of its uselessness. Like any institution adapted for human use, law tracks and simplifies patterns of behavior.

The Borgesian problem afflicts copyright law today, a legal field that has gotten so vast and detailed, and so unhelpful in many respects as a map to the territories of human knowledge, learning, and creativity, that some suggest that policymakers should start anew.³ Evidence of the problem is found in copyright's expansive scope and in its hyper-intricate com-

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¹ This is a tiny copyright pun. I mean “fix” both in the “stabilize” sense and in the “make it better” sense. I recognize that critical scholars, among others, have viewed the relationship between law and life less sympathetically. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (describing the “jurispathic,” or law-killing, role of judges).

² Jorge Luis Borges & Adolfo Bioy Casares, *On Exactitude in Science*, in JORGE LUIS BORGES, *A UNIVERSAL HISTORY OF INFAMY* 139 (Norman Thomas di Giovanni trans., 1972) (1946). Borges's work builds on Lewis Carroll, who wrote of a map produced at a scale of a mile to a mile, which was never used (“it would shut out the sunlight”), so “we now use the country itself, as its own map, and . . . it does nearly as well.” LEWIS CARROLL, *SYLVIE AND BRUNO CONCLUDED* 169 (1893).

³ See Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587 (2008).

pulsory and statutory licenses, digital copyright provisions, and statutory exemptions and limitations. Copyright's doctrine of fair use,⁴ apparently so cursed and situation-specific as a legal standard that one observer characterized it as "the right to hire a lawyer,"⁵ serves as a particularly acute example. Is there a solution to copyright's Borgesian problem? In this reflection on the emerging initiative to draft and implement "codes" of best practices in fair use,⁶ as mechanisms to carve out territories that are safe for science,⁷ I suggest that cartographers of copyright as a whole might take heart from the conceptual framework that lies at the heart of that initiative. Codes of best practices may not redeem copyright. But they offer the outline of a map between life and copyright law. They may chart a justification for fair use and copyright that follows the compass of knowledge in meaningful ways.

I focus on the idea of "best practices" rather than on the idea of "codes"; the word "code" in these contexts seems to be a rhetorical placeholder rather than a normative landmark in its own right.⁸ I offer four related points. I treat them as related themes rather than as fully

⁴ 17 U.S.C. § 107 (2006).

⁵ LAWRENCE LESSIG, *FREE CULTURE* 187 (2004). I do not agree with Lessig's characterization, but the rhetoric is catchy, and in the current copyright climate the rhetoric captures the sense of the law in the popular imagination — to the extent that the popular imagination imagines copyright.

⁶ See Patricia Aufderheide & Peter Jaszi, *Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video*, 6 *I/S: J.L. & POL'Y FOR INFO. SOC'Y* 13 (2010); Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 *UTAH L. REV.* 715; PAT AUFDERHEIDE & PETER JASZI, *FAIR IS FAIR* (forthcoming 2010).

⁷ Cf. Lord Ellenborough's statement in *Cary v. Kearsley*, 170 Eng. Rep. 679 (K.B. 1802) (applying the English doctrine of fair abridgement): "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science," cited in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994). The quotation refers to "science" in an older sense — the development of knowledge and access to it — that has been at copyright's core for three centuries. But the image of "manacles" on science supplies an odd metaphor; it anthropomorphizes science in an entirely inappropriate way. The problem is not that copyright puts manacles on science, but that copyright puts manacles on scientists, that is, on people practicing science. Recasting the metaphor reveals a challenge for the best practices model, which is the risk that the discipline of practice will inhibit the creative innovator who wants to break free of disciplinary shackles just as much as she wants to break free of copyright shackles. See *infra* notes 51–52 and accompanying text.

⁸ The role of the code is highlighted by a quotation from a recent film. Elizabeth Swann, daughter of the British governor of Port Royal, is captured by pirates and bargains for her return to shore by invoking the Pirate's Code. The pirate Captain Barbossa replies: "[Y]ou must be a pirate for the pirate's code to apply, and you're not. And thirdly, the code is more what you call

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independent points in an argument. First, codes of best practices make practical the observation that the development of knowledge and access to knowledge are inescapably social processes, in addition to individual ones. Second, codes of best practices highlight the existence of institutional settings for the production and re-production of knowledge. Third, codes of best practices signify the growing significance of blended public/private institutional forms for the development and application of law itself; “law” reform in copyright is not exclusively a matter for public authorities, such as Congress, courts, the Copyright Office, and international conventions. Fourth, and perhaps most important, codes of best practices offer an affirmative vision of the role of fair use as part of a broader project of copyright that extends beyond merely the affirmation of proprietary rights and fair competition in markets for creative and innovative goods, and in doing so they re-affirm that project itself.

II.

Fair use in American jurisprudence typically has occupied the shadow of two concurrent images. Fair use, like the common law doctrine of fair abridgement before it,⁹ like contemporary common law doctrines of fair dealing,¹⁰ and like the modern civil law practice of designing specific limitations and exceptions to copyright,¹¹ has been treated as the exception to copyright’s paradigm of exclusive rights. And fair use has been regarded as peculiarly situation-specific and case-specific. Copyright’s standard account speaks either in terms of the copyright owner’s proprietary right or in terms of competitive injury to the copyright owner’s incentives, or both. This conventional wisdom gives fair use no affirmative role in copyright’s instrumental calculus, the promotion of learning and the progress of

guidelines than actual rules.” *PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (Walt Disney Pictures 2003).

⁹ See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6-17 (1985).

¹⁰ See, e.g., Giuseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 *MCGILL L.J.* 309 (2008).

¹¹ See Annette Kur, *Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?*, 8 *RICH. J. GLOBAL L. & BUS.* 287 (2009). Professor Kur offers an elegant exploration of the meaning of the so-called “three-step test” in international copyright law, including the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the European Copyright Directive, which governs the extent to which member countries may include in their national law exceptions to the exclusive rights of the copyright owner. The three-step test is designed to prevent “excepted” uses of a copyrighted work from competing with “normal” exploitation of the work by the copyright owner.

knowledge — what eighteenth century philosophers and lawyers knew as learning and science.¹² Fair use is the proverbial safety valve, the condition — perhaps required, at least in the United States, by the constitutional requirement that the government not impair citizens' freedom of expression¹³ — that reconciles a system of private right with a system of free expression and free speech. That characterization plays out in the rhetoric of the Supreme Court of the United States¹⁴ as well as in several generations' worth of leading commentary on fair use. Commentary that subordinates fair use to earlier authors' rights, in one way or another, includes suggestions that the law of fair use tracks implied licenses to reuse protected material, granted by the copyright owner;¹⁵ that fair use plugs transactions cost gaps in the market structure of copyright;¹⁶ that fair use should be viewed in remedial terms, rather than substantive terms;¹⁷ that fair use is part and parcel of the proposition that copyright constitutes a

¹² "Learning" as copyright's framework comes from the Statute of Anne, which begins with the following preamble: "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The U.S. Constitution grants Congress the power "[t]o 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. Over the course of the twentieth century, copyright was infected by the idea that its purpose is to promote individual "creativity," and by the trope that it is a utilitarian doctrine. That proposition regarding creativity now seems too well-entrenched to dislodge, though policymakers have been slow to recognize the need to reconcile copyright's creative present with its knowledge past. See Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, VAND. J. ENT. & TECH. L. (forthcoming 2010). The idea that copyright is utilitarian masks the sizable extent to which the social benefit of intellectual property doctrines depend on spillovers that are not well-accounted for in standard economic models of intellectual property law. See Brett M. Frischmann, *Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801 (2009).

¹³ U.S. CONST. amend. I.

¹⁴ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994) (noting that the goals of copyright can be furthered by restricting the copyright owner's exclusive rights).

¹⁵ See Alan Latman, *Fair Use of Copyrighted Works, Study No. 14, Copyright Law Revision*, in STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3 (Comm. Print 1960).

¹⁶ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

¹⁷ See Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y. 513 (1999).

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limited, special monopoly granted to authors;¹⁸ and that fair use ought to focus on the creation of new, or “transformative,” work.¹⁹ Even commentary that is sympathetic to fair use as a salient feature of an unfair competition model for works protected by copyright tends to privilege a market orientation,²⁰ or to treat the substance of fair use in the competitive as vessel defined only by “fairness.”²¹

That subordination of fair use to private right is curious when one considers the proximity of fair use to free speech. As manifested in the First Amendment to the U.S. Constitution, freedom of expression may be *the* paradigmatic value of representative democracy. What gets too little detailed attention in copyright scholarship is the proposition that fair use and its fair dealing and “exceptions and limitations” counterparts are the private law cousins of public law free expression principles.²² Fair use and free speech are not identical; one cannot be substituted for the other. But

¹⁸ See Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009).

¹⁹ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 *HARV. L. REV.* 1105 (1990). Judge Leval’s “transformativeness” approach comes the closest of any commentary cited here to advancing a substantive theory of fair use. In Judge Leval’s account, however, and as his standard has been adopted by the courts, “transformativeness” nearly always refers to the individual work proffered by the accused infringer and challenges courts to weight the economic and cultural value of the new work, which is often uncertain, against the economic and cultural value of the plaintiff’s existing work, which is typically demonstrated by the fact that the plaintiff is pursuing the litigation.

²⁰ See L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 *HOUS. L. REV.* 215 (2009).

²¹ See Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 *HARV. L. REV.* 1137 (1990).

²² Scholars are familiar with a rich and still growing body of work that analyzes the relationship between copyright and free speech. The best-known older work includes Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. REV.* 1180 (1970); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 *CAL. L. REV.* 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 *COLUM. L. REV.* 983 (1970). Excellent recent contributions include NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 *S. CAL. L. REV.* 1275 (2003); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *DUKE L.J.* 147 (1998); and Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004). Most of this work has focused on the existence, scope, and enforcement of copyright’s exclusive rights as a challenge to First Amendment principles. Aside from Professor Tushnet’s work, little of it teased out in detail the meaning of fair use as a First Amendment doctrine, except in passing.

both are models that simplify for the law the normative proposition that some thoughts, beliefs, and forms of expression cannot and should not be subject to clearance, either before or after the fact, by owners of private rights, or by the government. Conscience, speech and expression as lived experience are related to but are not identical to freedom of expression and fair use, the rights and legal concepts.²³

The lesson that I draw from these affinities and relationships is one that I want to map onto the codes of best practices initiative. The lesson is this: fair use and free speech appear to pull normatively in the same direction, in offering safety and security for expression of different kinds,²⁴ even while they pull descriptively in different directions. Unlike free expression, with its normative connections to political governance, social stability, and personal autonomy, fair use as an instrument of knowledge has been copyright's stepchild. But fair use is linked to a variety of phenomena, such as private use of copyrighted works and reverse engineering of computer programs, that seem to have little to do with speech as such. I embrace the normative affinity. The descriptive discontinuity should be remedied. And it can be. But not at the level of the individual actor, speaker, or user, nor at the level of the individual claim, defense, or suit. Mapping the laws of fair use and free speech at that level is the task of a Borgesian cartographer; such detail is inevitably unhelpful. The way forward is institutional.

Individualist perspectives have their histories and their roles. Over the course of the twentieth century, especially during the latter part of the twentieth century, individual speech and expression rights and liberties were loosed from their far-off natural law origins and set free,²⁵ jostling for attention in the metaphorical marketplace of human experience. The modern link between speech, copyright, and markets is well-established; Justice Oliver Wendell Holmes, Jr. is largely responsible both for the "marketplace of ideas" as a defining metaphor of free speech jurisprudence²⁶ and for the closely-related "aesthetic nondiscrimination" theme in

²³ I note that fair use is properly considered a "right" in both positive and normative terms, though as interpreted by the Supreme Court it is a defense to a claim of copyright infringement, in procedural terms. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

²⁴ I mean "different" both in the sense of "new" as well as in the sense of "variety."

²⁵ An abbreviated history of this development is supplied by Adam Mossoff. See Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001 (2009).

²⁶ See *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

copyright law.²⁷ This is not altogether a wrong development. In many ways, market-oriented perspectives on speech and expression represent the apotheosis of political liberalism. What was lost in the process, however, was any discipline beyond laws and markets themselves. Both free expression doctrine and fair use got into trouble as a result. As the phrase has it, political liberalism as the engine of free expression (or, free expression as the engine of political liberalism; theirs is a recursive relationship) does not “scale” amid pervasive digital networks.²⁸ Nor is a free speech principle centered on individuals up to the task of resisting the formalist impulses of the law. Corporations are persons, too, according to the law of corporate law due process; now corporations and individuals stand on equal footing, both with full “free speech” rights.²⁹

A similar evolution, starting from individualist premises, has undermined modern copyright. According to modern law, virtually everyone can be an author, and virtually everyone is.³⁰ Copyright succeeded initially in its given mission — the production and distribution of knowledge and learning — by commodifying (some might say thing-ifying³¹) practices of communication and expression. The digital revolution shows how manipulable the concept and technologies of commodification have become. We have marketable bits rather than books and other analog artifacts; we sell and license endlessly combinable and re-combinable digital “things.”³² The trend toward commodification has neither gone too far nor gone far enough; the problem is that commodification of expression in markets has never been sufficiently stable in its own right to support the social structures that it has been asked to support.³³ Copyright creators, copyright-

²⁷ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). See Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 170 n.177 (2000).

²⁸ See CASS R. SUNSTEIN, REPUBLIC.COM (2001) (arguing that the Internet creates a substantial risk of enabling the “Daily Me,” a tool for reinforcing one’s preexisting ideas). Professor Sunstein’s work has been criticized, see Dan Hunter, *Phillipic.com*, 90 CAL. L. REV. 611 (2002), but the tension between fully-realizable individual autonomy, on the one hand, and the Internet, on the other, remains unresolved, and perhaps unresolvable.

²⁹ See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

³⁰ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³¹ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

³² See Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381 (2005).

³³ As a form of externalization of meaning, commodification, evoking markets, can be distinguished from objectification. See George H. Taylor & Michael J. Madison, *Metaphor, Objects, and Commodities*, 54 CLEVE. ST. L. REV. 141 (2006). Both commodified speech and objectified speech are comprehensible only in broader context. For example, Searle’s and Austin’s theory

protected things, and copyright markets do not comprise the entire vocabulary needed to describe the copyright system. In both copyright and free speech settings, digital technology and computer networks — the multiple sources and outlets of “expression” — everywhere, and all the time, exposed as incomplete the “individual liberties” understanding of fair use, like its counterpart understanding of free speech. Neither stands up to the complex demands of media, communications, and human expression. Law that maps only those phenomena is law that has left society’s destination too much in the hands of thing-makers and market-makers and not enough in the judgment of policymakers. Society needs a map that provides guides to both.

What I mean by pointing to institutions as a way forward is that institutions — regularized patterns of behavior, both formal (firms and universities) and informal (scholarship, journalism) — offer the most sensible way to understand and leverage the normative potential of both free speech and fair use. The key insights here are those of Frederick Schauer and Robert Post in the First Amendment context.³⁴ First Amendment law, they point out (although in different ways), operates via an important indirection: law’s normative objectives vis-à-vis individuals can be realized best not by training the sights of Congress and courts on individuals, but instead by realizing the normative aims of individuals in institutional context. Train the law on institutions, in short, for reasons relating both to life and law itself. The speech in free speech enables individuals to be who they are and who they want to be as autonomous social and political beings; the freedom in free speech allows them to build and sustain institutions that make speech possible and permissible. Free expression doctrine is and ought to be understood primarily in institutional terms, rather than only in personal terms. “Speech” does not make sense, experientially or legally, as a disembodied “thing” to be kicked around a “marketplace of

of speech acts teaches that under some circumstances, the meaning of speech is external to the words themselves; the words are “things” whose meaning depends on their roles in certain social settings. See JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY ON THE PHILOSOPHY OF LANGUAGE* (1969) (distinguishing “propositional” from “performative” speech, the latter consisting of utterances that do things rather than assert things).

³⁴ See Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249 (1995); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 *UCLA L. REV.* 1747 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 *MINN. L. REV.* 1256 (2005); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *HARV. L. REV.* 84 (1998).

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ideas.”³⁵ Importantly, there is some highly persuasive evidence that taking an institutional approach is, in fact, what First Amendment law has done, especially with regard to journalism,³⁶ teaching and scholarship,³⁷ and political criticism.³⁸ Going forward, Post and Schauer each have argued, we need to de-commodify the act of speech, and re-contextualize it, in order to save free speech principles. Institutions supply important and valuable discipline to the otherwise unregulated speech “market.” Speech is not what we say. Speech is what we do.

I think that a similar shift in emphasis may be underway in fair use, from the individual to the institution,³⁹ and that this may be the right approach to law reform and practice.

³⁵ Professor Schauer summarizes the epistemological case against the “marketplace” metaphor in Frederick Schauer, *Facts and the First Amendment*, 57 *UCLA L. REV.* 897, 908-12 (2010), while he recognizes its persistence in popular discourse. The marketplace metaphor cannot explain the fact that large numbers of people have believed demonstrably false things; First Amendment protection for the expression of these things can be justified, therefore, only on some other basis. Likewise, the utilitarian justification for copyright cannot fully explain legal protection for bad but popular art, unless the point of the law is circular — that is, simply to ratify individual choice as expressed in the marketplace.

³⁶ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defining constitutional boundaries of the tort of defamation with respect to claims by public officials and public figures against broadcasters and publishers). The growth of social media (blogs, message boards, social networks such as Facebook) has engendered recent examinations of the application of shield laws that protect news organizations to these new settings. See, e.g., *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 2010 WL 1791274 (N.H. May 6, 2010) (applying state constitutional newsgathering privilege to message board).

³⁷ See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (reversing conviction of college professor for contempt for refusal to answer questions regarding content of lectures, based on the professor’s liberties with respect to academic freedom and political expression).

³⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (suggesting the existence of a “limited purpose public figure” exception to common law defamation doctrine).

³⁹ Cf. Robert P. Merges, *Individual Creators in the Cultural Commons*, 95 *CORNELL L. REV.* 793 (2010); Robert P. Merges, *From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation* (University of Wisconsin Law School, Conference on the Legal History of Intellectual Property, Working Paper (2004), available at <http://ssrn.com/abstract=661543>); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 *MINN. L. REV.* 129, 139-55 (1998) (suggesting the emergent trend toward specialized property institutions in the intellectual property context).

III.

Since its inception, copyright law has been filled with production-side institutions: booksellers, publishers, distributors, and more recently, collecting societies. During the twentieth century a handful of consumer-side copyright institutions developed, such as the cable and satellite television industries, partly in connection with the design and implementation of compulsory licenses in American copyright law. Institutional libraries, museums and archives, and used bookstores, too, are consumer-side institutions that have long flourished in copyright's shadow. The Library of Congress owes much of the breadth of its collection to mandatory deposit requirements adopted during the mid-nineteenth century.⁴⁰ Copyright has been dominated by an individual sensibility spurred by the rhetoric of authorship, but that sensibility has always co-existed with a powerful institutional sense.⁴¹ Partly via public law (compulsory licenses, copyright's first sale doctrine, deposit requirements) and partly via private ordering (private publishers, distributors, and even collecting societies) copyright relies on institutions to facilitate and discipline the production and distribution of knowledge that copyright is intended to support. Without pausing immediately to parse the strengths and weaknesses of each of these institutions, in general terms, copyright's institutionalism is a good thing.

The best practices approach to fair use problems is, among other things, an important extension of this same institutional perspective. At one level, codes of best practices represent a modestly innovative form of private ordering in a domain that has been subject to far grander, more formal, and more ambitious private institutional counterparts, such as ASCAP and BMI for clearing public performance rights for musical compositions, and the Harry Fox Agency for clearing mechanical rights. HFA may provide the stronger analogy; it is a private business that operates entirely in the shadow of a compulsory license but with no special public law privilege or oversight.⁴² Codes of best practices likewise operate in the shadow of fair use, but with no public law blessing.⁴³

⁴⁰ See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1026-28 (2007) (describing revisions to the deposit requirement in 1846 and in 1870).

⁴¹ See Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361 (2009).

⁴² See 17 U.S.C §§ 115(a)-(c) (2006). Both ASCAP and BMI operate under consent decree supervision, and other compulsory and statutory licenses in copyright come with privileges for limited antitrust scrutiny, judicial or administrative review of rate setting, or both.

⁴³ For some scholars, this is a source of weakness. See Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 430-37 (2009) (defending a formal administrative process for fair use rulemaking that might borrow from codes of best practices).

That is not all, nor should it be. Codes of best practices may be forms of private ordering, but that characterization offers institutional legitimacy only in the weak sense that any form of private ordering derives legitimacy from the acts of autonomous individuals. The normative thrust of codes of best practices comes from a more specific source that links best practices to copyright itself. I described that source in earlier work on fair use, trying to make sense of it in institutional terms and aligning that institutional sense both with the goals of the copyright system (law) and the goals of human behavior (experience). My prior claims are consistent with the argument implicit in the best practices approach. Those claims can be broken down into three parts: (1) creativity and knowledge production is an emergent property of patterned social behavior; (2) those patterns exist concurrently with but distinct from market-based production of knowledge goods by individuals and firms; (3) those patterned behaviors can be identified as institutions, and exempting those institutions from the discipline of copyright's scheme of exclusive rights is likely to increase the social welfare produced by the copyright system as a whole and is likely to not diminish the social welfare produced by the market side of copyright.

In *A Pattern-Oriented Approach to Fair Use*, I argued:

The pattern-oriented perspective, by contrast, recasts creativity as an emergent property of a complex system. Given a group, or pattern, or system of some sort, which is not purely homogeneous but which is characterized by a relevant set of sociocultural rules or constraints (such as context, conventions of a domain, and representation or internalization of that domain in the individual), novelty or creative production is the probabilistic — though not necessary — result. It is a process-oriented view, that creativity inheres in the increased number of interconnections that arise in such a context, to be contrasted with the older product-oriented view, the comparison of old and new.

The emergentist approach relies in part on broader interest in exploring the properties of complex systems. These collections of decentralized, evolutionary phenomena are ordered roughly by properties that cannot be captured by descriptions of their constituent parts, which produce complex structures over long periods of time via the interaction, uncoordinated events and actions. It is characteristic of an “emergent” system that its properties cannot be predicted completely by analyses of the properties of its constituent parts; instead, the system is characterized probabilistically. Examples at levels far grander than copyright law and creative expression include the laws of thermodynamics, evolution by natural selection, and evolutionary game theory. At the relatively simple level at which the approach is represented here, social and cultural patterns can be used to define the contours of complex social systems that are probabilistically situated to produce creative expression. If one fa-

vors such patterns in the law of fair use, then it is likely that the creativity anticipated by the law will emerge.⁴⁴

In *Rewriting Fair Use and the Future of Copyright Reform*, I continued:

Social practices of this sort are not perfectly accessible, either to laypersons or to the legal system. Their existence and their scope are not uncontroverted. They are not eternal. Over time, they evolve. No fair use doctrine will eliminate litigation over their meaning, and no doctrine will enable perfect prediction regarding what is fair and what is not. But they are sufficiently autonomous, accessible, and durable that they offer a meaningful guide for achieving the benefits that fair use is meant to offer, whether that is simple fairness, “the good life,” or creativity of the sort that the market system may not produce.⁴⁵

Those arguments should be viewed critically. I noted originally that my arguments regarding the institutional context of creativity, to which I now add knowledge and learning, are somewhat tentative. The benefits of aligning those arguments with law reform regarding fair use are probabilistic, at best.

Those arguments and the best practices approach are highly sympathetic to one another. The “best practices” of each relevant disciplinary context may be understood as a kind of “pattern” described above, such that a code of best practices is not merely a private, disciplined, institutional defense to copyright infringement claims, but also a way to express the fact that these institutions produce creativity and knowledge. The institution should be recognized as a copyright agent, alongside the individual author, creator, or knowledge producer.

And my arguments are probabilistic, in practice there is some good news: There is evidence of the institutional approach already at work in fair use. A close reading of copyright’s fair use jurisprudence reveals that in practice, copyright courts have been pursuing such a pattern-oriented approach to fair use under the formal umbrella of the four factors supplied by Section 107 of the Copyright Act.⁴⁶

As I noted above, the institutional approach to knowledge, learning, and creativity has been part of copyright all along — though it has often been treated as a pathology by critics who view copyright as overbroad. The role of intermediaries, publishers, distributors, aggregators, hosts and

⁴⁴ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1685-86 (2004) (footnotes omitted).

⁴⁵ Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 409-10 (2005).

⁴⁶ Professor Mazzone’s proposal for fair use rulemaking, see Mazzone, *supra* note 43, appears to be sympathetic to an institutionalist perspective, and he is explicitly sympathetic to my claim that fair use case law is relatively predictable, along “pattern-oriented lines.” *See id.* at 427-28.

so forth has been characterized as a necessary evil in the path to recognition and encouragement for creators and knowledge makers. My view is that these institutions are not harmful as such; the role of each one has to be assessed and justified. Whether they are purely private, blends of public and private elements, or something else, intermediary institutions share elements that can make comparative assessment more straightforward.⁴⁷ But it is dangerous to paint with too broad a brush. The point is simply that groups and other institutions possess normative inertia in their own right and should be analyzed for their normative benefits in particular cases, rather than deriving their normative status entirely via the normative status of their members and those who adopt the relevant institutional perspective.⁴⁸ Section 107 nods in this direction when it recites a non-exclusive series of favored uses that are described in institutional terms: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁴⁹ Congress did not make up that list out of whole cloth; the statutory form of fair use is explicitly derived from more than a century of judicial fair use decisionmaking. Those fair use decisions do not exist as free floating normative constructs, which judges use without reference to institutional context. Doctrines of fair abridgement and fair dealing, and the details of the exemptions and limitations section of the European Union’s Copyright Directive, illustrate that the institutional matrix of fair use case law, which is reflected in the language of Section 107 quoted above, is broadly shared beyond the United States.

IV.

In emphasizing the normative benefits of institutions in copyright generally and in fair use in particular, I do not lose sight of the fact that the doctrinal question is whether an individual instance of reproducing or

⁴⁷ See Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010).

⁴⁸ See Cover, *supra* note 1; Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623 (1999). Importantly, of course, Cover distinguished between groups sanctioned by the state and those that exist autonomously. More recent commentators have argued that Cover’s work challenges us to explore connections between the state and groups, rather than to preserve distance between them. See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005) (“I read Cover as endlessly fascinated with the interactions between the state and paideic communities—and with the potential for such interactions themselves to be jurisgenerative moments.”).

⁴⁹ 17 U.S.C. § 107 (2006).

distributing a work of authorship should be treated as “fair use” or “unfair use.”⁵⁰ For a code of best practices, the question is not merely the existence of the practice, but whether the individual user is operating within it — that is, whether the individual is honoring the code.⁵¹ Individuals may have powerful reasons for noncompliance, reasons that society often may want to recognize. Institutional perspectives risk reproducing sameness;⁵² fair use (like free speech, often) can and should be about difference. Generally, as with institutional perspectives everywhere, the challenge is to align commercial and cultural interests in comprehensibility, stability, consistency, and predictability with interests in evolution, adaptation, dynamism, novelty, and individual fairness. I have described the possible normative benefits of a best practices project. What about the normative benefits — the legitimacy — of the codes themselves?

In my view this question is best answered by figuring out whether it — the institutional approach, manifested in codes of best practices — works. Codes of best practices in fair use supply a type of discipline that is related to but distinct from the discipline supplied by public law and by the commercial marketplace. What kinds of knowledge worlds and knowledge products do we see as a result of this added layer of discipline?

For now, the answer is partly and perhaps largely that we do not know; too little time has passed, and there is too little data. Codes of best practices come with certain costs — the time and labor associated with identifying a practice, documenting it as such, and communicating the product to relevant audiences; the risk that the “best” practices will be seen as a ceiling on acceptable conduct, rather than as a floor — that are present in nearly every effort to institutionalize a practice, whether the effort is part of a public or private initiative. It is difficult, in other words, to assess the costs of a code of best practices strategy as compared with the cost of any alternative. From the standpoint of benefits, anecdotal evidence abounds that in some contexts, notably documentary filmmakers, the code of best practices has generated related institutional change leading to the release of some films that otherwise would not have survived a

⁵⁰ Older copyright cases and scholars often characterized infringement as “unfair use.” See, e.g., Leon Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203 (1954). That binary emphasis on fairness in the use of copyrighted works seems to have been displaced in recent times by a different binary: infringement, regardless of the infringer’s intent or the nature of the infringer’s benefit, is piracy. For a recent, comprehensive history of piracy, see ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2010).

⁵¹ See *supra* note 8.

⁵² For a helpful introduction to modern perspectives on institutional analysis, see *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul DiMaggio eds., 1991).

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copyright clearance process.⁵³ In this limited sense, codes of best practices in fair use are increasing the distribution of some knowledge goods over the supply available under existing institutional arrangements. Is there a hidden or unquantified harm to the incentives of other knowledge producers or creators? My intuition suggests that no such offsetting harm exists, but in truth there is no data on point.

In a broader sense, it is difficult to separate the influence of the codes of best practices from the best practices themselves. One premise of the best practices initiative is that these disciplines exist independent of their informal acknowledgement as part of a copyright reform project. The codes are partly documenting existing practice and making it salient, rather than inventing something new. If disciplinary institutions are cauldrons of emergent creativity, then there is little need to reify them with codes and raise the possibility that working within the code offers legal privileges that the participants otherwise could not access. Creativity and knowledge production are happening in any event.

So whether “it works” has meaning here turns on a somewhat deeper question, which is the normative relationship between codes of best practices, as a species of private ordering, and law reform generally. These codes are not merely documenting existing practice. Critiques of the best practices approach that re-characterizes it as relying on custom miss the mark in my view, to the extent that the critiques do not account for the reform agenda that lies beneath them.⁵⁴ The subjects of the codes wish to rationalize and reform some of what they do as knowledge producers; the codes appear to argue not just “this is what we do,” but also “this is what we believe we should do.” And the sponsors and organizers of the codes wish to rationalize and reform some of how copyright law maps onto lived experience. Because the initiative is still in its early stages, the scope and details of that latter agenda are murky. It is not clear, for example, whether the codes are intended for blending with the text and purposes of Section 107 when an appropriate fair use case is adjudicated, so that compliance with a relevant code would be a fact weighing in favor of an alleged “fair” use, or whether the codes are being developed as my earlier writing was offered — as ways to interpret the law as it has been practiced for many years. Or perhaps the codes are constitutions (small “c”) for the governance of knowledge disciplines and creative communities, to be interpreted, applied, and refined as autonomous texts and principles, with no planned connection to the public law of fair use.

⁵³ See AUFDERHEIDE & JASZI, *supra* note 6.

⁵⁴ See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

The most potent objection to any of these interpretations is that no private group has *ex ante* authority to appropriate for itself the power to decide what “is” or “is not” fair use, in any context. That role necessarily belongs to public lawmaking authorities — the legislature, in the first instance, and the judiciary, as the interpreter of the intent of the legislature. Group practices are legitimate exercises in autonomous self-ordering so long as we have no concern for spillovers onto adjacent communities or other systematic undervaluing of broader values. As fair use is, among other things, the institutional embodiment of the value of spillovers from the use of copyrighted works,⁵⁵ justice dictates that the scope of fair use, like the scope of related limitations on copyright, be determined by public processes. Law reform is taking place outside the public institutions of lawmaking. I have articulated the argument as I think it is strongest in the fair use context. Related points have been raised since the dawn of the Internet era against so-called “law” created by private groups dealing in social and technical standards.⁵⁶

This critique is, at its idealist and principled core, irrefutable. But as I have written before, I am a copyright pragmatist as well as a copyright optimist.⁵⁷ Similar challenges with respect to other emerging intermediaries — Creative Commons, open source licenses, content aggregators, information services offered by Google, among other firms — have gotten limited traction. The challenge today is to situate these institutions in copyright’s existing order and to help that order adapt to them, with grace, where possible. Codes of best practices can be defended, as I have briefly defended them, on purely instrumental grounds, but the fit is imperfect. The empirics are tempting but uncertain. The institutional design intentionally keeps positive law at arms’ length, even while the design depends on the law. Codes of best practices and their sponsors want to leverage the normative value of fair use law into stable, knowledge-sustaining institutions, without getting too entangled in the risk of actual litigation. Identifying relevant groups and disciplines and decoding their practices is labor-intensive work and prone to a variety of errors. It is mapmaking of a new kind, and no one argues that the technique is costless, or that it is a panacea. The claim is simply that this is a new way to understand the why and how of free expression in fair use. It might be called therapeutic copy-

⁵⁵ See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

⁵⁶ See Joel Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073 (2007); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998).

⁵⁷ See Madison, *supra* note 45.

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right cartography,⁵⁸ an effort to make a map that helps us see and know, as knowledge producers and users, scholars, and would-be policymakers. The related claim is that the best practices approach works, or at least, that it can.

V.

I cannot push that point strongly, because the best practices initiative is a second-best approach to law reform. Fair use is an inherently limited tool for copyright reformers. Fair use is now held up as central to copyright's balance between rights owners and readers, scholars, critics, consumers, and other new users,⁵⁹ but the doctrine was introduced to the law originally as a lever to expand copyright.⁶⁰ The underappreciated history of fair use shows that the doctrine now described as the most important of copyright's limitations was designed in *Folsom v. Marsh*⁶¹ to enable the commercial expansion of copyright — from a circumscribed knowledge-promoting regime founded on unfair competition principles into a full-blown regime based on individual proprietary rights. A non-institutional sense of fair use, or at least a sense of fair use that is focused principally on individual interests, risks taking fair use doctrine at face value, rather than taking it in historical perspective, and feeding the proprietary rights orientation of copyright. The orientation accepts the legitimacy of the copyright owner's presumptively superior position. Perhaps the most influential fair use scholarship of the last thirty years, Professor Wendy Gordon's *Fair Use as Market Failure*,⁶² has been used and perhaps misused by later scholars and by courts in precisely this way. In that article, Professor Gordon argued that fair use is appropriately applied in contexts where transactions costs would otherwise prevent the consummation of voluntary transactions to enable socially valuable uses of copyrighted works. In practice, courts that have relied on this work have focused on institutional interests on the copyright-owning side of the transaction, as participants in copyright markets defined by individual, proprietary rights, and have expressed minimal concern for institutional interests on the consumption

⁵⁸ I am forever indebted to Joseph Scott Miller for reminding me of the several uses of intellectual property therapy.

⁵⁹ See *ELDRED v. ASHCROFT*, 537 U.S. 186, 219-220 (2003) (characterizing fair use as one of copyright's built-in First Amendment accommodations).

⁶⁰ See L. Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and its Legacy*, 5 J. INTEL. PROP. L. 431 (1998); R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES* 259 (Jane C. Ginsburg & Rochelle Dreyfuss eds., 2006).

⁶¹ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

⁶² Gordon, *supra* note 16.

and re-use side of the transaction.⁶³ The transaction has been everything; the interest in socially valuable uses has been minimized.

Some more recent cases have broken away from that model and looked to a discipline-based or institutional sense of the accused infringement, building on the suggestion in *Campbell v. Acuff-Rose Music, Inc.*⁶⁴ that “transformative” uses are more likely to be favored in fair use cases. The paradigmatic example finding fair use is the Second Circuit’s opinion in *Bill Graham Archives v. Dorling Kindersley, Ltd.*⁶⁵ This is the more traditional route to law reform: if not outright revision of the text of the fair use statute (or of the scope of copyright as expressed in the copyright owner’s exclusive rights), then evolution and interpretation of the statute through repeated judicial application. But this process is slow, even if it is important, and it is subject to a variety of biases and limits.⁶⁶ Judges can pass on only the cases that come before them and that are framed in fair use terms, and the current state of the law requires that accused defendants plead and prove a fair use defense. Industry and community practice and the so-called clearance culture in both contexts suggest that the number of such cases is likely to be small, and that disputes are likely to be framed at the margins of copyright law and practice rather than at its center.⁶⁷ Copyright owners are unlikely to bring cases that they are unlikely to win; potential fair users have difficulty initiating cases at all.⁶⁸

⁶³ See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994).

⁶⁴ 510 U.S. 569 (1994).

⁶⁵ 448 F.3d 605 (2d Cir. 2006). Adopting an institutional perspective does not mean that fair uses always prevail. In *Warner Brothers Entertainment, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008), the district court rejected a fair use defense to an infringement claim based on the popular Harry Potter books and accompanying reference works. The defendant had produced an unauthorized “Lexicon” of Harry Potter characters and references, which the court characterized as “transformative” to the extent that it served as a reference guide, see *id.* at 543, but less so to the extent that the author of the Lexicon wavered in his commitment to the work’s reference purpose. See *id.* at 544.

⁶⁶ See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007); Madison, *Complexity and Copyright in Competition*, *supra* note 27.

⁶⁷ See Gibson, *supra* note 66; *cf.* *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008) (noting that in copyright infringement lawsuit against provider of digital video recorder system, plaintiff alleged theories of direct infringement, not contributory infringement, and defendant waived any defense based on fair use).

⁶⁸ An even more optimistic view of fair use than I express here would take note of the fact that fair use might be used offensively by litigants, to protect a proposed use against a threat of infringement litigation, rather than only

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There is reason to suppose, in other words, that law reform through judicial interpretation is unlikely to be broadly effective in influencing either individual or institutional practices regarding knowledge and copyright except, possibly, over a long time frame and in favor of proprietary rights. One worries that implementation of codes of best practices and reliance on them would reinforce the trend to exclude meaningful copyright disputes from public fora. This, too, is ultimately an empirical question. So far, the salience of these codes in relevant disciplines appears to be making understanding of and reliance on fair use or fair use-style arguments more robust, rather than less. But the day is young.

VI.

What if copyright had a narrower initial scope, one more focused on knowledge and learning, as the law once was, and one more oriented to competitive injury than to proprietary right? Do the insights derived from reflecting on these codes of best practices lose their force?

I think not. Suppose that my premise is wrong, and that abstracted models and maps that clearly distinguish law and experience are the solution to the Borgesian problem with which I began. These might be based on legal formalism; they might be based on contemporary law and economics thinking. In that case, however, the cartographic project still needs to start somewhere. It still needs a prime meridian. The appeal of the best practices perspective then is not merely that it situates fair use in institutional context and describes knowledge and creativity as inherently social. The added virtue of the best practices perspective is that it does not regard fair use merely as an antidote to broad copyright (because doing so feeds

defensively. *See* Shloss v. Sweeney, 515 F. Supp. 2d 1083 (N.D. Cal. 2007) (describing lawsuit filed by scholar against the owner of copyrights in the works of James Joyce, seeking a declaration of noninfringement with respect to the plaintiff's use of the works of James Joyce). The recent decision of the Supreme Court in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), widens the potential scope of these claims, by giving federal courts the power to hear claims involving works whose copyrights have not been registered. *Cf.* 17 U.S.C. § 411 (2006) (requiring that a copyright be registered before a civil action for infringement may be instituted). Before *Muchnick*, a prospective defendant alleging a defense based on fair use would have no recourse in federal court against a potential copyright plaintiff who had not (yet) registered the copyright in the work. After *Muchnick*, that putative infringer may file a declaratory judgment lawsuit to vindicate a fair use claim. A declaratory judgment lawsuit, like proposed administrative processes for clearing fair uses of copyrighted works, see Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006), benefits would-be fair users with time to litigate and/or with financial resources.

broad copyright!), but instead treats fair use as an independent normative good — in distinct legal and experiential ways, beyond the particular value of a given work of authorship. It is important to see these codes of best practices not merely as instances of custom affirmed as informal law but also as institutional lattices on which practice and prospect may converge, enabling expression in contexts and communities that are related to copyright law. All expressive communities are related to copyright law, and they map onto the law (as the law maps onto them) in partial, imperfect ways.

Put a documentary filmmaker with an interest in using copyrighted material via a fair use justification up against the owner of a copyright in the filmmaker's source. The best practices perspective implicitly argues that the filmmaker's normative claim is not inherently subordinate to the copyright owner's claim; the temporal bias that usually prioritizes the copyright owner's position has been eliminated. The filmmaker is not necessarily the copyright rule, but neither is the filmmaker necessarily the copyright exception. The filmmaker has a normative claim to use of the copyrighted material that exists regardless of the scope of copyright in the first place. The filmmaker's claim might stand on and be disciplined by institutional context. Or the filmmaker's claim might stand on and be disciplined by a more abstract set of legal principles that describe competitive injury and the public good. The version that we prefer will depend on the scale of the map that we believe is right, on whether the map should be supplied exclusively by the government (acting as a flawed agent for the voting public⁶⁹), and ultimately on the effectiveness of the map in showing society its various destinations. Which version is more effective not just in guiding the filmmaker but in enabling the filmmaker to explore? Which version effectively accommodates not only the filmmaker but the others — copyright owners, knowledge producers and users — who wish to use the same map?

⁶⁹ See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857 (1987) (describing processes that underlie copyright legislation).