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## Rewriting Fair Use and the Future of Copyright Reform

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REWRITING FAIR USE AND THE FUTURE OF  
COPYRIGHT REFORM

By  
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## REWRITING FAIR USE AND THE FUTURE OF COPYRIGHT REFORM

MICHAEL J. MADISON\*

### I. INTRODUCTION

Well over fifty years have passed since a panel of the Second Circuit called the doctrine of fair use “the most troublesome in the whole law of copyright.”<sup>1</sup> Like all the king’s horses and all the king’s men, generations of scholars, judges, and lawyers have struggled since to make sense of fair use,<sup>2</sup> with little success. In articles published earlier, I offered some lengthy criticisms of fair use and proposals for how judges, in particular, might make better use of it.<sup>3</sup> This Essay distills those proposals into a different form. I offer not merely to reinterpret the fair use doctrine, but to rewrite the fair use statute.

The judges of a generation ago were wrestling with fair use as it had come to them since *Folsom v. Marsh*,<sup>4</sup> a judge-defined concept in a statutory domain. Nearly thirty years ago, fair use was codified for the first time. Yet today, the doctrine is no less troublesome, and in some ways, it is worse. Even in light of extensive judicial interpretation, the gaps, overlaps, ambiguities, and inconsistencies in the statutory text prompt even one of the leading members of the copyright bar to view the fair use statute with equal parts despair<sup>5</sup> and admiration.<sup>6</sup> This Essay briefly

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\* Associate Professor, University of Pittsburgh School of Law. Email: madison@law.pitt.edu. Copyright © 2005 Michael J. Madison. This Essay was prepared in connection with a presentation at the Modest Proposals 2.0 conference in February 2005 at Yeshiva University, Benjamin N. Cardozo School of Law. Many thanks to Justin Hughes for the invitation to participate in that conference, and to Ruth Okediji, Alec French, and Gigi Sohn for commenting on this proposal.

<sup>1</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

<sup>2</sup> See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT (1978); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639 (2004); *Ty, Inc. v. Publications Int’l, Ltd.*, 292 F.3d 512 (7th Cir. 2002) (Posner, J.).

<sup>3</sup> See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) [hereinafter Madison, *Patterns*]; Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998) [hereinafter Madison, *Legal-Ware*].

<sup>4</sup> 9 F. Cas. 342, 349 (D. Mass. 1841).

<sup>5</sup> See David Nimmer, *“Fairest of Them All” and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 282 (Winter/Spring 2003) (“By now, we have come far enough to

recounts the key dimensions of the current problem and suggests a route to repairing the statute.

Because I am well-aware that any proposal to comprehensively redraft Section 107 of the Copyright Act is a non-starter in practical terms, in truth I am using the fair use question to introduce a specific theme into discussions of copyright reform more generally. That theme is this: like all law, copyright has to work out the relationship between its own formal structures, on the one hand, and the informal structures of social life, on the other, and it has to do so both in its day-to-day application and in its formal framing. One way to do that is to focus, as copyright conventionally has done, on “authors” and “works” and markets. I suggest that in many respects copyright is better understood in terms of practices and processes, that is, in terms of how creative things are produced as well as in terms of who does the producing and what is produced. Fair use is one place in the law where an explicit shift in emphasis with that end in mind would be valuable, both in rationalizing the history of the doctrine and in making it more sensible prospectively.

## II. THREE FAIR USE PROBLEMS

Theoretical and policy debates underlying fair use are not my focus, but they are inevitably part of framing the problem. In abstract terms, fair use matters to copyright law, and to innovation and information law, because fair use has come to embody many of the most important conceptual limits on the seeming absoluteness of copyright. Fair use marks the precious and elusive line between the future and the present, and between the good of the many and the good of the one, that exists for reasons of justice, fairness, utility, or otherwise. The world is a better place in some small measure because fair use enables it to be so. Fair use also matters concretely, at least so long as society takes seriously the notion that copyright is a system of limited rights and interests. Other limits on copyright’s scope, such as the idea/expression distinction, the first sale doctrine, and the term of copyright, have come under such sustained attack that they are widely viewed, in practical

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realize that, pious words notwithstanding, it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases.”).

<sup>6</sup> See David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1275 (2004) (“As much as transparency gains in allowing advance planning of one’s affairs, more is lost by sacrificing the ability to achieve justice in each of the foregoing cases as well as countless others. For these reasons, Congress has deliberately sacrificed transparency in the interest of equity.”).

terms, as unimportant. The idea/expression distinction is almost impossibly elusive; licensing of digital content presses the first sale doctrine nearly to the breaking point; and in *Eldred v. Ashcroft*<sup>7</sup> the Supreme Court determined that Congress has nearly unlimited discretion in setting copyright's duration. Fair use appears to be the battleground state of copyright politics. To paraphrase Lloyd Weinreb, fair use embodies the true meaning of copyright<sup>8</sup>—whatever that is.

Both abstractly and concretely, however, fair use has been spectacularly unsuccessful as a substantive player in copyright theory and practice. The persistence and variety of copyright disputes over fair use strongly suggest that in the practice of creativity and innovation the doctrine has failed to fulfill its liberating premise. There are three classes of problems in contemporary fair use debates; I draw examples from each one.

The first sort of problem is what might be called “classic” fair use, or what the dissenters in *Sony Corp. of America v. Universal City Studios*<sup>9</sup> characterized as the unauthorized but nonetheless “productive” use of copyrighted works.<sup>10</sup> For example, the Center for Social Media at American University recently released a report summarizing an extensive series of interviews with documentary filmmakers, which indicted the copyright-owning community and copyright law in general for failing to adequately enable filmmakers to make “productive” use of copyrighted audio and video excerpts as part of documentary films.<sup>11</sup> There is little doubt that copyright law should enable so-called “productive” fair use. There is little agreement, however, on what constitutes “productive” use or on when seeking permission to make such use should be excused.

The second sort of problem is what might be called “pure” personal use, descended from the time-shifting of broadcast television programs that was implicitly recognized as fair use by the *Sony* majority. The legitimacy of “personal” use of peer-to-peer file sharing systems and of the TiVo “personal” digital video recorder falls into this category.<sup>12</sup> Notwithstanding *Sony*, there is broad

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<sup>7</sup> 537 U.S. 186 (2003).

<sup>8</sup> See Lloyd L. Weinreb, *Fair Use*, 67 *FORDHAM L. REV.* 1291, 1292 (1999).

<sup>9</sup> 464 U.S. 417 (1984).

<sup>10</sup> *Id.* at 478 (Blackmun, J., dissenting).

<sup>11</sup> See *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (November 2004), [http://www.centerforsocialmedia.org/rock/backgrounddocs/printable\\_rightsreport.pdf](http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf)

<sup>12</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *rev'd*, 125 S. Ct. 2764 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The legality of

debate concerning whether fair use is ever an appropriate copyright concept for mediating “personal” concerns, such as individual privacy and autonomy.

In between these two, there is a third problem, what might be called “personal productive use.”<sup>13</sup> Here, “mere” individuals (as opposed to professional or trained creators) exercise some of the kinds of editorial or creative discretion that classically characterizes the “creative” or “productive” end of the fair use spectrum. One example is the recent controversy over the sale and rental of pre-recorded DVDs that omit content believed to be objectionable to some consumers—but without the permission of the films’ producers, directors, or copyright owners.<sup>14</sup> Related technology would enable consumers to skip objectionable content on unedited DVDs. The point of the technology is to enable “personal use” of the copyrighted work (if you bought, borrowed, or rented a DVD legitimately, you should be able to watch the parts you want to, and not watch the parts that you don’t want to), but this is *customized* or arguably *creative* personal use (the resulting “edited” film may closely resembled a version edited for television broadcast).

The difficulty with this third problem is that it seems to reverse the typical copyright equation. Usually, to the extent that using such technology is characterized as “productive use,” it would seem more plausibly to be “fair” use. “Mere” personal use might be treated differently. In this instance, however, the positions of the parties are reversed—a situation that may become more frequent as tools and practices of creativity expand beyond traditional creative communities. In disputes that fall into the “personal productive use” category, consumers argue that the use constitutes “mere” personal (i.e., consumptive) use, and copyright owners contend that it constitutes “creative” reuse, and that it crosses the line that separates fair use from unauthorized preparation of a

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the TiVo has not been litigated. In conceptually similar cases, different federal trial courts have determined that the Digital Millennium Copyright Act prohibited selling software that enabled making backup copies of DVDs, *see* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004), and copyright law prohibited the unauthorized operation of an Internet-based digital music storage and retrieval system. *See* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

<sup>13</sup> *See* Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 407-20 (2003).

<sup>14</sup> The leading companies in this “Edited Hollywood movie” market are CleanFlicks, which rents “edited” films, *see* CleanFlicks It’s About Choice!, <http://www.cleanflicks.com> (last visited August 25, 2005), and ClearPlay, which distributes filtering technology that works with DVD players. *See* ClearPlay, <http://www.clearplay.com> (last visited August 25, 2005).

derivative work. Which framing of the dispute is the right one?<sup>15</sup> The law lacks clear criteria for choosing, just as in the first two sorts of problems, it lacks a clear vocabulary for deciding the case on the merits.

I have argued that courts have better tools for dealing with these problems than they are usually given credit for,<sup>16</sup> but even in the best of worlds, courts are *slow*. How has the *legislative* process responded? Congress's approach has been to undertake mostly incremental changes in response to particular concrete problems. In particular, Congress has addressed the distinction between "productive" use and "personal" use by trying to cabin "personal" use tightly so that it does not engulf all reproduction, distribution, and modification of consumer-oriented copyrighted material. Thus, in the Audio Home Recording Act (AHRA) of 1992, Congress created a limited exemption from liability for "the noncommercial use by a consumer of [a limited class of digital audio recording devices] for making digital musical recordings or analog musical recordings."<sup>17</sup> Efforts to protect consumer use of technology to display edited DVDs have tied exemptions to use of such technology as *private* use, in *the household*, serving *only* that household,<sup>18</sup> in effect making sure that "personal" means "one family and one family only." Proposed legislation that would regulate or even ban file sharing technologies outright have likewise focused on distinctions between "private" and "public" use.<sup>19</sup> Recent Congressional efforts to address the "productive use" side of the divide consist of excruciatingly detailed exceptions to liability under the anti-circumvention provisions of the Digital

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<sup>15</sup> Wendy Gordon recently suggested that copyright law look to distinguish the "expressive" user from the "instrumentalist user" in a variety of contexts. See Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 79, 88 (2004). Her project—acquiring "a better conceptual map of the generative process and the mix of incentives that serve it," *id.* at 75—is similar to mine, though she doesn't offer much detail regarding how to apply her distinction in practice, and (in contrast to mine) it remains resolutely individualistic.

<sup>16</sup> See Madison, *Patterns*, *supra* note 3, at 1645-65.

<sup>17</sup> 17 U.S.C. § 1008 (2000).

<sup>18</sup> The Family Movie Act protects distribution of DVDs edited by CleanFlicks and distribution of ClearPlay viewing technology. See Family Movie Act of 2005, Pub. L. No. 109-9, § 201, 119 Stat. 223 (codified at 17 U.S.C.A. § 110(11) (West 2005)).

<sup>19</sup> The proposed Author, Consumer, and Computer Owner Protection and Security (ACCOPS) Act of 2003 would have criminalized "the placing of a copyrighted work, without the authorization of the copyright owner, on a computer network accessible to members of the public who are able to copy the work through such access." See H.R. 2752 (108th Cong. (1st Sess. 2004)). Efforts to "liberalize" fair use under the Digital Millennium Copyright Act have proposed related steps, enumerating situations where circumventing technological protection measures would be lawful. See Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. §§ 3-4 (2002); Digital Media Consumers' Rights Act of 2003, H.R. 107, 108th Cong. § 5(a) (2003).

Millennium Copyright Act.<sup>20</sup> Otherwise, the question is left for development in the courts.<sup>21</sup> But anxiety about unpredictable outcomes is leading to pressure to define “productive” as well. The problem of documentary filmmaking has prompted discussion of two statutory models, one a sort of safe harbor for re-use of certain amounts of copyrighted material, the other a centralized content clearinghouse for audio-visual materials, similar to the Copyright Clearance Center for periodicals and other text.<sup>22</sup>

In both “personal” and “productive” use examples, actual and proposed legislative reform has avoided the fair use statute entirely, treating it as all but useless as written. Since the complexity of the copyright statute already compares unfavorably to the tax code, it seems unwise to “solve” fair use by adding more details to the statute. Among other things, this is the lesson of the AHRA. As the technological innovation that prompted passage of the AHRA was rejected by the marketplace, the “personal use” exemption added in 1992 has been relegated to what amounts to a copyright ghetto.<sup>23</sup> If fair use is to mean anything substantive, and if statutory reform is to enable it to do so, then the task is not to tinker with its details, but to rewrite fair use itself.<sup>24</sup>

### III. AN IDEAL SOLUTION

The current problem, in other words, is the emptiness of Section 107. What do I mean by “emptiness”? I mean that the statute itself has become not the embodiment of copyright’s blended nature, as Professor Weinreb argued, but a placeholder for all manner of arguments about limits, many of which have little to either with “productivity” or “personal use,” without doing much at all to help courts, lawyers, litigants, and plain old ordinary folk reason their way to solutions. It’s what prompted Professor Lessig

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<sup>20</sup> See 17 U.S.C. §§ 1201(d)-(i) (2000).

<sup>21</sup> In mid-2005, the Librarian of Congress appointed a “Section 108 Study Group” to examine whether and how Section 108 of the Copyright Act, which provides certain exceptions and limitations to libraries and archives, might be revised to account for digital media.

<sup>22</sup> See *Untold Stories*, *supra* note 11.

<sup>23</sup> The section has been addressed only once by appellate courts. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (noting relevance of section 1008, *in dicta*, in opinion deciding that manufacturer of portable device for playback of mp3 computer files was not required to comply with technical and administrative requirements of the AHRA).

<sup>24</sup> My approach under American law contrasts with the European method, which has been to itemize exceptions and limitations at great length. See Council Directive 2001/29/EC of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5, 2001 O.J. (L167/10).

to characterize fair use as “the right to hire a lawyer,”<sup>25</sup> and it’s the problem of the supplicant who crawls his way to the top of the mountain to seek wisdom and spiritual guidance from the seer and who asks, above all else, “What is fair use?”<sup>26</sup> Fair use has become too many things to too many people to be of much specific value to anyone.

I don’t suppose that repairing Section 107 will resolve the political and structural forces that seek highly specified “solutions” to fair use controversies, rather than content for the emptiness. I do believe, however, that revising the statute can narrow the range of fair use issues that courts seem to be incapable of resolving on a systematic basis; that lawyers, as a result, are incapable of analyzing systematically for purposes of advising their clients; and that, finally, end up in the legislative hopper. As a matter of seat-of-the-pants comparative institutional analysis, Congress is the wrong body to be making fine-grained fair use judgments. If Congress wants to avoid that responsibility, however, it should build into the statute a mechanism not only for keeping and resolving fair use cases at the grass roots level, but for building a body of fair use law that is sufficiently stable that it resists both light to moderate pressure for legislative relief with respect to “little” fair use problems. A better statute won’t resolve all of the problems currently presented under the banner of fair use. Some of those problems don’t belong in fair use in the first place and should be dealt with elsewhere in the Copyright Act—as problems of first sale under Section 109, or of the distinction between intangible “works of authorship” and tangible “copies,” under Section 202, or of the definition of “copies” under Section 101, for example, or “works of authorship” under Section 102. Fair use has been used, perhaps wrongly, as a stalking horse for broader philosophical concerns.<sup>27</sup> Each and all of these are intellectual swamps, ready to be recharacterized metaphorically and put to productive use as valuable wetlands.

Here, I can tackle only fair use. Repairing Section 107 would involve more than reworking the syntax of the statute (though the

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<sup>25</sup> LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 287 (2004).

<sup>26</sup> The quotation is the outline from a cartoon reproduced in MELVILLE B. NIMMER, ET AL., *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION AND UNFAIR COMPETITION, DEFAMATION, PRIVACY* 504 (5th ed. 1998).

<sup>27</sup> Rebecca Tushnet argued recently that fair use is a poor vehicle for First Amendment values, since the First Amendment recognizes an autonomy interest in out-and-out copying of copyrighted works that may be in fundamental tension with the promotion of “creative” re-use as fair use. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535 (2004).

syntactical problems are important). Giving Section 107 content means engaging in a process of reimagination. That process has, I believe, at least three steps: First is to appreciate what practice has revealed about the problems with and goals of Section 107. Second is to imagine what an idealized version of fair use would look like, bearing in mind what we know has worked well in practice, and what has worked badly. Third, and finally, is to consider whether and how to move from the current problematic text to something approximating the idealized version.<sup>28</sup>

A. *Inventoring the Goals and Defects of Section 107*

What is fair use designed to do? There are, broadly speaking, two answers to this question. One answer focuses on the exclusive rights reserved to the copyright owner, and it ties fair use to circumstances where unauthorized use doesn't really injure the value associated with those rights. Narrow versions of this argument focus on alleged "market failures," in which the copyright owner might not be willing to give permission for use of the work in legitimate circumstances;<sup>29</sup> other versions focus on balancing the economic value of the copyright owner's interest and the economic value of the putative infringer's interest;<sup>30</sup> still others cast a wider net, trying somehow to balance the value of the copyright interest against the social value of the use.<sup>31</sup>

The second answer more directly confronts the good to be served by allowing unauthorized use in certain circumstances. The standard may be phrased generally, as the Supreme Court confirmed in *Campbell v. Acuff-Rose Music, Inc.*, so that fair use is intended to apply in circumstances where liability "would stifle the very creativity which that law is designed to foster."<sup>32</sup> Or, fair use may be one place in copyright where courts should find affirmative expression of the values underlying the First Amendment.<sup>33</sup> Professor Fisher has mused that fair use may play a significant role in helping society to achieve "a substantive conception of a just and attractive intellectual culture."<sup>34</sup> And at the end of the day, above

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<sup>28</sup> The technique isn't mine. I've borrowed it from BARRY NALEBUFF AND IAN AYRES, *WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL* (2003).

<sup>29</sup> See, e.g., Gordon, *supra* note 2.

<sup>30</sup> See, e.g., Patry & Posner, *supra* note 2.

<sup>31</sup> See, e.g., Fisher, *supra* note 2.

<sup>32</sup> 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>33</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 220, (2005) (referring to fair use as a "traditional First Amendment safeguard" and citing the Court's opinion to that effect in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)).

<sup>34</sup> See Fisher, *supra* note 2, at 1744.

all things fair use should strive to be, well, fair.<sup>35</sup>

The problem with the first answer is that try as they might, its adherents cannot avoid its inevitable recourse to both rhetoric and substantive analysis that depend on the marketplace. Fair use is an exception to the presumption that the copyright owner should control markets for the work. If an exception is claimed, it should be first measured against markets, both existing and future.<sup>36</sup> If a market transaction is feasible, then the rule is (or should be) that the copyist should pay the copyright owner's price. On this reading, as observers have noted, as expanding technology and reduced cost facilitates more market transfers, fair use tends to diminish. Fair use has no normative bite. It exists as the market allows it to. In this case, there is little reason for hue and cry over inadequacy of the fair use doctrine or the fair use statute, though one might simplify matters considerably by either eliminating the doctrine entirely or reducing the statutory text to forcing consideration solely of the effect of the defendant's use on the market for the owner's work.<sup>37</sup> Of the current four fair use "factors," only this one factor is really important.

Alternatively, some who offer a market or economic balancing answer insist that some market "failures" will be sufficiently persistent (such as an author's reluctance to license the work of the critic, or the injustice of allowing a first author to capture the economic value associated with a genuinely "transformative" use by a second) that fair use is needed to remedy the situation and allow the use to proceed. Formulations of the first answer at times include exceptions of this sort. In that case, market and economically-oriented justifications turn out to be, in truth, normative visions of fair use constituted by the premise that some uses of copyrighted works should proceed just because we think that they should, whether or not some actual or fictive "market" is injured.<sup>38</sup>

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<sup>35</sup> See JESSICA LITMAN, *DIGITAL COPYRIGHT* 179-84 (2001) (advocating a return to a copyright framework that is comprehensible to ordinary consumers); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1161 (1990) (concluding that fair use remains, ultimately, an appeal to fairness).

<sup>36</sup> Wendy Gordon's recent proposal to look to "expressive" use is a move away from defining privileged use negatively. See Gordon, *supra* note 15. If Rebecca Tushnet is right about the expressive virtue of pure reproduction of others' work, see Tushnet, *supra* note 27, then it's not clear that the proposal, as such, really avoids dependence on market constructs.

<sup>37</sup> For an example of a proposal that tends to point in this direction, see Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

<sup>38</sup> See Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297 (2004).

I am unapologetically in the second camp to begin with, so I welcome this revision to the economic story. But the second answer to the fair use problem is no perfect solution. Even if courts have been deciding cases based on an unarticulated normative vision of the good, the standards that they have used—“is the plaintiff stifling creativity?” (translated by the Court in *Campbell* as “did the defendant ‘transform’ the plaintiff’s work?”<sup>39</sup>)—are just short of useless as substantive guides to behavior and decision-making.<sup>40</sup>

The difficulty is finding a way in the statute to articulate the premise that fair use shelters use of copyrighted material in circumstances where we are willing simply to disregard economic injury claimed by the copyright owner, and to do so in a way that is both syntactically and substantively coherent.

Syntactically, the defects in the fair use statute are all too clear. Notwithstanding David Nimmer’s conclusion that Section 107 is perfectly fine as written,<sup>41</sup> the truth is that the text is all but incoherent. Section 107 characterizes its subject matter as “fair use,” though this is an exception to liability under Title 17, and Title 17 otherwise sets liability in the context of “reproduction,” “distribution,” “public display,” and so on—not in the context of “use.” Section 107 begins with a preamble that identifies what appear to be paradigmatic or exemplary “fair uses,” but nowhere does the text provide that these things (“news reporting,” “criticism”) are to be regarded presumptively as non-infringing or even that they should guide decision-making. The statute offers four “factors” that courts may consider when evaluating a claim of fair use, yet it doesn’t explain how those factors relate to the list of exemplary uses, or to each other. Depending on the facts of the case, the factors may be redundant, or inconsistent, or possibly

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<sup>39</sup> See *Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

<sup>40</sup> There is certainly something to the notion that the law should track intuitive senses of “fairness,” but common or intuitive fairness as such is both too broad and too narrow a basis for framing fair use. It’s too broad for the oft-cited reason that anything, framed appropriately, might be alleged to be “fair.” It’s too narrow in the sense that the three illustrative cases cited in Part II suggest that our intuitions may not keep up with what are allegedly “fair” circumstances. The CleanFlicks and file sharing examples are characterized by widely disparate intuitions. The documentary filmmaking example may be supported by no popular intuitions whatsoever. Even within the filmmaking community, there may be a common intuition—that an appropriate licensing regime is needed—that doesn’t match an arguably “objective” view that this example appears to be a paradigmatic case for fair use. The appeal to intuition succeeds, though, in calling out the idea that the concept of fair use should be stable and persistent across time.

<sup>41</sup> See Nimmer, *supra* note 6, at 1273-75.

both. The legislative history urges that the statute be treated as an extension of the decades-long tradition of judicial discretion in applying fair use to the case at hand,<sup>42</sup> yet it also urges that each case be treated on a fact-specific basis.<sup>43</sup> As to the burden of proof, the statute indicates that “fair use” is “not an infringement,” suggesting that the party claiming infringement ought to be responsible for pleading and/or proving an absence of fair use, but over the last decade it has become an established rule of practice that fair use is nothing more than an affirmative defense, waivable both during the course of a lawsuit, and in advance.<sup>44</sup> About the only reasonably clear text in the statute is its last sentence, added in 1992,<sup>45</sup> that purports to clarify that fair use applies to re-use of unpublished works as well as to published ones. I say “purports” because the sentence is reasonably clear on its own, but like the rest of the statute it lacks any clear relationship to the whole.

Substantive defects fall into two groups, one that I characterize as “external” to the fair use statute, and one that I characterize as “internal.” Internal problems have to do with the substance of fair use itself. First, as I noted above, notwithstanding the long *history* of fair use, and the abundance of fair use *theory*, there is no coherent body of fair use *law*. Contemporary commercial practice pushes extremely hard toward copyright markets and toward minimization or elimination of fair use. Any possible competing paradigm needs a robust practice behind it.<sup>46</sup> Yet there is none, and the multi-factor standard given in the statute seems calculated to prevent one from developing. Not all cases of confirmed “fair use” need to fit a particular, timeless paradigm of acceptability, but it has been a key failing of Section 107 that courts usually have treated fair use as a question that arises *sui generis*. Courts frequently refuse to treat a new case primarily as similar to or different from an older case. The result is that arguably fair uses are systematically disadvantaged. The fair use statute, in other words, has prevented courts from doing with fair use what courts do with other legal concepts. Courts have failed to build a

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<sup>42</sup> See H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

<sup>43</sup> See *id.*

<sup>44</sup> See *Campbell*, 510 U.S. at 590. On the inconsistency between this standard and earlier practice, endorsed by the Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), see Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 989 (2002).

<sup>45</sup> The amendment was a reaction to the categorical approach concluding that fair use did not apply to unpublished works, seen in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), and *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989).

<sup>46</sup> See Madison, *Legal-Ware*, *supra* note 3, at 1111-32.

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common law of fair use, one that consists not merely of many cases applying a common rule, but instead a cluster of cases in which judges are listening to, echoing, and responding to one another in articulating their senses of the law.<sup>47</sup>

External problems have to do with the relationship between fair use and other copyright doctrines. The substantive emptiness of fair use makes it something of a dumping ground for copyright analysis that courts can't manage in other areas. There is the lack of clarity in the relationship between Section 107 and other statutory exceptions to infringement, including Section 110 (special privileges for certain not-for-profit uses); between fair use and copyright's compulsory and statutory licenses (Sections 114, 115, 119, and 121); and between the role of fair use in claims for "copyright infringement" and claims for "circumvention of technological protection measures" under the Digital Millennium Copyright Act. Non-statutory "external" concerns include whether fair use should be a statutory home for a "de minimis" defense to infringement;<sup>48</sup> the relationship between fair use and substantial similarity and idea/expression analysis;<sup>49</sup> and how fair use should be treated in analyzing claims of contributory and vicarious liability for copyright infringement.<sup>50</sup> What might be fair use questions are treated doctrinally as other kinds of questions, muddying the doctrinal waters elsewhere. Questions better resolved elsewhere are treated as fair use problems, blurring the proper scope of fair use.

The most important substantive defect of the text may be its failure to make any sense out of the problem of aggregating the allegedly "fair" or "unfair" use of a copyrighted work by an

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<sup>47</sup> See Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001) (describing cognitive science understanding of analogical legal reasoning). One might react not by reinforcing the judicial role, but by reducing it. See, e.g., Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 65-70 (2001) (proposing a specification for a computer-implemented fair use rights management system).

<sup>48</sup> See *Newton v. Diamond*, 349 F. 3d 591 (9th Cir. 2003) (holding that by virtue of defendant's *de minimis* use, the plaintiff had failed to make out a prima facie case of infringement).

<sup>49</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (concluding that defendant's parody of *Gone With the Wind* was substantially similar to the original, but that it was so transformative that, in light of First Amendment interests at stake, a preliminary injunction against its publication was not warranted).

<sup>50</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-55 (1984) (analyzing fair use interests of users of videocassette recorders); Glynn S. Lunney, Jr., Brief of Amicus Curiae Law Professors in Support of Respondents, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480) (cautioning against adjudicating fair use interests of parties not represented in contributory infringement litigation).

individual.<sup>51</sup> On the one hand, the statute is concerned with “the use” of the copyrighted work, and in “the use” the statute clearly contemplates a focus on the individual defendant and on what the individual defendant is doing. Proponents of market-oriented interpretations of fair use tend to seize on this perspective and are extremely reluctant to let it go.

On the other hand, the statute clearly makes sense only if a given fair use problem is characterized in social terms as well as in individual terms. The point is that fair use is fair because the fair “users” are doing *things that society wants done, even if—and possibly because—everyone does them*. The idea of only comparing the value of the copyright owner’s use to the value of the defendant’s use (whether done internally, from the perspective of the parties, or externally, from some “objective” perspective) is incoherent. Once we assume that the work of authorship is sufficiently creative to justify protection by copyright, there can be no principled reason for declaring that the defendant’s work is more worthy, either because it is somehow “more” creative or because it serves some other “more important” policy interest, such as privacy or autonomy. At the level of individual authors, one author is as deserving as the next, whatever our philosophical baseline for protection. The second use wins only where society trumps the individual, and that means that we need some *mechanism* in fair use for linking what the individual defendant is doing to what society gets out of the deal. The typical formal solution to the problem—declaring that creative re-uses provide third-party benefits that are systematically incapable of being internalized in two-party transactions—doesn’t wash as a practical matter.<sup>52</sup> Neither courts nor litigants can take “third party benefits” to the bank unless they have some structured sense for figuring out what those third party benefits *are*.

### B. *An Ideal Law of Fair Use*

In asking and answering the question: if we were to start from scratch, what would the law of fair use look like?, I begin by positing that we need a fair use doctrine of some sort. My position is mostly intuitive, though it has some support in a recent article by

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<sup>51</sup> See Madison, *Patterns*, *supra* note 3, at 1530.

<sup>52</sup> See Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000). It’s not clear that it washes as a formal matter, either, since there is no way to determine whether and how these alleged third-party effects happen. For what it’s worth, and as a matter of faith, I am highly sympathetic to the intuition that third-party effects are central to copyright generally.

Diane Zimmerman.<sup>53</sup> Professor Zimmerman argues that a public domain of some sort might be a *constitutional* requirement for copyright law, a position she finds justified in the First Amendment, rather than in the Copyright Clause. She doesn't address fair use itself, but her argument might be extended just a bit as follows: fair use is a part of copyright's public domain,<sup>54</sup> and if there were no fair use statute, a meaningful fair use doctrine might nonetheless be a constitutional requirement by virtue of the subtle overlap between copyright law and the First Amendment. There is support for this proposition, though it is slight, in dicta in *Harper & Row, Publishers v. Nation Enterprises*<sup>55</sup> and in *Eldred v. Ashcroft*.<sup>56</sup> The idea of *repealing* Section 107 has a certain contrarian appeal: so long as Congress specified that the repeal should not be interpreted as bearing on the merits or substance of the law,<sup>57</sup> the repeal would challenge courts to flesh out the scope of the First Amendment principle articulated in those cases.

Combining the Court's comments, the tradition of judicially-endorsed fair use, and a comprehensive copyright statute that otherwise sets the odds heavily in the copyright owner's favor, I conclude that there seems to be little reason to deny the world a statute that gives courts a structure for adjudicating cases and parties some *ex ante* guidance on what fair use looks like, even if that guidance, in revised form, remains far from perfect. If fair use is supposed to stand for something affirmative, we should take our best shot at stating what it is. A fair use doctrine may or may not be a constitutional requirement. A fair use statute is a pragmatic necessity.

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<sup>53</sup> See Zimmerman, *supra* note 38. For a more skeptical view of fair use, see John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005) (characterizing fair use as the triumph of an expansive natural law theory of copyright protection, and arguing that fair use undermines copyright's essential policy goal).

<sup>54</sup> My reading of the public domain here is an expansive one. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003) (describing different theories of the public domain).

<sup>55</sup> 471 U.S. 539, 560 (1985) ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.")

<sup>56</sup> 537 U.S. 186, 221 (2003) (noting that "copyright's built-in free speech safeguards are generally adequate to address" First Amendment concerns).

<sup>57</sup> Here I allude to the definition of "work made for hire" that appears in the Copyright Act, see 17 U.S.C. § 107 (2000), which reflects the controversy over Congress's amending that definition in 1999 to add sound recordings to the list of works eligible for that characterization, and the repeal of that amendment in 2000. See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y 387, 390-94 (2001).

Once we have a statute, in general outline it should respond to the general theoretical and policy concerns distinguished above, and it should avoid the syntactical and substantive traps of the current text:

- the statute should confirm circumstances under which infringing acts will not be treated legally as infringing, for reasons having to do with the substantive value of what the defendant is doing and independent of arguable harm to the copyright owner;
- the statute should be internally syntactically comprehensible;
- the statute should be structurally coherent with respect to the balance of the copyright statute;
- the statute should contain or refer to a mechanism for establishing, building, and relying on a body of precedent; and
- in order to serve as a suitable tool for planning as well as adjudication, the statute should incorporate a mechanism for reconciling individual and group interests in non-infringing use.

I largely set aside two potentially significant points. First, I treat fair use as a question of substantive law rather than as a question of remedies. A handful of cases have suggested that an allegedly infringing use might be accommodated in the copyright scheme by a sort of judicial compulsory license: the denial of injunctive relief, coupled with an award of damages.<sup>58</sup> Professor Zimmerman's argument suggests a similar distinction. The public domain is in a sense not fully public if it is governed by a compulsory license.<sup>59</sup>

Second, an American scheme of fair use cannot operate in a vacuum. The United States must be respectful of its international copyright obligations. Article 9(2) of the Berne Convention allows for exceptions to the reproduction right in national law, "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."<sup>60</sup> Article 10 of the

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<sup>58</sup> See *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 505-06 (2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994). Cf. *Rubin v. Brooks/Cole Publ'g Co.*, 836 F. Supp. 909, 922 (D. Mass. 1993) (awarding no damages for past infringement, but enjoining future use). See also Fisher, *supra* note 2, at 1723-26 (commending compulsory license solutions to conflicts over copyright entitlements).

<sup>59</sup> See Zimmerman, *supra* note 38, at 366-70.

<sup>60</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept.

Berne Convention stipulates that any national law of fair use should be consistent with “fair practice.”<sup>61</sup> To the extent that the current American law of fair use might be in conflict with those standards,<sup>62</sup> I assume that any improvement to the statute that renders its application more predictable would at least lessen such a conflict, and it might lead to some harmonization of national “fair dealing” and “fair use” standards.<sup>63</sup>

Treating the foregoing stipulations as specifications for a product, I offer the following idealized fair use implementation:

- [1] Exclusive rights in copyright shall not extend to any use of a copyrighted work that society regularly values in itself.

This isn’t a legislative proposal. Instead, I have tried to focus on two points. First, the phrasing addresses my central substantive concern, that the case for fair use is strongest when the defendant can persuasively argue that the value of her activity to society clearly outweighs even stipulated loss to the copyright owner. That balance tips most sharply in favor of fair use when the defendant is doing the sort of thing that society wants done regardless of, and even in spite of, the claim of some rights holder to authorize the activity. Second, the phrasing addresses the concern that fair use decision-making is at least unpredictable and at worst arbitrary. Judicial treatment of fair use as a case-by-case “safety valve” for a variety of policy, fairness, and/or personal autonomy concerns has tended, over time, substantially to reduce its usefulness in dealing with substantive policy concerns, as well as its usefulness in day-to-day planning in intellectual property economies. If society values

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9, 1886, as last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (“Berne Convention”). The TRIPs agreement has a similar provision. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), art. 13 (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”).

<sup>61</sup> Berne Convention, *supra* note 60, art. 10.

<sup>62</sup> Ruth Okediji argues that the American doctrine of fair use is broader than what the Berne Convention allows. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75 (2000).

<sup>63</sup> Canadian copyright law, for example, recognizes a right of “fair dealing” in terms that parallel my proposal. *See* Copyright Act, R.S.C., c. C-42, Part III (1985) (Can.); § 29 (“for the purpose of research or private study”); § 29.1 (“for the purpose of criticism or review”); § 29.2 (“for the purpose of news reporting”); *see also* CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13. In the United Kingdom, the Copyright, Design and Patents Act (1988) (c. 48) exempts fair dealing “for the purposes of research or private study” (§ 29); “for the purpose of criticism or review” (§ 30); and “for the purpose of reporting current events” (§ 30).

criticism, for example, then as a policy matter the law should embody a mechanism that consistently recognizes and protects it. As a matter of simple fairness, too, something that we recognize as criticism should be treated consistently in the law. Fair use applies where the defendant is doing something that is *regularly* valued as such.

There is one glaring problem with this formulation, and it is a problem deliberately obscured in my litany of defects with the fair use statute. Some would say: Even if we can accomplish the formidable task of figuring out uses of copyrighted material “that society regularly values in itself,” how should we evaluate those social values against the presumptive value given the exclusive rights of the copyright holder? Have I not simply fallen into the trap that I exposed early on, replacing one problematic balancing test with another?

I argue that I have not, and I elaborate that argument, and work toward a more pragmatic version of my proposal, in the final Part of this Essay.

#### IV. REWRITING TODAY’S FAIR USE

The substantive and procedural halves of my idealized suggestion depend on a single underlying concept, that there exist social structures that persist over time. In my formulation, I’ve characterized these as uses that “society values in themselves,” on a *regular* basis. “Regularity” captures, cryptically, both the substantive role of social structures in defining the nature of the individual use (a fair use is not an idiosyncratic use, but is part of a pattern of related uses), and the procedural goal of building a body of fair use jurisprudence (as use that is fair today ordinarily ought to have been fair yesterday, and should be fair tomorrow). Put more descriptively, I refer to these patterns as “things that society wants done,” and things that we recognize society has wanted done consistently in the past, and is likely to continue to want done consistently in the future. These structures may be internal or external to copyright law. They may be internal in the sense that those things or structures may underlie the production of additional expressive materials. They may be external in the sense that the expressive materials in question serve principally as anchors for valuable behaviors.<sup>64</sup> The two aren’t perfectly

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<sup>64</sup> Fair use as a legal matter may be the policy cousin of the concept of distributed cognition. See, e.g., Gilles Fauconnier & Mark Turner, *The Way We Think: Conceptual Blending and the Mind’s Hidden Complexities* (2002); Edwin Hutchins, *Cognition in the*

separable. My contention is that the history and practice of fair use in the courts suggests that these things are at the bottom of the fair use calculus, even if they are not often recognized as such.<sup>65</sup> By making them the explicit focus of fair use, I am trying not to change the law, but to bring into the open more clearly what I believe the law has long been about.

What remains, of course, is how to determine when “the social value of the use” is sufficiently great that the law should privilege it. When do we know that the defendant is engaged in a pattern or practice that society wants done, without a copyright owner’s permission, or even in spite of it? My answer is that demonstrating the existence of the pattern or practice itself is sufficient to demonstrate that the sought-after social good exists.

This is the point, then, at which I reject various forms of balancing. *Folsom v. Marsh* appears to teach that balancing is required. According to that case, reproduction of the work is not infringing based on “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.”<sup>66</sup> Read as balancing, the weakness in the *Folsom* formulation, as in the modern statute, is that it tends to force a one-to-one comparison of the values of the original copyrighted work and of the allegedly infringing work, a comparison that almost never flatters the accused work. The “transformative use” standard that the Court in *Campbell* borrowed from Judge Leval has been interpreted widely, and wrongly, as validating precisely this approach to fair use. If the defendant’s work “transforms” the plaintiff’s work, then the defendant wins. It is possible to use this test to reach sensible results, but the reasoning in these cases seems tortured, and it’s difficult to implement the rule on a universal basis. How transformative is transformative enough? No one ever knows until the appellate court sings.<sup>67</sup>

Some meaningful room for fair use emerges only when we look at *Folsom v. Marsh*, and the statutory framework that descends from it, as mandating that we take account of the broader social contexts in which the accused work was prepared and is being

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Wild (1995); Edwin Hutchins, *Material Anchors for Conceptual Blends*, 37 J. PRAGMATICS 1555 (2005) (describing process of “distributed cognition” in which human thought is grounded in material practice, rather than mental processes or structures); Madison, *Patterns*, *supra* note 3, at 1682-86.

<sup>65</sup> See Madison, *Patterns*, *supra* note 3, at 1586-1622.

<sup>66</sup> 9 F. Cas. 342, 349 (D. Mass. 1841).

<sup>67</sup> See Nimmer, *supra* note 5, at 287 n.95.

consumed. It isn't enough to conclude that society wants certain people to do certain "fair" things. Society wants these things done because of what society gets as a result. Fair use is fair, after all, because (we assume) that it generates social benefits that the market can't otherwise produce.<sup>68</sup> This was what *Folsom v. Marsh* really counsels, what the statute awkwardly pursues, and what courts have instinctively understood, even if they have had to articulate their reasons using the statutory vocabulary. Unlike most of the other statutory exceptions and limitations on the exclusive rights of the copyright owner,<sup>69</sup> fair use is not a market curative. Fair use is a knowing departure from the market.

How do we cabin this exception to avoid the problem that any individual, idiosyncratic use can claim that it's "not of the market," that is, how do we identify a genuine claim of fair use and distinguish that claim from an argument under some other (market-oriented) limitation on the rights of the copyright holder? The answer is to require that the arguably fair individual use be connected to some social structure. The statutory fair use factors, "nature of the use," "nature of the work," "nature of the portions used," and "effect on the market for the work" are each (and all) somewhat clumsy fact-based proxies for analyzing whether the use is the sort of thing that we ordinarily associate with market-based exploitation of the work. Something that we recognize as a social pattern or social practice, such as criticism and scholarship, exists and is valued precisely because it is not of the market. Individual use within that social practice will be constrained by it. Fair use is an individual use that is credibly tied to some larger, identifiable social practice. Multi-factor analysis has been a tool to measure the genuineness of the individual claim, rather than a balancing technique. Much of the debate about what is "productive" use and what is "personal" use of a copyrighted work, which I reported via the three fair use problems of Part II, consists of an argument about social practices.<sup>70</sup>

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

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<sup>68</sup> See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1 (1997).

<sup>69</sup> See *supra* notes 47-49 and accompanying text.

<sup>70</sup> Note that "personal use" drops out of the statute as an independent basis for fair use, on the likelihood that "privacy" and "autonomy" interests are too broadly and vaguely defined to serve as social structures or practices that would support fair use under this proposal.

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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. In response to the anticipated objection that the proposal wrongly turns lawyers into social scientists, I note that lawyers *are* amateur anthropologists as it is, and lawyers in fair use cases already engage in this sort of analysis and argument.<sup>71</sup> To be clear, my goal is not an algorithm for perfect and automatic decision-making, but instead a framework in which system participants can plan their affairs with a reasonable degree of certainty and courts can access structures that lend their decisions an acceptable degree of legitimacy. Decision-making with reference to identified and identifiable social practices offers such a framework.

I want to push the argument one step further, since to say that social practices can guide fair use to generate whatever it is that fair use is meant to offer is to damn my own proposal with faint praise. The affirmative case for social practices as fair use guideposts is this: Not only do I believe that there is a strong intuition, shared by courts and laypersons, that these social structures exist to a large degree autonomously of the law itself, there is an equal intuition—backed by some provocative social science research—that *the creativity that the copyright system seeks is generated not only by individuals (or firms) working alone in “innovation” markets, but emerges almost inevitably via the practice of socially-defined disciplines.*<sup>72</sup> That is, creativity depends on, even requires, the discipline of context.<sup>73</sup> The copyright system, it might be argued, encourages creativity not only by focusing on the end results of creative processes, but by structuring those processes themselves.<sup>74</sup> The dominant process is the market. Secondary but still important processes are valued *but*

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<sup>71</sup> See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 797 (9th Cir. 2003) (noting the defendant’s service of a report by an expert situating the defendant’s use of plaintiff’s Barbie doll in the context of contemporary art); *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1373 & n.9 (N.D. Ga. 2001) (noting defendant’s use of expert testimony to situate defendant’s work in context of African-American literature), *rev’d*, 268 F.3d 1257 (11th Cir. 2001).

<sup>72</sup> See Madison, *Patterns*, *supra* note 3, at 1677-87.

<sup>73</sup> *But see* Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 30-32 (2001) (describing American copyright law’s skepticism about respect for the context of art).

<sup>74</sup> *Cf.* Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331, 334 (1992) (noting ambiguity in *Feist Publications v. Rural Telephone Service* regarding whether “originality” in a copyright sense refers to “the work produced or . . . the activity producing it, or some of each.”).

*recognized* non-market structures. Courts look to the existence of those processes in judging claims of fair use. Creators, consumers, and lawyers can look to their existence in assessing plans. We do this intuitively as it is. I suggest organizing the statute in the same way.

In terms of melding this approach with the statute, what happens next? Given that we can't simply impose a perfect fair use statute, nor simply repeal the one we have, what's the next best solution? How do we move from an idealized doctrine to a practical one? Start with the existing text:

[2] Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>75</sup>

The goals of the idealized statute can be achieved in part simply by curing the syntactical problems of the current statute. References to “use” of the work in Section 107 can be modified to correspond directly to the acts that constitute infringement – reproduction, preparation of a derivative work, public performance, and public display. The exemplary uses in the preamble are clearly and obviously paradigmatic examples of the sorts of social practices that the statute was created to protect, and

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<sup>75</sup> 17 U.S.C. 107 (2000).

thus should be preserved. The four factors identified in the statute can be re-cast as tests for determining the existence of behavior that conforms to a valid social practice. In other words, they are ways in which litigants and courts can test for authenticity. The confusing character of the “market effect” inquiry under factor four, and the odd detail of the relevance of publication in the final sentence, can both be cured by clarifying the relationship of the four factors to the preamble. Rewriting the statute under these guidelines yields the following:

- [3] It is not a violation of this Title to reproduce, prepare a derivative work based upon, distribute, display or perform a work protected under this Title in connection with criticism, comment, news reporting, teaching, scholarship, research, or any other social practice. In determining the existence of such a social practice, the court may take into consideration—
- (1) the purpose and character of the use, including whether such use is of a commercial or nonprofit nature;
  - (2) the nature of the copyrighted work, including its published or unpublished status;
  - (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 market for the copyrighted work.

Much of the language remains mercilessly awkward. Removing ambiguities and redundancies, and solving for clarity, leaves us with:

- [4] It is not a violation of this Title to reproduce, prepare a derivative work based upon, distribute, display or perform a work protected under this Title in connection with criticism, comment, news reporting, teaching, scholarship, research, or any other social practice. In determining the existence of such a social practice, the court may take into consideration—
- (1) the purpose of the use;
  - (2) the nature of the copyrighted work;
  - (3) the amount of the work used; and

## (4) the injury to the copyright owner.

Two concerns remain. One is the extent to which the four factors in fact help the court identify a relevant social practice and the genuineness of an argument that the use is consistent with such a practice. I have argued elsewhere that authentic and genuine practices (including emerging practices that extend from existing behavior), and a given defendant's legitimate identification within that practice, can be established in two ways.<sup>76</sup> Both can be identified linguistically, accordingly to a pattern of language that defines members of the practice and what participants in the practice do, and behaviorally, by patterns of activity that define legitimate conduct within the bounds of the practice. The relics of the four factors get at these concerns only indirectly. This is no surprise, considering the fact that the factors were developed by Justice Story well over one hundred years before modern social science developed a vocabulary for identifying and studying them more systematically. Allowing courts to tap into that vocabulary would be far more productive and reliable than adhering to the ancient framework merely for the sake of tradition. As a result, the statute would be more robust if the four-factor test were discarded in its entirety, and litigants and courts encouraged directly to pursue an limited anthropological exercise.

The second concern is the absence of a specific mechanism for reconciling and building a body of fair use law over time, that is, limiting the specifically case-by-case nature of the doctrine. In this instance, since I have argued above that the objective is to build a genuine common law of fair use, I suggest the statute simply say so. We can borrow language developed elsewhere in federal law for instructing courts to build a common law, and add it to the statute as subsection (b).<sup>77</sup> The revised text reads as follows:

- [5] (a) It is not a violation of this Title to reproduce, prepare a derivative work based upon, distribute, display or perform a work protected under this Title in connection with criticism, comment, news reporting, teaching, scholarship, research, or any other social practice.
- (b) This section shall be governed by the principles of the common law as they may be interpreted by

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<sup>76</sup> See Madison, *Patterns*, *supra* note 3, at 1623-42.

<sup>77</sup> See Madison, *Legal-Ware*, *supra* note 3, at 1138-42.

the courts of the United States in light of reason and experience.

Some features of this language bear emphasis. Though I emphasized that my goal was to rationalize fair use rather than modify its substantive scope, it is clear that in some respects the scope of fair use under my proposal is somewhat narrower than it appears to be today. “Personal use” concerns are not obviously protected under this revision, since “personal use” may not count as a “social practice.” I repeat the following premise: Personal use concerns may belong in the Copyright Act, but they may be better handled under thoughtful analysis of Sections 109 and 202, for example, which in different ways deal with concerns regarding tangible things, and perhaps independently under the First Amendment.<sup>78</sup> The problem of the “productive” personal use is subsumed under the question of the relevant social practice. But fair use is not the place for the personal as such.

In other respects, the proposal does broaden the existing scope of fair use. I have proposed that Section 107 specify that fair use “is not a violation of this Title,” rather than “is not an infringement,” which is the current phrasing. This is a knowing broadening of fair use as currently understood, to encompass claims under all chapters of Title 17, including Chapter 12, the anticircumvention provisions of the Digital Millennium Copyright Act.<sup>79</sup> Specifying that fair use is not a violation of Title 17 may also help to clarify the extent to which enforcement of a contract limiting rights to make fair use of a copyrighted work is preempted by the Copyright Act, under Section 301.<sup>80</sup> The language should encourage courts to reconsider the allocation of the burdens of proof and production in cases in which fair use is argued by the defense. It seems implausible that the defendant in an infringement action should bear the burdens of both production and proof regarding an allegation of fair use. Specifying that fair use is “not a violation of this Title” is meant to suggest that the

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<sup>78</sup> See Tushnet, *supra* note 27.

<sup>79</sup> See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 739-40 (2000) (concluding that users’ rights provisions in the DMCA fail to secure genuine rights for users consistent with policies underlying fair use). Legislation proposed in the House of Representatives in early 2003 would have amended the DMCA to provide that it is not a violation of the Act “to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work.” Digital Media Consumers’ Rights Act of 2003, *supra* note 19, at § 5(b)(1).

<sup>80</sup> See *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (enforcing shrinkwrap agreement that prohibited reverse engineering of computer program), *cert. denied*, 539 U.S. 928 (2003).

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plaintiff is not required to plead that the defendant is not participating in a social practice as defined in this Section. Should the defendant meet an initial burden of production regarding Section 107 (by introducing credible evidence of the existence of a social practice and of the defendant's conformity with that practice), the burden shifts to the plaintiff to establish that the defendant's conduct is in fact infringing, because it is properly characterized as falling within a market for the plaintiff's work.<sup>81</sup>

Some activities that are fairly characterized as social practices, such as satire, should be clearly protected under this revision, though they are inconsistently protected under current fair use doctrine. The fact that my proposal takes this step opens it to possible criticism: can anything count as a social practice? My answer is that in theory, anything can, as an initial matter, subject to the core distinction between activities structured by markets and activities structured by social practices, and subject to the important qualification that any particular claim would, in the end, have to be supported by the evidence.<sup>82</sup> In practice there will be normative boundaries that cut off extreme arguments. Rings of authentic intellectual property pirates should have no recourse to a "social practices" claim under Section 107, even though they may have a colorable claim to be governed by specific social norms, language, and practice.<sup>83</sup> A better response in such a case, however, would be to conclude that rings of pirates aren't authentic social practices, but are in fact market-related organizations. The initial case cannot be made. At the other end, there are a number of social practices, such as criticism and scholarship, where the existence of the practice should rarely be

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<sup>81</sup> This is consistent with the current understanding of burdens of proof in fair use litigation. See *supra* note 44 and accompanying text.

<sup>82</sup> I have, therefore, intentionally failed to specify either that some social practices qualify for fair use treatment, and that some do not, or to specify explicitly that the statute applies to "any other *qualifying* social practice." The phrase "social practice" is meant to constrain on its own. If there is no *practice* and if the practice is not *social* in some genuine sense, then the fair use argument should fail. As a matter of proof, this is not problem-free. Inevitably, there would be cases where a defendant would assert some seemingly incredible version of a social practice. A court would have to assess the evidence. I fail to see, however, how this hypothetical state of affairs is any worse than what we live with today, where any idiosyncratic "use" is arguably characterized as "fair." The point is not to implement a perfectly determinable fair use system. The point is to implement a system that constrains effectively, and that does so by relying on the types of information that we believe are genuinely relevant to the results that the copyright system is designed to produce. It is true, however, that the liberal tradition includes deep-seated hostility to anything that appears to empower groups, and to weaken individual autonomy. See, e.g., CASS R. SUNSTEIN, *REPUBLIC.COM* 71-80 (2001) (describing polarizing effects of groups facilitated by Internet filtering).

<sup>83</sup> See, e.g., Jeff Howe, *The Shadow Internet*, *WIRED* 154 (January 2005) (describing culture of "topsites" that feed file sharing networks).

contested. The question is whether the use is consistent with the pattern. That is a judgment that can be made with confidence in a large number of cases, even without a lawyer's advice, and often *ex ante*. It is a judgment that courts do make in fair use cases, under the guise of the statutory four-factor approach.<sup>84</sup> And it is a judgment that finds support in a variety of philosophical perspectives on copyright. A social practices approach can be recharacterized as modeled on a set of presumptions in favor of certain conduct as fair use and justified in terms of economic efficiency.<sup>85</sup> Or, it may be recharacterized as a form of mutually-assured copyright destruction, in which the rights of individual creators and the interests of "fair users" in creative communities exist in equipoise, each posing such a risk to the interest of the other that neither possesses a superior right.<sup>86</sup>

## V. CONCLUSION

I am a copyright optimist, in that I believe that we (creators, lawyers, consumers, and courts) both should and can find ways to manage a doctrine of fair use that is both more robust and more structured than the current appeal to case-by-case equity. It is difficult for me *not* to be an optimist in this sense, simply because the pace of marketplace and technological developments suggest that fair use is one of the few remaining things that we still need copyright for. If creators and publishers can secure more than adequate incentive and reward via contract and "rights management" technology, copyright quickly becomes little more than a rhetorical safety net. We're not at that point yet. But consigning fair use to copyright's scrap heap represents another step in that direction. Instead, fair use should be rescued, and rebuilt.

I am an optimist, too, in believing that what I have characterized as a social practices approach to copyright reform can be productive. Throughout intellectual property law, both current doctrine and legal tradition already focus, in places, not only on the "who" and the "what" of innovation, the author or inventor, and the work and the invention, but also on the "how."<sup>87</sup>

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<sup>84</sup> See Madison, *Patterns*, *supra* note 3, at 1645-65.

<sup>85</sup> See Patry & Posner, *supra* note 2.

<sup>86</sup> See Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347 (1997) (advocating an interpretation of fair use that focuses on creative users "whose takings comport with customary practices that govern creative activities in the relevant community").

<sup>87</sup> The emphasis on creative process rather than creative output shows up in the joint authorship doctrine, *see* *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), in the

At times, focusing on the work or the invention is a useful proxy for difficulties in measuring creative or innovative processes. But there are times and places where those processes should be measured directly.<sup>88</sup> Within copyright, a social practices analysis has possible application well beyond fair use. Other, problematic limitations on the scope of copyright (including the idea/expression distinction and first sale, among other things) might benefit from re-examination using this perspective. Eligibility for copyright protection (“Is the work ‘original?’”) and boundaries between copyright and patent, and between copyright and trademark, similarly invite analysis based on social or disciplinary context. Outside of copyright, one might close this circle by drawing a similar conclusion in the theory of the First Amendment. In this constitutional domain, Frederick Schauer has argued persuasively for a contextual reading of the First Amendment, one that measures its scope by the institutional setting of the relevant speech.<sup>89</sup> Even if doctrinal links between the First Amendment and intellectual property law seem strained to some, conceptual connections are obvious. Social practices read on institutions, and institutions read on social practices. At some more abstract level, my argument may hold promise for integrating theories of copyright and speech.

I am a copyright realist, in understanding that my rewritten fair use statute is highly unlikely to influence Congress, let alone be adopted wholesale. It has been suggested that Section 107 in its current form represents a purely political compromise, and no interest in Washington, D.C. has a compelling reason to disrupt

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definition of works made for hire, *see* *Community for Creative Nonviolence v. Reid*, 490 U.S. 730 (1989), and in at least some approaches to separating art from function in pictorial, graphic, and sculptural works, *see* *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987). In patent law, the “Person Having Ordinary Skill in the Art” standard for measuring the nonobviousness of inventions invites courts to examine the manner in which scientific disciplines operate. *See* 35 U.S.C. § 103 (2000). Thanks to Brett Frischmann for this observation.

<sup>88</sup> Some argue that the “real” problem with copyright doctrine is not its failure to support novel forms of creativity, but its failure to recognize emerging processes of distribution. It’s not clear to me that the two problems are easily separated. The social practices approach tends to combine them into one. For other recent examples of what I would characterize as a social practices perspective on questions of information production and distribution, see Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004) (describing changes in social information practices that underlie production and distribution of creative content); Jonathan Zittrain, *The Future of the Internet—and How to Save It* (Working Paper 2005) (describing benefits of “generative technologies” that support group and recursive creativity).

<sup>89</sup> *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Michael Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 170-71 (2000).

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it.<sup>90</sup> But influencing legislators was not my goal. My goal was to distill, combine, and present two specific substantive reforms to the law of fair use that in my view clarify and simplify the law far more than they would change it. Putting those reforms into statutory form seems to me to be the clearest and most straightforward way to rationalize this important area of the law and to signal its importance. Judicial application of the approach is more feasible, and equally justifiable, even under the current statute. My continuing hope is that in either case, the presentation can be used to improve the lot of all those who enjoy the fruits of human creativity, by improving the law on which they depend.

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<sup>90</sup> In fact, when this proposal was described to the Modest Proposals 2.0 conference, its political feasibility received a skeptical response from the perspectives of both content-producing interests and consumer interests.