

2012

## Madisonian Fair Use

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### Recommended Citation

Michael J. Madison, *Madisonian Fair Use*, 30 *Cardozo Arts & Entertainment Law Journal* 101 (2012).  
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# MADISONIAN FAIR USE♦

MICHAEL J. MADISON\*

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It may seem immodest to reflect on one’s own work by christening it with an eponymous title, but readers with a historical bent will, I hope, appreciate the pun. “Madisonian” fair use refers not (only) to me, but to the Father of the American Constitution, James Madison. The separation of powers principle that he held dear and that animates the structure of the American federal government is also at work, in an important if distinct and metaphorical way, in copyright. Fair use is in many respects copyright’s clearest expression of a social and cultural separation of powers. Because that proposition is not clearly the focus of the article that this brief essay reflects on, *Rewriting Fair Use and the Future of Copyright Reform*,<sup>1</sup> for the next few pages I want to explain where that article came from, how it signifies a kind of copyright separation of powers principle, how that principle has been felt in fair use law and policy in recent years, and what that means for the future of copyright.

## I. FAIR USE SCHOLARSHIP IN CONTEXT

*Rewriting Fair Use* distilled and repurposed a much longer and denser work on fair use that I published in the *William & Mary Law Review* in 2004, titled *A Pattern-Oriented Approach to Fair Use*,<sup>2</sup> which I refer to as *Patterns*. The core of the argument of *Patterns* and *Rewriting Fair Use* was and remains that the law and policy of fair use should align with the law and policy of copyright generally, namely the

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\* Professor of Law, University of Pittsburgh School of Law. Copyright © 2012 Michael J. Madison. Email: michael.j.madison@gmail.com. Many thanks to the editors of the *Cardozo Arts & Entertainment Law Journal* for the kind invitation to contribute this reflection.

<sup>1</sup> Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 *CARDOZO ARTS & ENT. L.J.* 391 (2005).

<sup>2</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *WM. & MARY L. REV.* 1525 (2004).

provisioning of creative works for the benefit of society as a whole, and that fair use long had been and should be interpreted to provide legal protection—freedom from the exclusive rights of the copyright owner—for individuals and their works if the works were produced as part of an identifiable and provable “pattern” of activity by some group, that is, as part of a “social practice.” In *Patterns*, I collected and synthesized an array of arguments from social science literatures that, in the aggregate, suggest that people organized around these patterns are probabilistically likely to produce creative things. My goal was to contrast the institutional matrices of these patterns with the institutional matrices of the markets that otherwise produce and allocate interests in copyrighted works. Creative works are produced and distributed by at least two distinct but complementary institutional systems in society. One is a set of markets for copyrighted works, supported legally by a robust cluster of exclusive rights. A second is a set of patterned social practices, supported legally by a robust cluster of exclusions and exemptions from exclusive rights, including fair use (in the United States) and various doctrines defining and protecting the public domain.<sup>3</sup> Neither of these institutional systems is wholly independent of the other. They represent poles on an institutional continuum. But when copyright courts need to resolve infringement disputes, I argued, the choice is often between idealized versions of these two models—rather than a choice between two competing claims of individual right, as almost everyone associated with the copyright system otherwise tends to assume. A defendant who interferes in the operation of a market is ordinarily an infringer; a defendant who is participating in a different institution, one governed by the internal dynamics of a patterned social practice, ordinarily engages in fair use.

In *Patterns*, I argued that this construction of fair use was historically accurate, normatively desirable and—importantly—a means to discern a predictable conceptual framework for applying the doctrine.

*Rewriting Fair Use* followed from an invitation to put that argument into a more conventional law reform format, as part of the *Modest Proposals* conferences hosted by the Benjamin N. Cardozo School of Law at Yeshiva University. Though the premise of *Modest Proposals* may have been for scholars to suggest minor tweaks to intellectual property statutes to effect important change, my update of *Patterns* was modest in Swift’s sense. It was certainly possible to put a pattern-oriented approach to fair use into statutory form, and the paper and accompanying presentation did just that. The proposal, however,

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<sup>3</sup> This does not exhaust the inventory of systems and models for producing and distributing creative things. The iconoclast solo creator, sometimes referred to as the source of the trope of the “romantic author,” plays a role, for example. For a strong philosophical justification of the role of the individual artist in copyright, see Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010).

was modest only in an ironic way.

As I expected, at the conference itself my proposal proved sufficiently disruptive to settled understandings of fair use and to political and ideological commitments to the existing copyright regime that it was roundly criticized for its political and conceptual infeasibility. That critique came from all sides of the spectrum of copyright opinion: from a leading member of the public interest community advocating for copyright reform (who feared that the proposal would invite a larger retreat from gains to user rights made possible by open-ended, unpredictable legal standards); from a leading member of the corps of Congressional aides charged with managing proposed changes to copyright law (who dismissed any effort to modify fair use that did not enlist the support of content industries, on suspicion that unilateral proposals would expand user rights); and from a leading scholar of international copyright (who was concerned that the proposal was inconsistent with American obligations under the Berne Convention). It was clear from the beginning, in other words, that the future of the pattern-oriented argument, like the future of fair use itself, does not lie in the hands of decision-makers and policymakers typically charged with law reform. No one expressed an interest in advancing the argument in conventional law reform terms.

Despite the proposal's lack of traction in conventional terms (or perhaps, because of it), the proposal embodies a Madisonian separation of powers theme, in three senses. The first is its framing fair use in institutional terms, rather than in individual terms. Second is its examining fair use in terms of a separation or identity of institutions. Third is its express concern with the dual goals of stability and predictability in government and governance, on the one hand, and flexibility in the administration of the system, to deal with evolving goals, interests, technologies, and social conditions, on the other. The first two points can be taken together in the following way. The fair use defense historically has involved comparing the work produced or distributed by the copyright defendant to the work owned by the plaintiff, a work-to-work and individual-to-individual comparison. *Rewriting Fair Use* proposed a different lens, one that contrasts the social and cultural (that is, institutional) context of the defendant's production (that is, process as well as product) to the comparable context of the plaintiff's work. If both plaintiff and defendant are in and of the same institution (typically, both would be part of copyright markets), then there is ordinarily no fair use. If the plaintiff and the defendant are embedded in different institutions, then there is a strong case for fair use.<sup>4</sup> There is a metaphorically Madisonian separation of

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<sup>4</sup> As I have expressed the point here, the argument is consistent with, though in certain key respects different from, the argument regarding the weight to be given "fair use markets" presented recently by Wendy Gordon, discussing the Second Circuit's reliance on that concept in

powers at work in that logic, in the sense that no single social or cultural institution (the market, defined by the exclusive rights that constitute copyright ownership) does or should dominate control of production of and access to copyrighted works. Pattern-based or social practice-based groups of creators constitute important and powerful institutional forces in their own rights and as matrices for agency exercised by individuals within them. Recognizing those institutions and enabling them as institutional counterweights and complements to other copyright institutions, via fair use (and, perhaps, via other means), is an important way to combat what Madison called, in the American Constitutional context, tyranny.<sup>5</sup> The third point, the stress on balancing flexibility and predictability, emerges plausibly from precisely that institutional framework. Patterns of activity are grounded in social groups that are, largely by definition, stable across time, though not perfectly so. *Patterns* identified mechanisms through which fair use can adopt and evolve over time, even against a relatively stable background.<sup>6</sup> As a matter of institutional choice, fair use is at least as much about what people actually do as it is about the narratives, ideologies, and legal institutions of copyright itself. Those two things are closely related, but they are also separate, and fair use participates in maintaining them at an engaged but respectful, and stable yet flexible, distance from one another.

## II. FAIR USE SCHOLARSHIP AND LITIGATION

What has the impact and later history of the Madisonian proposal consisted of?

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Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006). See Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814, 1830-32 (2011).

<sup>5</sup> I do not want the metaphor to run away with the argument. But if the separation of powers idea has intellectual legs, then exploring it further might begin with considering in greater depth links and contrasts between copyright markets and a First Amendment or free speech-based “marketplace of ideas.” Justice Holmes had much to do with promoting the single market metaphor in both copyright and free speech contexts, and the metaphor has become a nearly totalizing ideal of democratic government. See *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting) (relying on the “marketplace of ideas” metaphor as a primary means of combating harmful speech); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (disclaiming a judicial role in evaluating legal protection for arguably trivial works of authorship, under what is now referred to as the “aesthetic non-discrimination principle”). I suggest the Madisonian separation of powers metaphor as an alternative conception of democratic principles in copyright, that is, as a partial rejection of the market framework altogether rather than as a substitute for the common “limited monopoly” view of copyright law. In a related vein, see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (suggesting an alternative conception of the market model underlying copyright, inspired by democratic theory).

<sup>6</sup> I am reminded of the twentieth century Realist project of reforming commercial law in the image of customary commercial practice and of the reality that no matter how much custom is baked into the Uniform Commercial Code, the practice itself is just dynamic enough that it would and should in some key respects escape capture. See Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 351, 351 (2010) (“Like any institution adapted for human use, law tracks and simplifies patterns of behavior,” with references to Jorge Luis Borges and Lewis Carroll).

In terms of copyright litigation itself, it cannot be said that the work has had any noticeable effect, but as Neil Netanel has shown persuasively,<sup>7</sup> since 2005 (when *Rewriting Fair Use* was published) courts applying the fair use doctrine have shifted their emphasis decisively to application of the “transformative use” consideration first made salient by the Supreme Court in 1994.<sup>8</sup> It is fair to say that *Patterns* captured a sense of creativity as the engine of fair use, and that same sense emerged elsewhere around the same time and has gathered momentum in the courts ever since.

Netanel uses a handful of leading cases as exemplary illustrations of his thesis: *Bill Graham Archives v. Dorling Kindersley, Ltd.*<sup>9</sup> (involving reproductions of concert posters in an art book); *Blanch v. Koons*<sup>10</sup> (involving the postmodernism of the painter and sculptor Jeff Koons); *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>11</sup> (implicating Google’s search technology); *A.V. ex rel. Vanderhye v. iParadigms, LLC*<sup>12</sup> (the Turnitin case); *Salinger v. Colting*<sup>13</sup> (the *Catcher in the Rye* case); *Warner Brothers Entertainment, Inc. v. RDR Books*<sup>14</sup> (involving the Harry Potter Lexicon); and *Gaylord v. United States*<sup>15</sup> (addressing a postage stamp that used a photograph of a copyrighted public memorial). Netanel does a thorough job of explaining how the doctrine of transformative use does a lot of work in each of those cases, whether or not he or anyone else thinks that any particular case was correctly decided. I share the view expressed by some other scholars that the doctrine of transformative use as such is freighted with too many meanings to be of real value in explaining what courts should do in these cases.<sup>16</sup> But interest in the transformative use concept is consistent with the proposition that fair use, like copyright as a whole, should be understood and applied as a system for encouraging, supporting, and rewarding people and firms who produce creative things.

Equally interesting has been the growing body of copyright scholarship that adopts and extends some of the methods of *Patterns* and *Rewriting Fair Use* in service of exploring and possibly critiquing the widespread popular assumption (and assumption in many parts of the copyright system) that fair use is an unpredictable, case-specific doctrine. In the years after the Supreme Court decided its last major fair

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<sup>7</sup> See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

<sup>8</sup> See *Cambell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>9</sup> *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

<sup>10</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

<sup>11</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>12</sup> *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

<sup>13</sup> *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

<sup>14</sup> *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

<sup>15</sup> *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010).

<sup>16</sup> See Diane Leenheer Zimmerman, *The More Things Change the Less They Seem “Transformed”*: *Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC’Y U.S.A. 251 (1998).

use case, *Campbell v. Acuff-Rose Music, Inc.*, fair use scholarship struggled to make sense of the Court's emphasis on transformative use and struggled in particular with claims of so-called personal or private use in the context of emerging Internet technologies. That work operated against a backdrop of an economic model of fair use inherited from a seminal piece of legal scholarship, Wendy Gordon's *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*.<sup>17</sup> The result of that post-*Campbell* scholarship was, largely, confirmation of an intuition that deviations from a market-oriented paradigm for fair use were idiosyncratic and unpredictable, if not outright random.<sup>18</sup> *Patterns* and *Rewriting Fair Use* were leading parts of a revival of interest in the empirics of fair use, intended in part to explore the possibility that fair use is saner, and saner on non-market principles, than its critics believe.

My own methods were relatively simple: I collected appellate cases and clustered them using a qualitative framework, according to my reading of the social or cultural patterns embedded (or claimed to be embedded) in each of them. (The clusters, in other words, partly represented groups of like cases but more importantly signified underlying patterns of social activity.) Other copyright scholars have embarked on much more ambitious and sophisticated empirical investigations of fair use. Neil Netanel's work, mentioned above, is the most recent of these. Other major contributions include work by Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*,<sup>19</sup> looking at the extent to which copyright courts rely on each of the four principal statutory fair use "factors"; Matthew Sag, *Predicting Fair Use*<sup>20</sup> (the same); and Pamela Samuelson, *Unbundling Fair Uses*.<sup>21</sup> Samuelson's article argues that fair use cases can be clustered by type, and her proposed clusters align closely with the patterns developed in *Patterns*. She relies on identifying the structure of disputes, on judicial logic, and on policy narratives of copyright somewhat more than on independent patterns of creative conduct. All three scholars rely on quantitative analysis to a greater or lesser extent. All three largely confirm the proposition argued in *Patterns* and again in *Rewriting Fair Use*. The fair use doctrine is metaphorically Madisonian: flexible, yet

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<sup>17</sup> 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). An example of excellent work in this vein is Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

<sup>18</sup> See, e.g., David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 280 (2003) ("Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.").

<sup>19</sup> Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 573 (2008).

<sup>20</sup> Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. (forthcoming 2012), available at <http://ssrn.com/abstract=1769130>.

<sup>21</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

more coherent, predictable, and stable than casual observers believe.

### III. FAIR USE BEYOND THE COURTS AND THE LAW REVIEWS

Demonstrating that fair use is more coherent than popularly believed is one thing; changing the behavior of legal institutions so that the underlying theory and corresponding evidence are incorporated explicitly into the copyright system is something else entirely. What the scholars discussed above have argued, in effect, is that both supporters and critics of the current copyright landscape ought to look not at what legal institutions say, but at what they do. Lawyers, judges, and even some policymakers are accustomed to that sort of reasoning and therefore have little trouble leading a kind of double life, publicly analyzing fair use cases by applying the four statutory factors on a case-specific basis but coming over time to a series of results that reveals an underlying if imperfect predictability. But the folks who are often most directly affected by contemporary copyright law, ordinary creators and users of copyrighted works who rely on the law as well as on their own casual understandings of the law, are not helped by that view. When legal language in particular cases diverges from legal outcomes, when the pattern of cases over time reveals a predictability that cannot be discerned in the here and now, there is at least a lot of head scratching and at worst a lot of misguided avoided creativity, unneeded licensing and/or threats of litigation, and general anxiety and stress.

This, the realm of actual practice, is where a Madisonian separation of powers theme has helped fair use to have a productive impact in recent years, at least in a preliminary sense. In a handful of key respects, fair use has been liberated (separated) from its formal role as a shield for the interests of some defendants in copyright litigation and has been used as a sword for the interests of groups of creative people who are trying to practice their arts and their crafts.

The most robust version of this approach has been implemented by scholars at American University's Washington College of Law and Center for Social Media, who since 2005 have produced and published a series of Statements of Best Practices in Fair Use for a variety of creative communities.<sup>22</sup> The production of each of these Statements, intended as guides for non-lawyers, follows a similar path: partnership with entities and organizations that represent members of the relevant community; a lengthy series of interviews and meetings with members of the community to determine the community's own understanding of

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<sup>22</sup> The Center's website, containing all of the relevant materials, is CENTER FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use>. The principal investigators are Patricia Aufderheide of the Center for Social Media and Peter Jaszi of the Washington College of Law. The vision animating this project, and the role that the research presented in the *Patterns* article played in advancing that vision, is described in PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE 71 (2011).



its interests and practices relative to the uses of copyrighted works; and preparation of document and related materials that fix that understanding in writing, with appropriate illustrations and guidelines, in the context of background copyright doctrine.<sup>23</sup> The results are then published back to the community and otherwise distributed publicly. To date, the objects and subjects of these Best Practices Statements have included documentary filmmakers, producers of online video, media literacy educators, communication scholars, producers of open courseware, poets, dance archivists, and research librarians. This is an eclectic group of interests, and each project is time-consuming and labor-intensive. But the Statements are both institutionally-based law reform and advocacy of a very concrete if unorthodox character. That character consists of giving creators in context (which often includes institutional gatekeepers as well as the creators themselves) a type of cultural permission to engage in the creativity and acts related to creativity that their discipline teaches are fair and appropriate, with a lessening of the threat of copyright litigation that hangs over their heads in light of unclear or overbroad understandings of the rights of copyright owners. To extend the Madisonian theme, the Statements of Best Practices situate the locus of relevant copyright power in individuals set firmly within creative communities themselves, rather than exclusively among copyright owners. The metaphorical cultural authority of the former reduces somewhat the risk of metaphorical tyranny by the latter. Creative communities are empowered by the tools that Madisonian fair use gives them.

Although there is some anecdotal evidence that the relevant creative communities have benefited in terms of being able to produce additional creative work,<sup>24</sup> the Statements of Best Practices have not been free from debate. Relevant content owners have been skeptical of the Statements on the ground that they are unilateral, rather than understandings negotiated bilaterally, with (unsurprisingly) copyright owners. Some scholars have expressed concern that the Statements tend to lock in backward-looking, customary interpretations of law and practice<sup>25</sup> and crowd out the radical creator who is untethered to community norms; in other words, the Statements blur the descriptive aspects of fair use with some versions of normative or aspirational aspects of fair use. The *Journal of the Copyright Society of the USA*, the leading professional journal of the copyright law community,

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<sup>23</sup> Each of the draft Statements is vetted by a Board of Legal Advisors to ensure that the Statement's recitations and applications of copyright law are consistent with a reasonable application of copyright law. I have been a member of several of these Boards.

<sup>24</sup> See Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY, Oct. 2007, at 26, available at <http://www.iptoday.com/articles/2007-10-aufderheide.asp>.

<sup>25</sup> The risk of locking-in normatively unattractive bargains over rights is described in general terms in James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

recently devoted an entire issue of the journal to papers assessing the Best Practices “movement.”<sup>26</sup>

A second version of the move to shift fair use from its traditional institutional settings to new fora is seen in rulemaking proceedings before the Librarian of Congress. The Digital Millennium Copyright Act (“DMCA”), passed in 1998, established a robust scheme of legal protection against circumvention of technological protection measures that encrypt or otherwise guard access to copyrighted works, generally known as Digital Rights Management, or DRM. The statute provides that fair use is not a defense to a claim of unauthorized circumvention of an access control,<sup>27</sup> but it also authorized the Librarian of Congress, the federal office within which the United States Copyright Office resides, to conduct administrative rulemakings every three years to identify classes of works that should be exempt from DMCA prohibition on circumvention of access controls—that is, works for which the case for access outweighs the case for protection from circumvention. The first several rulemakings were narrow in scope. The Register of Copyrights took the position that the statutory language was directed only to classes of works, rather than to types of proposed uses of work. In the most recent rulemaking, in 2010, on the recommendation of the Register the Librarian announced exemptions that focus more on practices than on specific classes of works.<sup>28</sup> The most notable of these, in my view, because of its overlap with one of the Statements of Best Practices, is an exemption to anticircumvention rules for reproduction of small portions of DRM-protected content in connection with “vidding,” or producing noncommercial video remixes of commercial and noncommercial film and television content. As one commentator observed, this interpretation allows at least some forms of fair use finally to survive the DMCA’s anticircumvention restrictions.<sup>29</sup>

A third context where fair use has found a new audience and new impacts is in international copyright discussions. Fair use hardly permeates international copyright; the doctrine itself is formally part of the copyright statute only in the United States and, by recent legislation,

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<sup>26</sup> The symposium papers include Peter Jaszi, *Getting to Best Practices - A Personal Voyage Around Fair Use*, 57 J. COPYRIGHT SOC'Y U.S.A. 315 (2010); Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 351 (2010); Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 371 (2010); Michael C. Donaldson, *Fair Use: What a Difference a Decade Makes*, 57 J. COPYRIGHT SOC'Y U.S.A. 331 (2010); Jay Rosenthal, *Best Practices*, 57 J. COPYRIGHT SOC'Y U.S.A. 389 (2010).

<sup>27</sup> 17 U.S.C. § 1201(c) (2006).

<sup>28</sup> See Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong., Recommendation of the Register of Copyrights in RM 2008-8 (June 11, 2010); Rulemaking on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (July 20, 2010) (codified at 37 C.F.R. § 201).

<sup>29</sup> Elizabeth F. Jackson, *The Copyright Office's Protection of Fair Uses Under the DMCA: Why the Rulemaking Proceedings Might be Unsustainable and Solutions for Their Survival*, 58 J. COPYRIGHT SOC'Y U.S.A. 521, 524 (2011).

Israel, the Philippines, and Singapore. “Fair dealing” doctrine in Commonwealth countries, notably England and Canada, is clearly more narrow than fair use, and in keeping with the European Union Copyright Directive, the copyright systems of Continental countries confirm users’ rights via statutory exceptions and limitations rather than through a broad standard such as fair use. Recent multilateral trade negotiations that wrap intellectual property issues into treaty form, such as those that preceded the recently-concluded Anti-Counterfeiting Trade Agreement (“ACTA”) and those that are now looking to a new Trans-Pacific Partnership (“TPP”), would ratchet copyright protections upward, to extend United States norms favoring copyright owners across a broader international stage, rather than confirming internationally the balanced United States copyright regime that encompasses fair use.

Against that background, fair use has received some additional international traction recently, and the Madisonian separation of powers metaphor has not been far behind. Whether the trend favoring international engagement will continue remains to be seen, but for fair use proponents these are both interesting and welcome developments. In England, the report on UK intellectual property law popularly known as the Hargreaves Review, conducted by the Intellectual Property Office and led by Professor Ian Hargreaves, was initiated in November 2010 and completed in May 2011.<sup>30</sup> That report called for study of ways to bring new flexibilities to copyright law, both in the UK and in alignment with European law, in view of digital technologies and interests in economic growth, even if those flexibilities were unlikely to take the form of a full-fledged adaptation of fair use as such.<sup>31</sup> That call for added copyright flexibilities in the UK has been echoed by a powerful recent report by the Institute for Information Law at the University of Amsterdam, prepared by Bernt Hugenholtz and Martin Senftleben, advocating for exploration of room for additional copyright flexibilities within the framework of existing European copyright law.<sup>32</sup> That report relies in part on research noted above by Pamela Samuelson and Barton Beebe, confirming that the doctrine is more predictable than many commentators assume.<sup>33</sup> (The report stops short of recommending European adoption of American-style fair use itself.) A recent paper by Jonathan Griffiths similarly bridges the gap between

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<sup>30</sup> IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (May 2011), *available at* <http://www.ipo.gov.uk/ipreview-finalreport.pdf>. The British Government’s response to the Hargreaves Review acknowledges the need for copyright flexibilities. HMGVERNMENT, THE GOVERNMENT RESPONSE TO THE HARGREAVES REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 7-8 (August 2011), *available at* <http://www.ipo.gov.uk/ipresponse-full.pdf>.

<sup>31</sup> HARGREAVES, *supra* note 30, at 47.

<sup>32</sup> See P. BERNT HUGENHOLTZ & MARTIN R.F. SENFTLEBEN, FAIR USE IN EUROPE: IN SEARCH OF FLEXIBILITIES (Nov. 14, 2011), *available at* <http://ssrn.com/abstract=1959554>.

<sup>33</sup> *Id.* at 8-9.

emerging interest in new flexibilities in European and UK copyright law and what I call Madisonian developments in fair use law described above.<sup>34</sup> Griffiths suggests that in light of evidence about these patterns, the American fair use experience warrants consideration in Europe. Bringing the question almost full circle, the Best Practices model itself has now begun to find an audience outside the United States, among documentary filmmakers in Canada, South Africa, and Norway.<sup>35</sup> It seems unlikely that fair use as such will find favor in the formal law of any European state, but the theory of fair use that looks to institutional settings to ground creative production and both doctrinal predictability and flexibility is beginning to make a difference in the lives of artists outside the United States. Madisonian fair use is being exported.

#### IV. FUTURE DIRECTIONS FOR FAIR USE

My copyright separation of powers principle is an incomplete metaphor, though it seems to be useful to a degree in understanding the contribution of *Patterns* and *Rewriting Fair Use* and various developments in fair use over the last several years. That contribution is no panacea for all that might ail modern copyright. Still, the metaphor and the argument seem to tie together a number of somewhat disparate themes in copyright reform.

One is the role of incrementalism and the common law in the development of copyright law and the role of institutional choice with respect to intellectual property law generally. My earliest work on fair use argued that the surest way to provide a stable cultural “space” for adaptation and critical re-use of copyrighted material was to embed the law of fair use in an explicit common law framework.<sup>36</sup> I expect that future scholarship and policymaking will focus renewed attention on institutional questions of that sort.<sup>37</sup>

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<sup>34</sup> See Jonathan Griffiths, *Unsticking the Centre-Piece—The Liberation of European Copyright Law?*, 1 J. INTELL. PROP. INFO. TECH. & ELEC. COMM. L. 87 (2010).

<sup>35</sup> See Sarah Sklar-Heyn, Note, *Battling Clearance Culture Shock: Comparing U.S. Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film*, 20 CARDOZO J. INT'L & COMP. L. 233 (2011) (Canada); Leif Ove Larsen & Torgeir Uberg Nærland, *Documentary in a Culture of Clearance: A Study of Knowledge of and Attitudes Toward Copyright and Fair Use Among Norwegian Documentary Makers*, 8 POPULAR COMM. 46 (2010), available at <https://bora.uib.no/bitstream/1956/4138/3/Larsen%20og%20%20Narland.pdf> (Norway); Sean M. Flynn & Peter A. Jaszi, *UNTOLD STORIES IN SOUTH AFRICA: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2010), available at <http://ssrn.com/abstract=1654025> (South Africa). See also Amira Dota, Niva Elkin-Koren, Orit Fischman-Afori & Ronit Haramti-Alpern, *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, 57 J. COPYRIGHT SOC'Y U.S.A. 447 (2010) (describing the production of a code of best practices in fair use for use by Israeli universities and faculty).

<sup>36</sup> Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1138-39 (1998).

<sup>37</sup> Recent examples of scholarship in this vein include thoughtful proposals to reform fair use by using tools of the administrative state. See, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395

Two is interest in copyright reform that takes place simultaneously within the legal system itself and beyond it. Theories and doctrines of fair use will continue to engage the narratives of copyright doctrine and the practices of the people whose lives are touched by it. The Statements of Best Practices are of a piece in this sense with Creative Commons, as an organization, as a movement, and as a set of licenses for copyrighted works.

Three is the role that language and metaphor play in constructing, interpreting, and applying the law. *Patterns* itself addressed the role of metaphor and language in identifying and justifying the groups whose patterns are recognized by fair use. The Madisonian separation of powers principle is, in its present copyright context, a simple metaphor. In broader copyright debates, “piracy” is both metaphor and phenomenon.<sup>38</sup> At their best and most useful, metaphors reveal both strengths and weaknesses in the worldly phenomena that they represent. Here, let me conclude with one of each. Metaphorical Madisonianism at its best may force us to confront the limits of the economic instrumentalism that justifies much if not all of modern copyright, while still rejecting (as the U.S. Supreme Court has done) application of the labor/desert theory of John Locke. That, I think, is all to the good. An institutional approach to copyright may be justified by appeals to groups as sources of creativity, but I also suspect that this explanation and justification is incomplete. The metaphor also reveals that institutional approaches to creativity and innovation (and to other things) may conceal the many ways in which individuals are included in and excluded from patterns, practices, and collectives; the different ways in which individuals may benefit and lose as they interact within the collective; and the variety of emerging, novel, and often independent ways in which individuals create new things and rework old ones.<sup>39</sup> In the American experience, the original Madisonian Constitutional framework oriented to governance institutions was quickly supplemented by a Bill of Rights oriented in many ways to individuals. James Madison himself once wrote of copyrights and patents that “[t]he utility of this power [of Congress to enact legislation addressing the rights of authors and inventors] will scarcely be questioned. . . . The public good fully coincides in both cases, with the claims of individuals.”<sup>40</sup> The future of fair use may lie in both law and society fully realizing and institutionalizing the ambition of that promise.

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(2009).

<sup>38</sup> For discussion of the origins and uses of piracy, see ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2009).

<sup>39</sup> See, e.g., Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133 (2011) (struggling thoughtfully with intersecting themes of sex and gender in practices of creativity by “vidders”).

<sup>40</sup> THE FEDERALIST No. 43, at 288-89 (James Madison) (Jacob Cooke ed., 1961).