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Fair Use Is Good for Creativity and Innovation

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FAIR USE IS GOOD FOR CREATIVITY AND INNOVATION

Bill Patry

ABSTRACT

Commenting on legal debates in other countries is usually bad manners. When, however, the debates concern a law from your own country, and that law is being misrepresented, it may be of service to set the record straight. The record, based on almost 300 years of Anglo-American case law and the experiences of those of us who apply fair use every day in our jobs, demonstrates that fair use is good for creativity and innovation, and in practice works well. You don't have to take my word for it; if you are willing to put the time in, and have an open mind to learn how fair use actually works, you'll see.

What follows is a description of the 35 year journey I have undertaken to understand fair use. First, I discuss how it has been common for centuries for our greatest artists to creatively copy from others. Next, I discuss how fair use helps authors to engage in such creative copying, while simultaneously ensuring that those who seek to capitalize on the hard work of others with no social benefit are denied fair use privileges. I then discuss my experiences with fair use as a lawyer, Congressional staffer, and as a law professor. Finally, I dispel a number of the myths about fair use: that it leads to a lot of litigation, is too fact-specific or unpredictable, and is somehow peculiar to the American legal system much like vegemite is to the Australian palate.

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I. THE GREAT ARTISTS COPY, AND CREATIVELY

I have been a musician for 60 years, first playing viola, then clarinet (now bass clarinet and basset horn). I was a music composition major at university, obtaining both undergraduate and graduate degrees. I studied in detail how the Western World's greatest composers created by building upon past masters while adding their own unique contributions to the music literature. My studies involved analyzing every chord, every melody or motif in a symphony or sonata, and tracing their roots. Once you understand how a composition is put together, you appreciate both the innovations in it as well as the debts to predecessors.

Many times, composers have showed their debts to their predecessors by copying, in a creative way, from those predecessors. In certain time periods, basing your work on another's was a revered art form. One of the most famous Renaissance composers, Giovanni Pierluigi da Palestrina, wrote dozens of parody masses based on music by other composers.¹

¹ Josquin de Prez's "Missa Malheur Me Bat," "Missa Mater Patris," and "Missa Fortuna Desperata" are further examples of masses based on others' music, as is Antoine Brumels' "Missa de Dringhs".

Parody masses did not make fun of the original, but were instead designed to show respect for and appreciation of the earlier composer's music while simultaneously showing off the second composer's own skills. The use of the first composer's work was not use of a mere single line or two, but rather involved copying the entire texture from the original. It has been estimated that by the middle of the sixteenth century, most masses were parody masses.

In the Classical and Romantic eras so obvious and accepted was transformative copying from predecessors that Johannes Brahms rejoined, in response to a critic pointing out that the allegro section in the first movement of his first symphony was derived from Beethoven's Ninth Symphony: "'Any ass can see that.'" Mozart, when meeting Salieri for the first time, remarked that he had written variations on an aria of Salieri's.² Salieri, far from being upset at this unauthorized derivative work, was pleased. So common was this practice then and later that Wikipedia gives a non-exhaustive list of 187 different composers whose works were the subject of variations by other composers.³

Conductor John Eliot Gardiner has pointed out that Beethoven often copied directly from Mozart:

There is a very real sense in which the spirit of Mozart imbues the early symphonies of Beethoven, particularly the second. Look at the finale and the very abrupt octave exchange in the second bar. This derives from the opening of Mozart's Haffner symphony. And one gets the same feeling even more strongly in the Eroica [symphony of Beethoven]. So many melodic, rhythmical, and harmonic features derive directly from Mozart. Not only is the main theme borrowed directly from [Mozart's] 39th symphony, but also features that one might typically regard as Beethoven's, like those

*This article reflects only my personal views.

² These were the six variations on "Mio caro adone" K. 180 .

³ https://en.wikipedia.org/wiki/List_of_variations_on_a_theme_by_another_composer

agonizingly harsh dissonances in the first movement [of the Eroica], where he piles up one chord after another with A,C,E, and F on top of each other. And you think, “surely that must be entirely his own invention, no one else could possibly have done that [before].”

Not so. Look at the introduction to Mozart’s same Eb symphony, K. 543, and there you find almost the identical chord superimposed, but in a Mozartian way, without the brazen, shocking impact that Beethoven achieves with his Eroica.

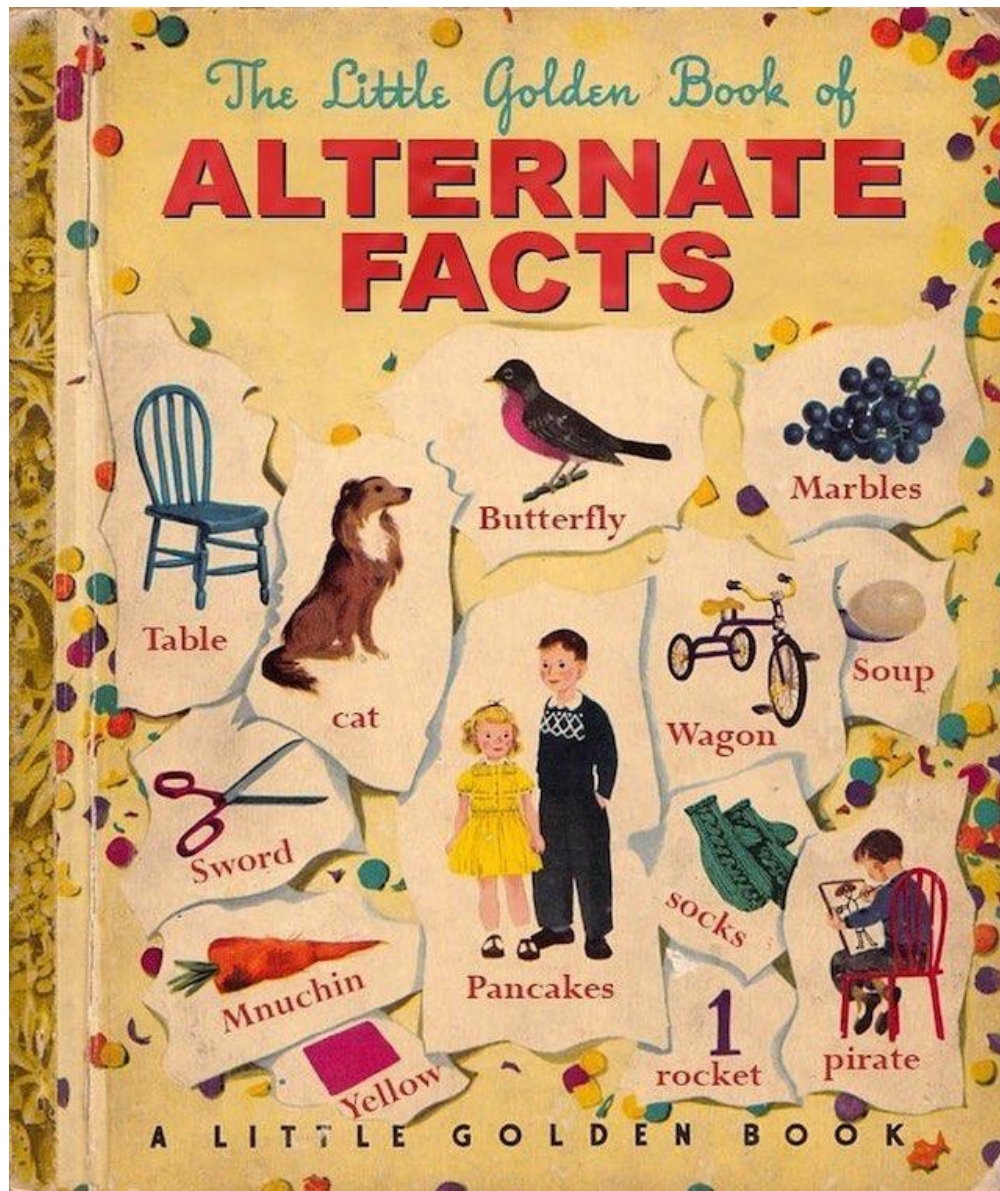
I think this is the key to it: Beethoven’s concept of orchestral sound – immediately arresting, even bizarre – and his concept of symphonic shape is unmistakably his own. He may have drawn elements from other composers; he may have used their rhythmical shapes, their motives, and harmonies as a springboard, but his whole way of handling material is entirely new.⁴

That’s the way the creativity works; if we want to truly nurture creativity, our copyright laws must work that way too: fair use does. Beethoven’s copying from Mozart is, in classic fair use terminology, a transformative use: he copied Mozart’s music but in doing so “communicates something new and different from the original”⁵ The role of fair use, like the copyright system as a whole, is thus to encourage the new and different.

Here is a very recent example from the visual arts:

⁴ This interview is on one CD from a multiple CD set of Gardiner’s conducting all the Beethoven symphonies on the Archiv Produktion label, #445-907-2 (1994). On the disc, Gardiner includes the relevant recorded snippets from Mozart’s and Beethoven’s works.

⁵ Authors Guild, Inc. v. Google Inc., 804 F.3d 202, 214 (2d Cir. 2015).



This work, by illustrator Tim O'Brien, responds to Trump advisor Kellyanne Conway's recasting of blatant lies as "alternative facts." Mr. O'Brien's fanciful cover was created by recreating exactly the look and feel of an actual cover and by sampling and photoshopping illustrations from the once ubiquitous Little Golden Books series, popular when I was a young child. Using actual images from those books, he adds "alternate fact labels," in which two children become pancakes, a dog becomes a cat, a chair becomes a table. A child drawing becomes a pirate. Mr. O'Brien's work is

fair use of the original;⁶ true, he did not alter the actual works, but through their transformed context and different labels, he wittily ridiculed Ms. Conway's ridiculous remark. He communicated something different. It shouldn't matter whether we call this criticism, comment, parody, satire or anything else. Nor should it matter if the use is on a government approved closed list of permissible uses. The only question should be whether society – in all countries -- is better off allowing this type of creativity. The answer is, yes, we are.

Fair use does not condone free use or laziness. As Judge Leval, who coined the transformative use metaphor, explained:

The word “transformative” ... is ... a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use.⁷

Those who fear fair use will stifle creativity have it backwards. As the U.S. Supreme Court has repeatedly held, fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁸

A. Fair use helps authors

One misrepresentation about fair use is that it reduces copyright owners' rights. The above examples, in which famous composers over the centuries have happily copied from each other belie this. And the question falsely assumes that copyright owners should have absolute control over all unauthorized uses of their works. This has never been the case, not for copyright or real property. No copyright law in history has allowed

⁶ Both under copyright and trademark law.

⁷ *Id.*

⁸ See e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)(citing earlier

anything remotely approximating full control, nor should such a law exist. If it did, we would have no book reviews that quoted from the book being reviewed; no breaking news stories that used photographs or film clips, unless improbably all rights had been cleared; no personal pictures of the thousands of buildings throughout the world that are subject to copyright; no parodies or satires; no classroom uses. No one should want such a world.

The existence of a fair use defense does not mean any particular claim of fair use will succeed. I have argued cases in court in favor of fair use applying. I have argued cases in court against fair use applying. I have won some of those arguments, and lost others, like all authors. In all cases, the assessment is driven by whether the claimed fair use furthers the goals of copyright. If a use furthers the goals of creating more works, one can hardly say that authors' rights have been diminished. The majority of fair use cases in the U.S., after all, are between two authors, so which author's rights have, allegedly, been reduced?

Fair use arose, and still functions, as a way to encourage learning through the judicious use of an earlier work for a socially beneficial purpose, most typically in a second author's work. That's why courts have heavily emphasized the fourth fair use factor, the effect of the use on the market for the original work. A use that substantially interferes with the market for another work through wholesale copying is not benefitting society and is not fair use.

II. FAIR USE IS A TOOL, AND A GOOD ONE AT THAT

Law is not an end in itself. Law is not an aesthetic object: we don't love laws. Law is merely a tool to achieve societal goals. Fair use is one tool to achieve copyright's goals. There are other copyright tools too: the idea-expression dichotomy, the *scènes à faire* doctrine, the requirement that unauthorized copying be more than *de minimis* to be infringing, and of course the array of exclusive rights and remedies. All work together as part

quotations).

of a whole to achieve copyright's goals. None is *primus inter partes*, and all have an important role to play.

Sometimes a particular tool is appropriate and sometimes it isn't. If a screwdriver doesn't work for a particular task, we might use a hammer instead, but if we do, we don't throw away the screwdriver or refuse to use it for other tasks. Instead, we use the tool that is the most appropriate for the task at hand. When the fair use tool fits, there should be a finding of fair use. When it doesn't fit, fair use shouldn't be found, but in doing so we wouldn't say fair use will never be appropriate in the future, no more than we would with the screwdriver. No one should be for or against all claimed assertions of fair use, any more than you should be for or against ever using a screwdriver.

Here are two examples of how fair use works as a good tool to separate the fair use sheep from the infringing goats.⁹ Both examples involving the same defendant, artist Jeff Koons. In the first case, *Rogers v. Koons*, photographer Art Rogers from Marin County, California (my home county) took the picture on the left, which Koons infringed by having the sculptural work on the right made:



Koons didn't even go through the trouble of making the sculpture himself. Instead, he took a copy of Roger's photograph, tore off the copyright notice, and sent it to real artists in Italy, with instructions to

⁹ The agricultural reference is to Justice Souter's opinion in *Campbell v Acuff-Rose Music*,

closely copy it with small color additions, and the flowers in the woman's ears. The Second Circuit Court of Appeals rightly rejected fair use, memorably holding, "it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."¹⁰ Amen. When I was a congressional staffer, we held a hearing with Rogers as our first witness, explaining the travails he went through after being ripped off by a celebrity artist.

The Rogers case was handed down in 1992. Fourteen years later, in 2006, the same court handed down another opinion in which Koons was the defendant for again copying photographs without permission. This time, the court of appeals rightly found fair use.¹¹ In the second case, Koons copied a photo of a woman from a fashion magazine ("Silk Sandals"), altered it, and made it into a collage from other photos. Plaintiff's photograph is the first below, while the second photograph is Koons' ("Niagara"):



Inc., 510 U.S. 569 (1994).

¹⁰ 960 F.2d 3 01 (2d Cir. 1992).

¹¹ Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).



As described by the court:

Koons scanned the image of “Silk Sandals” into his computer and incorporated a version of the scanned image into “Niagara.” He included in the painting only the legs and feet from the photograph, discarding the background of the airplane cabin and the man's lap on which the legs rest. Koons inverted the orientation of the legs so that they dangle vertically downward above the other elements of “Niagara” rather than slant upward at a 45-degree angle as they appear in the photograph. He added a heel to one of the feet and modified the photograph's coloring.¹²

Koons asserted fair use. The court of appeals noted:

¹² 467 F.3d at 248.

Koons does not argue that his use was transformative solely because Blanch's work is a photograph and his is a painting, or because Blanch's photograph is in a fashion magazine and his painting is displayed in museums. He would have been ill advised to do otherwise. We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work. ...

But Koons asserts—and Blanch does not deny—that his purposes in using Blanch's image are sharply different from Blanch's goals in creating it.

...

Koons is, by his own undisputed description, using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch's "Silk Sandals," but to employ it "in the creation of new information, new aesthetics, new insights and understandings.' "

One can – and I do – cast a dubious eye on Koons' bona fide interest in critiquing the media and fashion culture in the U.S., given his own fatuous celebrity status, but as the court observed, it is not its role to judge the value of art. Courts' task is an objective one, guided by the actual works. And judged by that task, Koons' work was a transformative fair use, regardless of what one may think of Koons or his work.

As the two Koons cases show, fair use is well placed to make rationale distinctions constructively furthering the goals of copyright. Judges and juries throughout the world are equally able to handle cases like these. There is nothing American about the task. It should be pointed out that both Koons cases were disputes between two artists. It should also be pointed out that in both Koons cases, the appeals court affirmed the trial court below, showing how certain the application of fair use can be.

III. HOW I CAME TO UNDERSTAND FAIR USE

My understanding with fair use has evolved through different experiences, a common way we all learn: through initially being a private lawyer and then through seven years of government service, I gained experience in the practical and legislative issues raised by fair use. In addition to my work as a young lawyer on the *American Geophysical Union v. Texaco, Inc.* case, as a Policy Planning Advisor to the Register of Copyrights, I testified as the lead witness before a rare joint hearing of the Congressional intellectual property subcommittees on bills to amend Section 107 to address concerns about use of unpublished letters in biographies. Shortly thereafter I became copyright counsel to the House of Representatives Committee on the Judiciary, and was intimately involved in the legislation that ultimately addressed (in an appropriately modest way) those concerns. That experience showed me the wisdom of the drafters of Section 107 in not codifying fair use but instead only statutorily recognizing it without altering the common law that gave life to the doctrine.

As a full-time law professor from 1995 to 2000, I had the joy and challenge of teaching fair use to students. The highlight for me was one course in which, rather than consulting the Copyright Act or reading court opinions, we spent three classes discussing what our ideal fair use provision would look like, without using the label fair use: what types of unauthorized uses should be permitted, and what factors would you develop to see whether any particular use should be permitted? It was a great process that I recommend to everyone. The end result was almost identical to Section 107, proving that 300 years of experience in the English and then U.S. courts has resulted in a doctrine that has both stood the test of time and been flexible enough to evolve with the times.

Back in private practice in 2000 after leaving academia, I litigated fair use cases, both at the district court and appellate level, winning some and losing some, like all lawyers. I won a reversal of summary judgment of no

fair use in a case before the Seventh Circuit in an opinion by Judge Richard Posner in a dispute in which photographs of plush bear toys were made for identification purposes.¹³ I lost a case before the Second Circuit in which I argued that photographs of rock music posters copied in a coffee table holiday book were not used for identification or transformative use purposes, and so should not be fair use.¹⁴ Since 2006, I have been a copyright counsel at Google Inc. where I routinely advise internally about fair use for new products or services that are being developed. I also participated in Google's two big fair use litigations: the Books Project case in which the Second Circuit found fair use,¹⁵ and the case brought by Oracle involving Java and Android in which Oracle sought \$2 billion in damages but which a jury found to be fair use.¹⁶ I know the stakes when fair use is at issue. I know when to assert fair use and when not to. Most experienced copyright lawyers do too. Experience, hard work, and keeping an open mind is all that is required. There is no magic to fair use; anyone who wants to learn it can.

I have also learned a great deal from re-reading the opinions of the early English common law judges who grappled with the bare bones 1710 Statute of Anne, the first general copyright law.¹⁷ That legislation said little more than that there is an exclusive right to publish your book. The law said nothing about the scope of that right: was copying of as little as 1% without permission infringement, or did infringement only occur if you copied 100% of the book, or could copying of somewhere between 1% and 100% be infringement depending on the reason for and effect of the copying? No legislative answers were provided, so the early English common law judges do what all judges, even in civil law countries do in such circumstances:

¹³ Ty, Inc. v. Publications International, Ltd., 292 F.3d 512 (7th Cir. 2002). Judge Posner and I went on to write a law review article together on fair use. See William Patry and Richard Posner, "Fair Use and Statutory Reform in the Wake of Eldred," 92 University of California, Berkeley Law Review 1639 (December 2004).

¹⁴ Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605 (2d Cir. 2006).

¹⁵ Authors Guild, Inc. v. Google Inc., 804 F.3d 202 (2d Cir. 2015).

¹⁶ Oracle America, Inc. v. Google Inc., 2016 Westlaw 3181206 (N.D. California June 8, 2016), appeal filed November 14, 2016).

¹⁷ Some of these cases are discussed below.

they looked to the purpose of the legislation and developed principles to fulfill that purpose.¹⁸ The Statute of Anne had a legislative purpose of encouraging learning by encouraging the publication of books that otherwise wouldn't have been written. That was a simple and functional goal. The goal was, moreover, free of bias whether the book to be encouraged was one written by the plaintiff or one written by the defendant. In short, the answer to the 1% question was no, that small amount of copying wasn't infringement, as was the answer to the 100% question – you can be an infringer even if you copy less than 100%. The answer to where in between 1% and 100% infringement would lay (or not) was, “it depends,” and over 300 years later, that is still the answer.

Based on principles not rules, late eighteenth century and early nineteenth century English common law judges, faced with only the Parliamentary purpose of encouraging learning, created all of the foundational elements of copyright: who is an author, what is an original work of authorship, the idea-expression dichotomy, when copying is de minimis and therefore not infringing, and when copying does violate the statute. The foundational elements of copyright are the same around the world, and importantly, are judge-made. They are judge-made because they have to be: creativity and innovation are fact-specific, contextual endeavors: if they weren't, every government in the world by fiat would have long ago developed serious rivals to Silicon Valley.

IV. PUTTING FAIR USE IN THE CORRECT CONTEXT

In the early English common law copyright opinions, there were no separate “limitations and exceptions,” no affirmative defenses. Plaintiffs and defendants were on equal footing, unlike today where a copyright holder plaintiff is argued to be in the type of protected class formerly reserved for children at risk. In copyright's formative period, there was a

¹⁸ See Aharon Barak, “Purposive Interpretation in Law” (Translated from the Hebrew by Sari Bashi, 2007 Princeton University Press).

single judicial inquiry under a single legislative purpose of encouraging learning. Put simply by Lord Chancellor Eldon in the 1810 case of *Wilkins v. Aiken*: “The question upon the whole is, whether this is a legitimate use of the plaintiff’s publication, in the fair exercise of a mental operation, deserving the character of an original work.”¹⁹ The original work referred to here is not plaintiff’s, *but defendant’s*.

The early judges saw copyright law as a way to mediate between conflicting authorial claims to creativity.²⁰ Fair use arose in disputes between two *authors*, not as a way to get free use. Where an unauthorized work was itself creative in its employment of a previous work, it was regarded as a “new book,” and encouraged under the statute. This is clearly seen in unauthorized abridgments. In 1740, Lord Chancellor Hardwicke wrote that unauthorized “abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them . . .”²¹ Unauthorized copying was not regarded as an inherent social ill, but in some circumstances as a social benefit. Seven years before *Wilkins v. Aiken*, in 1803, Lord Ellenborough, in *Cary v. Kearsley* had held:

That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt the work of another: he may so make use of another’s labours for the promotion of science, and the benefit of the public; but having done so, the question will be, Was the matter used fairly with that view?²²

Fair use was not a blank ticket to do what you wanted, and it still isn’t.

¹⁹ 17 Ves. (Chancery) 422, 426 (1810).

²⁰ Or other social benefits such as reviews and scientific discussions which used portions of the copyrighted work. From copyright’s inception in Anglo-American law, sanctioned unauthorized uses extended beyond creating a second work.

²¹ *Gyles v. Wilcox*, 2 Atk. 141, 143 (1740).

Sometimes the judgment by the early English judges was no, the work hadn't been used fairly, as in the 1752 case of *Tonson v. Walker*,²³ where Lord Chancellor Hardwicke condemned defendant's unauthorized copying of an edition of Milton's (public domain) poetry along with plaintiff's protected editorial notes. Defendant had merely added a few of his own notes. The court rightly dismissed defendant's work as a "mere evasion" of plaintiff's copyright, and not as a bona fide abridgment. In other words, an infringement. The English courts' unified approach to furthering learning through a unified judicial inquiry arose from their understanding of the creative process and their fidelity to Parliament's purpose. Their approach prevented them from falling prey to the accusation that all unauthorized copying is free-riding, to be stamped out at every opportunity, and condemned as a moral and social shortcoming. It also led them to ensure that those seeking to use a copyrighted work without permission or payment have a good reason for doing so, and that too is still the case.

V. FAIR USE IS IMPORTANT TO CULTURE

Copyright in communicative works raises cultural issues. Culture is not based on hypothetical markets or fictional rational markets, but instead on real flesh-and-blood people expressing their emotions, their fears, and their hopes. They can only do so by copying from others who have similar emotions, fears, and hopes. You can't communicate your emotions, fears, and hopes to others if you do not communicate in a shared cultural language, a language that you did not originate but will hopefully enrich. All works therefore exist only in context with past and present authors and the larger public: readers can only understand contextually; that is, within shared communal understandings. This is what Hans-Georg Gadamer meant when he wrote: "Understanding is to be thought ... as participating in an event of tradition, a process of transmission in which past and present are

²² 4 Esp. 168, 170 (1803).

²³ 3 Swans. (App.) 672, 680 (1752).

constantly mediated.”²⁴

Our greatest works of culture have been the result of that process of transmission between the past and present through creative copying: that is, in fact, the very way the past *is* transmitted to the present. I learned this first hand as a musician, beginning at age six. Children and adults who wish to learn how to play a musical instrument must do so by listening to the sounds their teachers make and then trying to replicate those sounds as closely as possible. Many times you play the same passage in unison so that you can keep your teacher’s sound stored in your brain along with yours. Tricky rhythms can only be learned by listening to others and by copying their playing. For most musicians, this process of copying continues throughout their lives, as you seek out new sounds you want to copy and make your own. It is the process of copying from others that allows us to gain the skills to find our own voice. Here is world-famous clarinetist Buddy DeFranco, who has been playing for over seventy years, giving advice on “How to Develop Your Own Voice on Clarinet”:

[I] recommend[] repeated listening to recordings, transcribing the solos of these players, and playing along with the solos. . . . [You] should begin to develop patterns and phrases based on these players’ styles. . . . [You] should strive to internalize aspects of the masters’ styles and incorporate [them] into [your] own playing.”

Note the title of his advice was not “How to Copy from Others” but “How to Develop *Your Own Voice*,” which you do by copying from others. I am fortunate to own a (thoroughly restored) set of early Buffet R-13 clarinets that Robert Marcellus, the principal clarinetist with the Cleveland Orchestra from 1953 to 1973, previously owned and played on. Marcellus’s 1961 recording of the Mozart Clarinet Concerto with George Szell conducting has long been an icon for classical clarinetists, who seek to

²⁴ Hans-Georg Gadamer, *Truth and Method* 291 (Continuum Press, 2004 revised edition).

replicate Marcellus's expressiveness. Here is a comment by one person about how important it was for him to copy Marcellus's sound:

I was 12 years old. I hadn't formed any opinion of Mozart, and had never heard of Robert Marcellus. But when I heard that recording for the first time, I knew I wanted to be the one playing that piece someday. His tone was what hooked me. Marcellus had a haunting clarity, a round, dark ring to every note. I couldn't get that sound out of my ear, and I still strive for it.

To deny people the ability to copy—whether from a book, a recorded performance (as in the Marcellus example), or from any source—is to deny them their dream of becoming who they want to be. This applies to groups of people, not just to individuals: despite European policymakers' often absurd pronouncements that they need the strongest possible copyright laws so that they can protect authors and culture, European jazz exists only because European musicians relentlessly copied American jazz musicians, without payment. The British rock groups of the late 1960s to early 1970s were successful because they relentlessly and shamelessly copied from American blues artists and Elvis Presley. Those artists in turn copied from each other Ray Charles, described how he set out deliberately to copy Nat King Cole:

I knew . . . that Nat King Cole was bigger than ever. . . .
Funny thing, but during all those years I was imitating Nat Cole,
I never thought about it, never felt bad about copying the
cat's licks. To me it was practically a science. I worked at it.
I enjoyed it. I was proud of it, and I loved doing it.

Mr. Charles later decided to move to a different style, but even here he copied from gospel music: His famous 1954 composition "I Got a Woman," was unabashedly copied from the 1904 hymn "My Jesus Is All the World to

Me” written by a white composer from East Liverpool, Ohio, William Lamartine Thompson. Nor was this a one-off: he regularly copied (without permission) from other hymn composers: “This Little Girl of Mine,” was taken from Clara Ward’s “This Little Light of Mine.”

Copying, done by famous composers and performers from time immemorial, is how culture is created and passed on. To deny that is the case or to disallow it, is to deny the very nature of culture. Fair use is an essential part of ensuring that culture continues to thrive. Judge Pierre Leval has written: “Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”²⁵ Throughout his thirty-nine years as a member of the federal judiciary – sixteen years as a trial judge in the Southern District of New York, and twenty-three years as an appellate judge on the U.S. Court of Appeals for the Second Circuit in Manhattan, Judge Leval has gained a great deal of practical experience in deciding fair use cases. His over three decades of experience in applying fair use has led him to a greater, not a lesser appreciation of the doctrine’s importance in furthering creativity. He is not alone in this view: those with the most experience with fair use feel the same way.

VI. FAIR USE DOES NOT LEAD TO LOTS OF LITIGATION

One would not recognize the critical role that fair use plays from the attacks on it by some private interests. As revealed in the leaked Sony documents, Chris Dodd, head of the Motion Picture Association of America (MPAA), described fair use as “extremely controversial and divisive” in an email to the then-United States Trade Representative Michael Froman.²⁶ Mr. Dodd has no experience with or understanding of copyright, let alone fair use. He became the head of the MPAA after declining to run again for

²⁵ Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

²⁶ See www.techdirt.com/articles/20150416/17252230680/chris-dodds-email-reveals-what-

the U.S. Senate from my current state of Connecticut, after his involvement in favorable real estate deals during the crash of 2008 led to a crash in his poll numbers. In any event, Mr. Dodd's comments are not only false, they contradict other public statements by the MPAA, including a thoughtful October 2013 MPAA blog post by its very experienced copyright counsel Ben Sheffner. Mr. Sheffner was responding to comments about an MPAA brief submitted in litigation supporting fair use:

[W]e do want to push back a bit on the suggestion in some of the commentary about our brief that the MPAA and its members somehow “oppose” fair use, or that our embrace of it in the Baltimore Ravens brief represents a shift in our position. That's simply false, a notion that doesn't survive even a casual encounter with the facts. Our members rely on the fair use doctrine every day when producing their movies and television shows – especially those that involve parody and news and documentary programs. And it's routine for our members to raise fair use – successfully – in court. . . . No thinking person is “for” or “against” fair use in all circumstances. As the Supreme Court and countless others have said, fair use is a flexible doctrine, one that requires a case-by-case examination of the facts, and a careful weighing of all of the statutory factors. Some uses are fair; some aren't.²⁷

I agree with these remarks completely. Yet, it has become common to attack fair use as unpredictable, as being merely the right to hire a lawyer. The right to hire a lawyer argument applies equally to all litigation, not just for authors, not just for the poor, but for the middle class too.²⁸ This is particularly a problem in criminal cases where the personal stakes are much,

[mpaa-really-thinks-fair-use-extremely-controversial.shtml](#)

²⁷ [www.mpa.org/mpaa-and-fair-use-a-quick-history/](#)

²⁸ See “Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid,” July 22, 2010, available at : [www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid](#)

much higher than whether one pop song infringes another. Some studies have indicated that the average hourly income of a person needing legal services (of any type) is \$25, while the average hourly rate for a new lawyer is about \$350. Thus, for every hour of a lawyer's time, the person hiring the lawyer would have to work an extra 14 hours just to break even, or almost an extra week for just three hours of a lawyer's time.²⁹ That doesn't happen, and therefore many middle-class people (in addition to the poor) cannot access the courts, regardless of the type of dispute. This is a national problem, not one of copyright law in general, much less fair use.

Nor does the existence of a fair use defense lead to lots of litigation. The U.S. has a reputation of being a litigious society. Here are the facts. In 2002, in our trial courts, the number of all copyright cases filed was finally separately broken out. In that year, there were 274,842 civil cases filed. Of those, 2,084 were copyright cases, or 0.75%. How many of those 2,084 resulted in fair use opinions in all of 2002? Only nine. As a percent of all civil cases filed, fair use rulings accounted for 0.004% of district courts' docket. Any doctrine that results in a defense being decided in only 0.004% of all cases decided at the trial level is hardly a "flood of litigation."

And what makes up the bulk of litigation in the United States? Far and away, most copyright litigation is brought by one company, Malibu Media LLC, a pornography company. Here is the most recent report, by Bloomberg Law, on litigation trends in the U.S. in 2016:

Copyright complaints fell 25 percent to 3,811 in 2016 from the previous year. Volumes of copyright complaints continued to fluctuate, partly due to irregular activity from adult film maker Malibu Media LLC, which has filed more than 5,000 lawsuits since 2012. Malibu still files more copyright infringement lawsuits than

²⁹ See "Is There Such a Thing as an Affordable Lawyer?" www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/

any other company in the country.³⁰

Fair use is not an issue in Malibu's cases. If we want to crack down on the amount of copyright litigation, we should crack down on pornographers, not parodists.

A. Yes, fair use is fact-specific and that's a good thing

There is a big difference between an exemption and fair use. Exemptions are blanket passes on liability: if you are within the class of works or behavior covered by the exemption, you have no liability. There is no weighing of different factors, including importantly no concern with whether the exempt behavior harms the market for the original work. Not so with fair use. Fair use is focused on individual uses and the individual (or company) who asserts fair use as a defense. (And as an affirmative defense, much less, meaning the party who claims fair use has the evidentiary burden of proving it). The result in a fair use case is based only on the facts of that case, and in reaching the result, one must weigh various factors, including whether the defendant's conduct harms the market for plaintiff's work. That's a good thing to examine. So yes, fair use is fact-specific and that's a good thing: by being fact-specific courts are able to hear all relevant evidence and make a considered judgment, but are not "legislating" the outcome for future cases.

B. No, fair use is not unpredictable

The argument that fair use is so fact-specific that it is unpredictable singles out fair use for treatment we don't apply to other fields of law: the argument is equally applicable to the "reasonable person" in tort and negligence law, and the "rule of reason" in antitrust law. These standards do not exist independently of the facts of the particular case. Yet, we do not

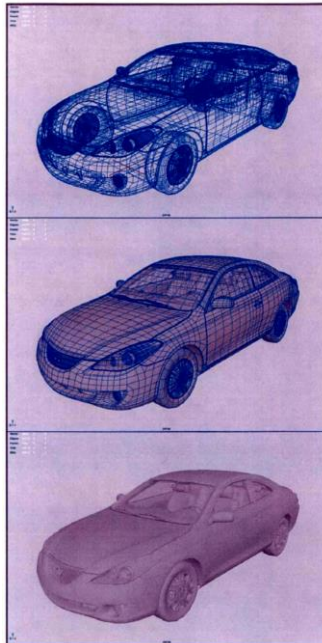
³⁰ See <https://www.bna.com/patent-copyright-lawsuit-n73014449878/>

hear complaints that tort law or antitrust law are inherently unpredictable. Even within copyright law, all of the foundational issues in copyright are equally fact-specific: did you contribute enough to be considered an author, did you imbue the work with enough originality for the work to be protected?

Here is an illustrated example of the fact-specific nature of the most foundational of all copyright questions, is a work protected? It is from a 2008 opinion³¹ written by Judge Neil Gorsuch, who was nominated to the U.S. Supreme Court on January 31, 2017. The dispute concerned a digital wire-frame computer model of a Toyota car made by a contractor of an advertising agency. The contractor gave a license to use the model and claimed the scope of the license had been exceeded, which would have resulted in copyright infringement, if the model was a protected work. Toyota argued the computer model was not an original work of authorship because it faithfully reproduced the appearance of the actual car. Here are pictures of the model:

APPENDIX A

06-4222, Meshwerks v. Toyota



In holding that Meshwerks' efforts, while substantial, were not the type the copyright law protects, the court first turned to foundational legal elements that would guide its decision:

What exactly does it mean for a work to qualify as "original"? In *Feist*, the Supreme Court clarified that the work must be "independently created by the author (as opposed to copied from other works. In addition, the work must "possesses at least some minimal degree of creativity," *Feist*, 499 U.S. at 345; see also William F. Patry, *Patry on Copyright* § 3:27 ("both independent creation and a minimal degree of creativity are required"), though this is not to say that to count as containing a minimal degree of creativity a work must have aesthetic merit in the minds of judges (arguably not always the most artistically discerning lot).³²

In short, the Court did not look to the statute for guidance, because the statute doesn't and can't give guidance. Instead, the court cited judge-made foundational principles. Next, the court looked to the facts of how the model was created. Here is the court's description of the process of creation:

Meshwerks took copious measurements of Toyota's vehicles by covering each car, truck, and van with a grid of tape and running an articulated arm tethered to a computer over the vehicle to measure all points of intersection in the grid. Based on these measurements, modeling software then generated a digital image resembling a wire-frame model. In other words, the vehicles' data points (measurements) were mapped onto a computerized grid and the modeling software connected the dots to create a "wire frame" of each vehicle.

³¹ *Meshwerks, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).

At this point, however, the on-screen image remained far from perfect and manual “modeling” was necessary. Meshwerks personnel fine-tuned or, as the company prefers it, “sculpted,” the lines on screen to resemble each vehicle as closely as possible. Approximately 90 percent of the data points contained in each final model, Meshwerks represents, were the result not of the first-step measurement process, but of the skill and effort its digital sculptors manually expended at the second step. For example, some areas of detail, such as wheels, headlights, door handles, and the Toyota emblem, could not be accurately measured using current technology; those features had to be added at the second “sculpting” stage, and Meshwerks had to recreate those features as realistically as possible by hand, based on photographs. Even for areas that were measured, Meshwerks faced the challenge of converting measurements taken of a three-dimensional car into a two-dimensional computer representation; to achieve this, its modelers had to sculpt, or move, data points to achieve a visually convincing result. The purpose and product of these processes, after nearly 80 to 100 hours of effort per vehicle, were two-dimensional wire-frame depictions of Toyota’s vehicles that appeared three-dimensional on screen, but were utterly unadorned-lacking color, shading, and other details.³³

Finally, in classic fashion, the court applied the guiding principles to the facts to reach its holding:

[W]e hold that the unadorned images of Toyota's vehicles cannot be copyrighted by Meshwerks and likewise must be filtered out. To the extent that Meshwerks' digital wire-frame models depict only those unadorned vehicles, having stripped away all lighting, angle, perspective, and “other ingredients” associated with an original expression, we conclude that they have left no copyrightable matter.

³² 528 F.3d at 1262-1263.

Confirming this conclusion as well is the peculiar place where Meshwerks stood in the model-creation pecking order. On the one hand, Meshwerks had nothing to do with designing the appearance of Toyota's vehicles, distinguishing them from any other cars, trucks, or vans in the world. That expressive creation took place before Meshwerks happened along, and was the result of work done by Toyota and its designers; indeed, at least six of the eight vehicles at issue are still covered by design patents belonging to Toyota and protecting the appearances of the objects for which they are issued. ... On the other hand, how the models Meshwerks created were to be deployed in advertising—including the backgrounds, lighting, angles, and colors—were all matters left to those ... who came after Meshwerks left the scene. Meshwerks thus played a narrow, if pivotal, role in the process by simply, if effectively, copying Toyota's vehicles into a digital medium so they could be expressively manipulated by others.

...

Were we to afford copyright protection in this case, we would run aground on one of the bedrock principles of copyright law—namely, that originality, “as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works).” Feist, 499 U.S. at 345. Because our copyright laws protect only “original” expression, the reason for refusing copyright protection to copies is clear, “since obviously a copier is not a creator, much less an ‘independent’ creator.” Patry on Copyright § 3:28; see also *id.* (“The key is whether original matter in which protection is claimed is the result of plaintiff's ingenuity rather than appropriation of another's material.”)³⁴

³³ 528 F.3d at 1260-1261.

This is the way all courts throughout the world would decide similar cases, common law or civil law, and none of it is the result of applying a statute, rules, or a closed list of factors. Principles and facts alone are the courts' tools in determining the most foundational element of copyright: is this a work protected by copyright? Nor is originality the only foundational element in which this occurs. The idea-expression dichotomy, in which "ideas" are not protected, but "expression" is, provides another example of the inherently fact-specific nature of a foundational element of copyright laws. One of the greatest U.S. judges ever, Learned Hand, made this point in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."³⁵ Yet, the idea-expression dichotomy is a bedrock of copyright laws around the world, and is not subject to criticism, even though like fair use, it is fact specific and therefore allegedly "unpredictable."

All of the other elements of copyright infringement litigation are similarly situated: Was the copying de minimis? If not, was the copying material enough for the two works to be substantially similar? As early as 1836, English courts held these inquiries involve multiple factors that could not form the basis for precedent, seen in this opinion by Lord Chancellor Cottenham:

When it comes to a question of quantity [of copying], it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.

This too is a bedrock of modern copyright law, never challenged or criticized as making copyright protection merely the right to hire a lawyer.

³⁴ 528 F.3d at 1265-1266.

The inquiry into whether one is a joint author is the same, as one court observed:

[A] determination as to whether a work was created jointly involves an examination of both the quantity and quality of the parties' contributions as factors bearing on the ultimate question, intent. While a co-author's contribution need not equal the other author's, at least when the authors are not immediately and obviously collaborating, the co-authors contribution must be "significant" both in quality and quantity in order to permit an inference that the parties intended a joint work.³⁶

I have 22 years of practical experience in applying fair use, both as a private lawyer and as in-house counsel at Google. In those 22 years, I have not found applying fair use any more uncertain than any of the many other, foundational, common law principles in fair use discussed above. In the United States, every day corporate lawyers make fair use determinations with substantial consequences. Many companies are both copyright owners and users. Large U.S. media companies routinely rely on fair use, telling evidence that the doctrine is not uncertain to those that use it the most. Viacom's Comedy Central channel could not exist without fair use. Hardware companies like Apple have benefitted tremendously from fair use. The iPod was built on fair use: the only way it could have -- and did work commercially -- is by allowing people to copy their existing fair use personal copies onto the iPod. Had Apple built the iPod by only allowing people to use it with newly bought songs, it would have been dead on arrival. Fair use made it possible for the iPod and iTunes to exist. And who can forget this classic advertisement:

³⁵ 274 F.2d 487 (2d Cir. 1960).

³⁶ *Eckert v. Hurley Chicago Co.*, 638 F. Supp. 699, 704 (N.D. Ill. 1986).



The certainty with which U.S. companies routinely release products that rely on fair use is borne out in how fair use is adjudicated. In the 19 years since the last significant amendment to the U.S. Copyright Act (the 1998 DMCA), there were 64 court of appeals opinion on fair use (for a population of 320 million people). Of those 64 opinions, 50 affirmed the lower court, 13 reversed, and one was mixed (affirming some works, remanding on others). Leaving aside the mixed decision, there was a reversal rate of only 20%. This means 80% of the time fair use judgments are affirmed. If you give a client an 80% chance of prevailing on appeal in any case, copyright or not, that's pretty darn good.

C. Closed fair-dealing lists are not inherently more certain than fair use

If fair use is not unpredictable, at least aren't closed-list fair dealing systems more certain? Certainty in law is generally a good thing. People should not be held to have violated a vague law. When we pay our taxes, we want to know exactly how much we pay. When we drive, we want to know the exact speed limit. There are areas of copyright law where we want, and should have precise provisions, as with compulsory licensing, which

involves payment of a government set fee as a way to avoid infringement.

The foundational elements of copyright law have, however, never been written like tax laws, speed limits, or even compulsory license provisions: the foundational elements of copyright law have always been standards, not rules based, in common law and civil law countries alike. The analyses of these questions have always been judge-made and fact specific, for the simple reason that creativity and innovation are dynamic. For our copyright laws to be effective they too must be dynamic, a synonym of which is flexible.

And they are: in the 1976 Act, the U.S. Congress deliberately created an open-ended definition of “copy,”³⁷ and a list of exclusive rights that are flexible.³⁸ Thus, when in the mid-1980s, digital music formats became popular, there was no need for Congress to amend the law to enable copyright owners to go after those who were reproducing their analog works without permission, because the law was drafted to be open-ended. That’s a good thing. Similarly, by not providing definitions of most forms of protected subject matter, Congress gave artists and authors the flexibility they need to develop new forms of expression without the need to go to Congress. As the legislative reports noted: “Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.”³⁹ To address this, Congress inserted into the statute two terms which are in turn defined as being illustrative and not limitative: “include” and “such as”:

The second sentence of section 102 lists seven broad categories which the concept of ‘works‘ of authorship‘ is said to ‘include.‘ The use of the word ‘include,‘ as defined in section 101, makes clear that the listing is ‘illustrative and not limitative,‘ and that the seven categories do not necessarily exhaust the scope of ‘original works of

³⁷ See 17 USC section 101.

³⁸ See 17 USC section 106.

³⁹ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 51 (1976).

authorship’ that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.⁴⁰

Fair use got the exact same treatment for the exact same reason, right down to the use of “include” and “such as” in Section 107, noted by the U.S. Supreme Court in *Harper & Publishers, Inc. v. Nation Enterprises*, which, after citing the statutory list of possible fair use purposes, held: “This listing was not intended to be exhaustive; see section 101 (definition of ‘including’ and ‘such as.’”).⁴¹ As the legislative reports explain:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.⁴²

It is not coincidental that there is an exact parallel between how Congress treated copyrightability and how it treated fair use: both involve dynamic processes and thus require flexibility. Flexibility is necessary to

⁴⁰ *Id.* at 53.

⁴¹ 471 U.S. 539 (1985).

⁴² *Id.* at 66.

give authors the freedom to find new ways to express themselves, and flexibility is necessary so that all authors can creatively build on the works of others.

Closed lists cannot provide that flexibility: the very idea of top-down government approved lists of which creative or innovative activity should be permitted should be an anathema to authors, artists, and performers. Moreover, it is an illusion that a closed list is inherently precise: the mere fact that a provision is specific does not mean it is precise, nor that it can practically be implemented without reference to the principles that animate its underlying purpose. Language is inherently open textured and is not susceptible to the “originalist” prattle bandied about by some in the legal field. The classic example, given by H.L.A. Hart in 1958 is this:

A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, rollerskates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not?⁴³

In a reply to Hart, Lon Fuller asked him about a World War II military truck set on a pedestal as a memorial. Is that a vehicle? What about an ambulance? A stroller? A wheel chair?⁴⁴ The answers could not be found in the closed list label “vehicle,” but only in the purpose of the statute and the principles that animate that purpose. Fair dealing provisions that specify classes of uses unavoidably leave substantial discretion both as to the boundaries of those classes and as to what constitutes fair dealing within those classes.

This is seen in the Canadian fair dealing provisions. The Canadian Supreme Court ruled in a case involving lawyers’ photocopying articles that: “The fair dealing exception ... is a user's right” that “must not be

⁴³ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 593, 607 (1958).

⁴⁴ Lon Fuller, *Positivism and Fidelity to Law---A Reply to Professor Hart*, 71 *Harvard Law*

interpreted restrictively.” On that basis, the Canadian Supreme Court, in interpreting the closed list label of “research,” held that “Research must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”⁴⁵ The word “research” was thus understood by reference to the underlying principles of users’ rights, and users’ rights being interpreted in a “large and liberal way.”

The Court later expanded beyond lawyers doing research in that earlier case to include consumers listening to 30 second previews of music, since customers could be considered to be “researching” whether to purchase the album.⁴⁶ As a result of these interpretations of the closed list purpose of “research,” Canadian fair dealing law is, in some respects, broader and more elastic than U.S. fair use law since a U.S. court had rejected such previews as fair use.⁴⁷ In the preview case, the Canadian Supreme Court wrote:

[21] It is true that an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity... But that does not argue for permitting *only* creative purposes to qualify as “research” under [s. 29](#) of the [Copyright Act](#). To do so would ignore the fact that the dissemination of works is also one of the *Act*’s purposes, which means that dissemination too, with or without creativity, is in the public interest. It would also ignore that “private study”, a concept that has no intrinsic relationship with creativity, was also expressly included as an allowable purpose in [s. 29](#). Since “research” and “private study” both qualify as fair dealing purposes under [s. 29](#), we should not interpret the term “research” more restrictively than “private study”.

Review 630, 663 (1958).

⁴⁵ CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339 at 50.

⁴⁶ Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, [2012] 2 SCR 326.

⁴⁷ See United States v. American Society of Composers, Authors and Publishers, 599 F.Supp.2d 415 (S.D.N.Y. 2009)

[22] Limiting research to creative purposes would also run counter to the ordinary meaning of “research”, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.

Thus, not only is the term “research” in the Canadian closed list **not** any more certain than in the U.S. “open” system, fair dealing statutes may result in decisions more liberal than those in fair use regimes. What should matter is not the label, but the analysis: both systems involve a flexible application of law to the facts according to a legislative purpose. Fair use is neither more nor less uncertain, unpredictable, likely to lead to litigation, nor to diminish rights than any other inquiry. If we want to further creativity and innovation, our copyright laws must allow for such flexibility because that the very nature of creativity and innovation.

It is, moreover, illogical and against the evidence that a closed list of permissible uses can simultaneously be precise yet broad enough to cover uses that the legislature didn’t think of at the time but would have permitted had it thought about it. No legislature, no matter how conscientious and careful can predict the future, and as a result cannot draft laws that will be effective for a future it cannot see. Here is an example. With the Internet widely available to school children of all ages, the opportunities for learning are fantastic. So too are the opportunities for cheating, given how easy it is to electronically cut and paste from an online source. Educators do not have the resources to manually check every student paper to look for evidence of plagiarism. A private company, Turnitin, came up with a solution: if educators gave them electronic versions of student papers, it could

automatically check the papers against a database of other papers and online sources. A school district in the state of Virginia signed up; a number of students sued for copyright infringement. The defendant asserted fair use.

In affirming the trial court,⁴⁸ the court of appeals for the Fourth Circuit in 2009 agreed the use was fair. The appellate court noted that defendant was a for profit entity, that its copying of the students' works was its business model, and that it copied the entirety of the works. In many fair use cases, these would be serious strikes against the defense. But what was the reality? The reality was that the company was acting on behalf of the school in order to address what had become a serious plagiarism problem. As the court wrote, "use of these works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism." The use in question did not fit within any of the enumerated fair use purposes in Section 107 of the U.S. Copyright Act, and would not fit within any closed, fair dealing list either. But so what? The use was for a valuable social purpose, was not for appropriating the expressive content of the student papers, and did not harm their market should they ever sought to sell the papers. The advantage of fair use is that its flexible nature could and did come to the right result. The disadvantage of a closed list (and no list at all even more so) is that it can't, unless a court, in a results-oriented approach, wildly stretches the meaning of a word to get to the result it wants. That is not an approach we should want, and such an approach would truly create uncertainty for future cases.

The choices are not to legislate at all and have a legal Wild West; to legislate in a manner strictly applicable to the present thereby necessitating frequent revisions on the pain of laws becoming irrelevant or ignored; or to legislate in a manner that is applicable to the present but is flexible enough to be applied to the immediate future. Flexibility does not mean without guidance, and this is where principles come in. Principles can guide judges

⁴⁸A.V. v. iParadigms, <http://www.ca4.uscourts.gov/Opinions/Published/081424.P.pdf>.

Again note how often this occurs, rendering the fair use is uncertain argument silly.

and juries about how to decide future cases. Without such guidance, judges and juries are placed in an untenable position: they have to decide a case without knowing how the legislature wished the case to be handled. Fair use, with its set of principles and almost 300 years of precedent, is ably situated to address such dilemmas.

D. Fair use is not unique to the American legal system

In our current era of alternative facts, it should not be surprising that fair use is described by some as inappropriate for any country other than the U.S. Fair use is not culturally-specific or rooted in the United States. It is not vegemite which Australians have a unique fondness for, Scottish haggis, Japanese wasp crackers, or Icelandic Kæstur hákarl (treated shark). It was, in fact, adopted from the UK along with marmite (a cousin of vegemite). The type of inquiry that one engages in with fair use, is as noted above, no different from the foundational copyright inquiries that all courts in all countries of the world engage in.

What is peculiarly American about asking why someone copied? What is peculiarly American about inquiring whether the work copied is a highly original work of fiction or an intensely fact-laden work like a compilation of data? What is peculiarly American about inquiring into how much of the original was copied and whether the amount copied was necessary to the copier's purpose? What is peculiarly American about caring whether the copying resulted in harm to the market for the original?

Everything is right about these questions, and courts all over the world consider these factors regardless of the label given to the inquiry. They consider these factors because they should; the factors are important to fulfilling the purposes of copyright. Would one rather not know the answer to these questions? Of course not.

VII. CONCLUSION

Once understood, fair use should be seen as a constructive, necessary flexible tool to ensure that the purposes of copyright – encouraging creativity, innovation, and learning – are in fact achieved. One can have laws that suppress creativity and innovation, laws that support these activities, or laws that are ignored. My preference, and hopefully that of policymakers, is to have laws that work. Fair use works: 300 years of experience proves it.