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Spring 2010

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GETTING TO BEST PRACTICES – A PERSONAL VOYAGE AROUND FAIR USE

by PETER JASZI*

*Extracts (Supplied by a sub-sub-sub copyright librarian with an marked aversion to footnotes)***

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Annotation of Wikipedia illustration of art from a VHS cassette of *Moby Dick and the Mighty Mightor*, <http://en.wikipedia.org/wiki/File:Moby-dick-mightor.jpg>

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Fair use is the great white whale of American copyright law. Enthralling, enigmatic, protean, it endlessly fascinates us even as it defeats our every attempt to subdue it.

Paul Goldstein, *Fair Use in Context*,
31 COLUM. J.L. & ARTS 433 (2008)

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In a magisterial new work, “The Evolution of Childhood,” Melvin Konner, an anthropologist at Emory University, defines play as “inefficient, partly repetitive movements in varied sequences with no apparent purposes.” Play, Konner writes, is a biological puzzle: it requires a great deal of energy, involves risk, and is apparently pointless. Nonetheless, he says, the most intelligent animals — including primates, elephants, and larger-brained birds, such as parrots — are also the most playful ones. “Research suggests that people in positive and playful moods are more open to experience and learn in better and more varied ways,” Konner writes. “The idea is that natural selection designed play to shape brain development . . .”

Rebecca Mead, *State of Play: How Tot Lots Became Places to Build Children’s Brains*, NEW YORKER, July 5, 2010, at 32, 33.

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**Despite which, an apologetic salute to Herman Melville and his “wicked book,” with its immortal “Sub-Sub Librarian,” is in order here.

The so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like, and is concerned with the use made of prior compilations, listings, and digests. In certain of these cases, it is held that a writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text; but even in such cases, it is generally held that if he appropriate the fruits of another's labors, without alteration, and without independent research, he violates the rights of the copyright owner. In these instances, as has been said, there are certain to be considerable resemblances, "just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself." *Chautauqua School of Nursing v. National School of Nursing*, 2 Cir., 238 F. 151, 153. . . . But up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work, and presenting it, with few variations, as a burlesque.

Benny v. Loew's, Inc., 239 F.2d 532, 536 (9th Cir. 1956), *aff'd*, by an *equally divided Court*, *sub nom.*, *Columbia Broad. Sys., Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958)

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Does this doctrine — a floating one, not mentioned in the statute — bring into our inquiry anything new or special? We are told that the earliest American report in which the expression fair use appeared — within quotation marks — was that of *Lawrence v. Dana* in 1869, where the defendant's edition of Wharton's *Elements of International Law* was accused as a plagiarism of the plaintiff's earlier edition of the same work. Justice Clifford's opinion, sustaining the charge, followed Story on the factors to be considered in adjudging liability for the research uses of one scholarly book by another; fair use emerged as the sort of taking which on such considering would be held noninfringing. Justice Clifford was not being consciously innovative. Judge Hand in the *Nichols* and *Sheldon* cases seemed also to speak of fair use as merely the contrary of infringement. But other authorities have taken fair use to refer to a set of justifications averting liability for what on the face of things is infringement. This tends to leave the impression that infringement itself is decided with contamination by notions of policy, with fair use coming in later to supply those notions. But policy runs throughout our subject, as much of the discourse to this point shows. Dealing with fact works, Professor Gorman does not apply fair use as a separate analytical instrument; it would, I think, be possible to dispense with it in relation to other works also.

BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 67-68 (1967)

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[A]s a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyright work to promote the ends of public welfare for which he was granted copyright The the-

ory of “enforced consent” suggests another rationale which relies more directly upon the constitutional purpose of copyright. It has often been stated that a certain degree of latitude for the users of copyrighted works is indispensable for the “Progress of Science and useful Arts” [because] progress depends on a certain amount of borrowing, quotation and comment. Justification for a reasonable use of a copyrighted work is also said to be based on custom. This would appear to be closely related to the theory of implied consent. It also reflects the relevance of custom to what is reasonable. In any event, it has been stated that fair use is such as is “reasonable and customary.”

ALAN LATMAN, STUDY NO. 14, FAIR USE OF COPYRIGHTED WORKS 7 (1958), *reprinted in* 2 STUDIES ON COPYRIGHT 781, 785 (Arthur Fisher Memorial ed. 1963)

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The [statutory] list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: it has always had to do with the use by a second author of a first author’s work. Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose to make what might be called the “ordinary” use of it. When copies are made for the work’s “ordinary” purposes, ordinary infringement has customarily been triggered, not notions of fair use.

LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978)

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The fourth fair use factor, the effect on the potential market for the work, is closely related to the first. By examining the effect of a use, a reviewing court can measure the success of the original purpose and single out those purposes that most directly threaten the incentives for creativity which the copyright tries to protect. Some commercial purposes, for example, might not threaten the incentives because the user profits from an activity that the owner could not possibly take advantage of. . . . But in this case, TV News Clips uses the broadcasts for a purpose that WXIA might use for its own benefit. The fact that WXIA does not actively market copies of the news programs does not matter, for *Section 107* looks to the “potential market” in analyzing the effects of an alleged infringement. Copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market. TV News Clips sells a significant number of copies that WXIA could itself sell if it so desired; therefore, TV News Clips competes with WXIA in a potential market and thereby injures the television station. This evidence is reinforced by a presumption established in *Sony* that a commercial use naturally produces harmful effects. . . . The actual harmful effect, along with the presumption, undermines any fair use defense.

Pacific & Southern Co, Inc. v. Duncan, 744 F.2d 1490, 1496-97 (11th Cir. 1984)

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The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)

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The subject of this essay has been a small part of a large body of law, but fair use may have a greater impact on American life than its narrow compass. At issue here is access to learning, endangered by the efforts of copyright owners to make a commodity of all the knowledge in the land for the purpose of obtaining private fortunes. Consumers, on the other hand, are often too willing to use copyright without the payment due. The problem, then, is how to maintain a just balance between the copyright owner's interest and the user's interest — between the good obtained from private profit and the good obtained from public learning.

Fair use is the most viable concept for this purpose, but so far it has not been developed and utilized to the best advantage . . .

L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249, 266 (1992)

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Some . . . have suggested that the United States is being divided into a nation of information "haves" and "have nots" and that this could be ameliorated by ensuring that the fair use defense is broadly generous in the NII context. The Working Group rejects the notion that copyright owners should be taxed — apart from all others — to facilitate the legitimate goal of "universal access."

BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 87 (1995)

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Just as secondary users may not exploit markets that original copyright owners would "in general develop or license others to develop" even if those owners had not actually done so, copyright owners may not pre-empt exploitation of transformative markets, which they would not "in general develop or license others to develop," by actually developing or

licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.

Castle Rock Entertainment v. Carol Publishing Group, 150 F.3d 132 (2d Cir. N.Y. 1998)

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There are many who believe that “fair use” is an adequate balance within copyright law. I believe that at present, this view is mistaken [A]s any practical understanding of the law reveals, “fair use” is an extraordinarily uncertain freedom. The test is crafted as a balancing test, with no single factor as determinative. This means that ex ante, it is extremely hard for creators and publishers to know precisely what freedom the law allows. This either forces publishers to impose rules that are far more strict than fair use, or it forces creators to clear permissions upfront. And when that permission cannot be secured, it forces the creator into an extremely difficult choice: whether to risk substantial exposure for copyright liability, or to remove the speech from the creator’s work.

The Digital Media Consumers’ Rights Act of 2003, Hearing Before the House Subcomm. on Commerce, Trade, and Consumer Protection (May 12, 2004) (testimony of Lawrence Lessig on H.R. 107)

These days, I view fair use as a central feature of the law around our information ecology — its presence reminding us, from day to day, that there is more to copyright than maximization, and that innovation happens when the doctrinal settings are loose enough to permit a good deal of “play” (literally and figuratively) in the system. But before the mid-1990s I thought little about the fair use doctrine and did less. As I suspect may be true of other copyright lawyers of my generation (and the ones preceding it, I spent most of my professional career taking fair use for granted. I tended to view it as a minor application “running in the background” — occasionally useful, but hardly central to the copyright enterprise.¹ As a result, I gave it little sustained attention, either as a matter of theory or as one of practice, in my first decades as a practitioner and a teacher.

¹ There were, of course, notable exceptions to this generalization — scholars who focused early on what others of us still largely overlooked. This roll of honor includes (though it is by no means limited to) Alan Latman; Paul Goldstein, who foresaw much of what was to come in *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Leon Seltzer; Wendy Gordon, who reframed the discussion in *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600 (1982); Bill Patry, whose one-volume treatise, *The Fair Privilege in Copyright Law* was published in 1985; Jessica Litman, whose discussion of fair use in *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, appeared in 1987; and, of course, Ray Patterson.

Of course, I wasn't alone. Even some of the greatest minds in the field wrote fair use off, at least as a matter of inherent intellectual interest. At worst, the conclusion that a use was fair was just another way of saying it wasn't infringing. And at best? The late and much lamented Benjamin Kaplan's conclusion that fair use was (in effect) the fifth wheel of the copyright system, invoking "policy as does the rest of the subject of plagiarism and in no markedly different sense," was probably pretty typical. Certainly, for one of his students, it was highly influential.

Anyway, as copyright students c. 1970, we weren't exactly bombarded with material on fair use, and what we did get to read was, to say the least, demoralizing. This was, after all, the nadir of U.S. fair use jurisprudence — a moment when money talked and culture walked, as far as the courts were concerned. I vividly remember a classroom discussion organized developing a theoretical critique of opinion in *Benny v. Loew's*² (the "Autolite" case). But however crabbed we may have concluded the Ninth Circuit's decision was, this learning experience still was less than invigorating. As a practical matter, we were learning that fair use wasn't to be relied upon — at least if there were other ways of getting to the same end.

I had the great good fortune, early in my career, to represent respectable "users" who found themselves on the wrong end of infringement litigation.³ So I was challenged to think about all the ways in which copyright doctrine promoted what we today would call "access to information." But fair use wasn't prominent among them. Back then, in the waning days of the 1909 Copyright Act the law was fairly rich in such features — among them term limitations, the Manufacturing Clause, and — of course — robust formalities, particularly around renewal. And this, of course, had been then Professor Kaplan's point. Thanks to all the other safeguards against the over-engorgement of copyright, fair use really didn't have a central role to play — or so it seemed.

And — I need to confess — it wasn't just that all these traditional limiting doctrines packed a punch where the preservation of a meaningful public domain was concerned. It was also that they were — in a way that fair use seemingly was not — technically challenging. Constructing an argument that (for example) a failure to renew derivative work copyright should trump residual rights in the underlying source work was intellectually challenging in a way that (I imagined) making a "policy" argument about the "fairness" of a use simply couldn't be. The fair use route to imposing limits on copyright reach seemed not just unpromising but relatively uninteresting.

² *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956).

³ In particular, the late Paul Killiam and his classic film distribution company. See *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975); *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977).

In the years that followed, other ambitious projects aimed at getting the fundamental copyright balance right seemed more important to an academic on the make (and copyright skeptic in the making) than any undertaking to make fair use more accessible would have — even if I had any notion of such a possibility. So I busied myself with work on the relationship between underlying and derivative copyrights, research on the proper scope of substantial similarity, and (in particular) a investigation of the romantic “cult of authorship” and its implications for contemporary doctrine. As a member of the Librarian of Congress’s Advisory Committee on Copyright Registration and Deposit (ACCORD), I argued for the preservation of the few copyright formalities that had survived the 1976 general revision of the Act. And when the time came, a few years later, I threw myself into the doomed effort to avert copyright term extension.

Over the years, when fair use did claim attention, it was mainly in connection with parody and personal copying issues, important in their own right but far from central to a unified theory of balanced copyright. In fact, only when other commonly understood (if not widely discussed) aspects of fair use, such as the quotation right, came under threat did the issue to take on — however briefly — strong focus. The best example was the 1992 legislative campaign, in which I was marginally involved, to install what is now the last sentence of Section 107, counteracting a line of Second Circuit cases building on the Supreme Court’s decision in *Harper & Row*,⁴ and casting doubt on whether unpublished works ever could be subject to fair use.

Another instance, around the same time but involving a very different array of forces, was the effort by publishers to re-present the so-called “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to books and periodicals” as an outer limit on permissible fair use. That effort was turned back in *Basic Books, Inc. v. Kinko’s Graphics Corp.*,⁵ where I testified for the otherwise spectacularly unsuccessful defense. This specific question, at least, was resolved in favor of flexibility in fair use decision-making, by means of the following unremarkable language:

There is dispute as to whether the Guidelines represent a maximum or minimum of allowable copying. The Guidelines assert its intended meaning thusly: “the purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223.” The Guidelines clearly state that notwithstanding their promulgation, fair use standards may be more or less permissive.⁶

⁴ *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985).

⁵ 758 F. Supp. 1522 (S.D.N.Y. 1991).

⁶ *Id.* at 1536.

A bit later, I joined a gaggle of academics (assembled by Pamela Samuelson, an early supporter of the doctrine) who filed as friends of the court in *Sega Enterprises, Ltd. v. Accolade, Inc.*,⁷ urging fair use treatment of reproduction incidental to lawful reverse engineering.

Apart from these fleeting engagements, fair use did not loom large in my thinking about copyright. I suspect that, during these years, I was not alone in neglecting Ray Patterson's 1992 demand that attention be paid to the project of developing fair use to maintain a "just balance between the copyright owner's interest and the user's interest." One reason for our inattention, I suspect, is that outside of the specialized domains of scholarly quotation and parody, the issue of fair use as a justification for unlicensed repurposing of copyrighted material simply didn't arise — or not so that most of us could see. Professor Patterson, of course, had seen it by 1984, sooner (as usual) and more clearly than practically anyone else. Not only that, but he had acted on that vision, taking charge of the defense in the *Duncan* case (involving the resale of off-air video recordings by a video new clipping service) to make the larger point that copyright owners don't necessarily control all new, value-added uses of their content.

So it's with some shame that I confess that I didn't immediately embrace Judge Pierre Leval's innovative "transformativeness" standard for fair use analysis, when it was first floated in the early 1990s. Others may have grasped its promise immediately but I certainly did not — failing to see, I suspect, either the importance of the problem it addressed or the elegance of the solution it proposed. Even now, I blush to remember challenging Judge Leval, during the question period of a lunchtime lecture to the Washington, D.C. Chapter of the Copyright Society, to defend the standard against charges of open-endedness and manipulability. Perhaps mercifully, I don't remember his response, except that it was far more gracious than the question!

What changed, then? For me, part of the answer is in the truism that humans sometimes don't fully appreciate the value of something until they are about to be deprived of it. The early-1990s CONFU debacle, so elegantly chronicled by Kenny Crews,⁸ helped those who (like me) observed the proceedings from a distance to understand better what was at stake. This understanding was reinforced for me when, in the mid-1990s, I became embroiled in a campaign to arrest or deflect the momentum behind the proposals for reform legislation first floated in the "White Paper" on Intellectual Property and the National Information Infrastructure, in particular the so-called "anti-circumvention" provisions that ultimately (and

⁷ 977 F.2d 1510 (9th Cir. 1993).

⁸ Kenneth Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 602 (2001).

with some modifications) were enacted in the Digital Millennium Copyright Act of 1998 and codified in Chapter 12 of 17 U.S.C. What I and my allies in the Digital Future Coalition realized, early on, is that these provisions were a threat to fair use in the Internet environment — and the fact of that threat, along with a growing appreciation of the potential for digital technology to enable productive new uses of existing content, made what was at risk seem newly precious. While the space for fair use finally recognized by Section 1201(a)(1) was certainly inadequate, the exercise left anti-DMCA campaigners with a new respect for the importance of the doctrine.

Not so coincidentally, 1998 also saw the enactment of the Sony Bono Copyright Term Extension Act, the last piece of legislation in a line of post-1976 enactments that had transformed the copyright environment by radically deemphasizing what remained of copyright formalities and — in the case of foreign works — restoring protection for items formerly in the U.S. public domain, interacting with judicial decisions extending the scope of rights and liability for infringement. Simply put, it was becoming increasingly clear that among the traditional balancing features of copyright doctrine, fair use was the last one standing.⁹

So, as the 1990s drew to a close, the cause of safeguarding a pristine understanding of the doctrine looked newly important, to say the least. Eventually, as I'll suggest below, important new scholarship also played a role in stirring of my fair use consciousness. So did crucial developments case law — particular the Second Circuit's decision in *Bill Graham Archives v. Dorling Kindersly, Ltd.*,¹⁰ which crystallized our (or at least my) understanding of the new “transformativeness” analysis as a very big deal indeed.

I'd be less than honest, though, if I didn't admit that the most important trigger for my change in thinking about the value of fair use wasn't the predictable denial of the doctrine's importance by copyright owners but the (to me) surprising turn away from fair use on the part of copyright “progressives.” We all know the mantra: “Fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad — in practically every context, but especially here.”¹¹ In the mid-1990s, this critique was coupled with calls to reopen Section 107 to insert new language updating it for the digital condition.¹² My initial re-

⁹ That is, unless the idea/expression distinction is in the mix.

¹⁰ 448 F.3d 605 (2006).

¹¹ LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 107 (1984).

¹² See, e.g., Gigi Sohn, *Six Steps to Digital Copyright Sanity* (Oct. 26, 2007), *available at* <http://www.publicknowledge.org/node/1244>. For a modified and

sponse, based on the bruising and largely demoralizing experience of doing “public interest” advocacy in the “copyright wars” around the DMCA, was that a political campaign to “fix” fair use probably entailed more risks than potential benefits — and that, meanwhile, critics were undermining public confidence in this potentially potent doctrine.

This came together for me at a path-breaking conference organized in June 2004 by Professor Joseph Turow, and held at the Annenberg School of the University of Pennsylvania: “Knowledge Held Hostage: Scholarly versus Corporate Rights in the Digital Age?” Convened to address big-think questions like:

What justifies fair use in a scholarly context? Is there a viable alternative to fair use in the academic environment? What are the fair use issues and needs raised by different scholarly media? . . . Are there new ways to approach copyright that may be more beneficial to academics than the status quo?

The meeting threatened at times to devolve into a carnival of fair use bashing.¹³ I wondered whether the needs of the academics who contributed their tales of access denied might be better served by taking advantage of the existing fair use doctrine, after all.

Around that time, my colleague Professor Pat Aufderheide (a leading authority on the documentary who directs my university’s Center for Social Media) decided to look into how non-fiction filmmakers experience copyright law. We discovered, among other things, that many members of a community with a strong tradition of “quoting” other people’s material to make their own points (whether or not they would have called this practice fair use), were now uncertain or afraid to use any unlicensed material, even when it seemed pretty clear that the law would permit it.¹⁴ They were in the grip of the “clearance culture,” many with the importance of gatekeepers — the broadcasters, distributors and (most of all) insurers who really called the shots where documentary filmmakers’ ability to rely

more developed version of this proposal, demonstrating that my original aversive response may well have been unjustified, see JENNIFER URBAN, *UPDATING FAIR USE FOR INNOVATORS AND CREATORS IN THE DIGITAL AGE: TWO TARGETED REFORMS* (Feb. 10, 2010) (a report prepared on behalf of Public Knowledge by the Samuelson Law, Technology and Public Policy Clinic), *available at* <http://www.publicknowledge.org/pdf/fair-use-report-02132010.pdf>.

¹³ See, e.g., Siva Vaidhyanathan’s lunchtime keynote, http://www.archive.org/details/knowledge_held_hostage_3.

¹⁴ See Patricia Aufderheide & Peter Jaszi, *Untold Stories: The Creative Consequences of Copyright Clearance Culture* (Nov. 2004), *available at* <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/untold-stories-creative-consequences-rights-clearance-culture>.

effectively on fair use was concerned.¹⁵ These filmmakers were a case in point of a more general proposition: fair use challenges practitioners to find ways of making this powerful but elusive doctrine more transparent and predictable.¹⁶ We were challenged to think about ways that filmmakers — for a start — could accomplish this.

For reasons already suggested, legislative reform didn't seem likely to be an efficacious way of improving fair use. Nor was it likely that — at least in the near term — test case litigation could be a confidence-raising measure for user communities.¹⁷ As it turned out, the approach the filmmakers finally settled on had been tested more than a decade ago by the Society for Cinema and Media Studies. In 1993, with the help of several experts (including the present author), the SCMS developed a best-practices code for its members concerning use of stills and frame grabs from films in academic literature.¹⁸ Ever since, this code has effectively reduced costs and facilitated publication for many film scholars. The takeaway was that collective action offers members of various practice communities a chance to affect the way in which the law, as applied to them, is understood.

Missing, though, was a theoretical justification for investing in this kind of “community organizing.” One clue was there in plain sight, in the passage Professor Latman's study quoted above: “Justification for a reasonable use of a copyrighted work is also said to be based on custom.” In other words, courts engaged in fair use decision-making should care about evidence of what is considered “reasonable” and “customary” within the relevant practice communities. And at least before the enactment of Section 107, fair use case law offered various examples of this approach in judicial practice.¹⁹

¹⁵ As Jeff Tuchman, one of the filmmakers we interviewed for “Untold Stories,” put it, as of the mid-1990s: “I haven't used fair use in the last ten years, because from the point of view of any broadcast or cable network, there is no such thing as fair use.”

¹⁶ What follows is a lightly edited version of a discussion exploring the theory behind the “best practices” model, which first appeared in my 2007 *Utah Law Review* article. See Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 UTAH L. REV. 715.

¹⁷ The subsequent experience of the Fair Use Project at the Stanford Center for the Internet and Society suggests that we may have been too quick to write off this alternative. See <http://cyberlaw.stanford.edu/fair-use-project>.

¹⁸ Kristin Thompson, *Report of the Ad Hoc Committee of the Society for Cinema Studies, “Fair Usage Publication of Film Stills”*, 32 CINEMA J. 3 (1993).

¹⁹ See generally Harry Rosenfeld, *Customary Use as “Fair Use” in Copyright Law*, 25 BUFF. L. REV. 119 (1975). In 1973, the United States Court of Claims held that handwritten copies of text materials by scholars represented fair use since they were “customary facts of copyright-life.” *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973). See also

After 1976, the customary roots of the doctrine were obscured. Scholars sought elsewhere for coherence, particularly in utilitarian economic analysis. Other commentators expressed pessimism that fair use analysis, which depends on a "calculus of incommensurables," can ever be rationalized or made more predictable.²⁰ Even after the Supreme Court, in 1985, acknowledged the connection between custom and fair use (in *Harper & Row, Publishers, Inc. v. Nation Enterprises*²¹), many lower courts continued to devote most of their attention to factoral analysis.²² Eventually, as we know, their opinions came to focus increasingly on the issue of "transformativeness."

However, as Michael Madison demonstrated in *A Pattern-Oriented Approach to Fair Use* (his reanalysis of historical and contemporary case law), the link between fair use and custom never really was severed — only temporarily obscured:

I suggest . . . that the contemporary focus on "case-by-case adjudication of fair use disputes misunderstands the properly contextual orientation of fair use decision making as it developed historically, as Congress understood it when it enacted the fair use statute, and as the statute actually has been applied over the last twenty-five years."²³

Madison argues that as courts explore the four factors and ponder degrees and kinds of "transformativeness," they are in fact seeking to ascertain whether the challenged work fits within a privileged use category, or (on the other hand) whether an invocation of fair use is merely an infringer's attempt to dress its unjustifiable appropriations in borrowed plumage. Thus, Madison points out, the very first fair use decision, *Folsom v. Marsh* of 1841,²⁴ involved a judicial effort to distinguish between true biographical scholarship and simple free-riding.

Likewise, the focus of the Supreme Court's celebrated 1994 "2 Live Crew" decision (*Campbell v. Acuff-Rose Music, Inc.*²⁵) was the determination of whether the allegedly infringed song was a genuine parody or a mere effort to capitalize on the fame of the plaintiff's song. In the handful of cases involving narrative filmmaking, a recurrent question was whether

Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir. 1986); Rosemont Enters., Inc. v. Random House, 366 F.2d 303, 307 (2d Cir. 1966) (fair use in biography) .

²⁰ Lloyd Weinreb, *Fair Use*, 67 *FORDHAM L. REV.* 1291 (1999).

²¹ 471 U.S. 539, 550-51 (1985).

²² That this trend may have run its course is suggested by the discussion of custom in a 2006 Ninth Circuit Court of Appeals decision. See *Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 778 (9th Cir. 2006).

²³ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *WM. & MARY L. REV.* 1525, 1587 (2004).

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

²⁵ 510 U.S. 569 (1994).

the reproductions of plaintiffs' artistic creations were actually part of the film's decorative background — or something more.²⁶ Such inquiries, although conducted using the vocabulary of Section 107, always involve — at bottom — a comparison between practices of a defendant and the norm or pattern of use with which he seeks to affiliate. And the best way to determine whether (in Madison's terms) a genuine "patterned" use is involved is to look, in one way or another, to common or customary practice in whatever the field of practice may be.²⁷

Pat and I decided to test whether this approach could be applied to contemporary fair use issues, and began working with documentary filmmakers to facilitate their development of a "Statement of Best Practices in Fair Use." Both the background of the document they released in 2005, and its subsequent (and significant) effect on the field are well described at <http://www.centerforsocialmedia.org/fair-use> and <http://www.wcl.american.edu/pijip/go/fair-use>. Perhaps the most notable development has been the shift in Errors and Omissions insurance practice that followed release of the Statement. Today, insurance companies that would once routinely have refused to cover risks associated with quoting uncleared material are just as routinely writing policies that cover a wide range of reasonable, justified assertions of fair use. What you won't find documented on the Web site, or anywhere else, are the conversations we've had over the last five years with copyright industry figures who privately acknowledge that the Statement of Best Practices has worked to their advantage by reducing the time they have to spend processing miscellaneous permissions requests!

But the site does provide information about the various other practice communities (teachers, archivists, open courseware providers, learned societies and others) that have taken up the cause of fair use best practices and developed Statements or Codes — sometimes with help from the team at American University, and sometimes on their own.²⁸ Most re-

²⁶ *Compare* Ringgold v. Black Entm't TV, Inc., 126 F.3d 70 (2d Cir. 1997) and Jackson v. Warner Bros., Inc., 993 F. Supp. 585 (E.D. Mich. 1997).

²⁷ More recently, James Gibson has extended this analysis, warning of a possible "vicious circle" in fair use jurisprudence: When users are too conservative in their practices, choosing to license rights even when they do not have a legal obligation to do so, the result of this timidity may eventually be a recalibration of the law itself towards a less permissive setting. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007). Gibson also points out that failures to assert fair use are often the result of constraints imposed on users by various "gatekeepers" — including (in the case of filmmakers) broadcasters, distributors and — especially — insurers.

²⁸ For more detail about best practices and how to develop them, see PATRICIA AUFDERHEIDE & PETER JASZI, *FAIR IS FAIR!* (forthcoming 2011).

cently with support from the Andrew W. Mellon Foundation, three national library organizations (the Association of Research Libraries, the American Library Association, and the American Council on Research Libraries) have launched a multi-year project to develop fair use best practices for the research library community.²⁹

Of course, lots of issues remain to be sorted out, among them the following:

- To date, the creation of best practices has been generously supported by various funders interested in IP policy, including not only Mellon but also the John D. and Catherine T. MacArthur Foundation, the Ford Foundation and the William and Flora Hewlett Foundation. But how will this “movement” (if it can be so designated) fare in a future where such funding is likely to be scarcer?³⁰
- Some scholars, including Jennifer Rothman, have pointed out the real risk that, like the fair use “guidelines” of the past, best practices could end up being interpreted in ways that constrain, rather than liberate, the future development of fair use. Is prophylactic language (of the kind employed in the various Statements and Codes to date (i.e., “the . . . principles just stated do not exhaust the scope of fair use for documentary filmmakers,” etc.)) sufficient to forestall this risk? If not, what might do the job?
- As already noted, a part of the theory behind best practices is that when and if fair use issues to which a particular Statement or Code speaks get to court, the relevant community’s articulation of consensus values would be entitled to significant weight, if not outright judicial deference. So far, however, no cases involving creative practices falling within the scope of the various best practices documents that have ended up before members of the federal bench. Proponents of best practices would claim that this is, in part, because few copyright owners will choose to

²⁹ More information is *available at* Association of Research Libraries, <http://www.arl.org/pp/ppcopyright/codefairuse/index.shtml>.

³⁰ Equally essential to the development of best practices has been the array of generous copyright specialists who have vetted the various Statements and Codes after the work of the practice communities has been completed: Thanks are due to Jamie Bischoff, Robert Clarida, Julie E. Cohen, Kenny Crews, Michael Donaldson, Jack Lerner, Michael Madison, Gloria Phares, Virginia Rutledge, J. Stephen Sheppard, and Jennifer Urban, as well as the “blue ribbon” panel of legal and cultural studies experts who helped develop the *Code of Best Practices in Fair Use for Online Video*, including (along with individuals named above) Anthony Falzone, Lewis Hyde, Mizuko Ito, Henry Jenkins, Pamela Samuelson and Rebecca Tushnet.

litigate in the face of such a document. But how will theory translate into judicial practice when (or if) they do?

- In most practice communities, customary unlicensed uses of copyrighted materials are alive and well, if not always publically discussed (or identified as invocations of fair use). But what about situations in which the community is so relatively new, illusive and/or multicentric that it isn't easy to ascertain what its emergent customs are? This was the problem posed for the June 2008 *Code of Best Practices in Fair Use for Online Video*, and the solution was to convene a blue-ribbon panel of copyright lawyers and cultural studies experts knowledgeable about the new world of DIY video — to act (in effect) as surrogates. Is this a valid strategy? Is it a persuasive one?
- In some practice communities, high-profile artists with more than plausible fair use claims have taken decisive turns away from relying upon the doctrine, and toward licensing-based approaches to copyright clearance. The most obvious example that of hip-hop artists who record with major labels and participate in their system for obtaining sampling authorization.³¹ As a result, at least one court has concluded that although an instance of sampling is “certainly transformative,” it may not qualify as a fair use.³² Putting aside whether this may be an overly narrow reading of Section 107 and the recent fair use case law, another question remains: If there is strong evidence of a “customary” licensing on the part of some practitioners, is there still room for a best practices approach that emphasizes the values of the larger community?
- It's clear that the best practices approach depends, in part, on the recovery of once-stable customs that have been temporarily extinguished by external pressures to comply punctiliously with licensing demands. The documentary filmmakers who got the project provide an obvious example; by the time this group set about to create its Statement, some filmmakers had largely abandoned their former reliance on fair use. Inevitably, however, any discussion of best practice in a given field has an aspirational, as well as a strictly descriptive, dimension. How can this circumstance be accommodated within the theoretical framework?

³¹ For documentation of this turn, see KEMBREW McLEOD & PETER DiCOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* (forthcoming 2011).

³² See *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009).

Where at least one lurking issue is concerned, however, there are at least signs of a possible resolution — that issue being what impact the articulation of fair use best practices may have on the ongoing implementation of Section 1201 of the Digital Millennium Copyright Act, with its prohibitions on unauthorized “circumvention” of encryption and like forms of technological protection for copyrighted content. For many of the users’ communities that have developed best practices codes, the CSS encryption on DVD’s has been a particular source of frustration, since it effectively prevents not only the whole copying of a disc, but also the extraction of short clips in digital format. Practitioners have noted that even as they worked to clarify fair use in their fields through developing best practices, the “paracopyright” provisions of the DMCA stood (in varying degrees) as an effective barrier to actually putting fair use to work.

So it was both satisfying and reassuring to see that in the July 19 final rule resulting from the most recent triennial round of rulemaking under Section 1201(a)(1), broad new exceptions to the anti-circumvention prohibitions were defined for documentary filmmakers, college and university professors, post-secondary film and media students, and on-line video makers (among others).³³ The process of honing their fair use values through the best practices projects had made these communities particularly powerful advocates for the essential propositions on which the decision ultimately turned: that many of the purposes for which they seek access to audiovisual content are transformative ones,³⁴ and that the fulfillment of these purposes depends on their ability to employ DVD-quality images and sound. It will be interesting to see how other groups of fair users respond in coming years to this significant expansion in the scope of anti-circumvention rulemaking.

I hope that this issue of the *Journal of the Copyright Society* will promote discussion of these and other issues. Certainly, there are shoals enough here to keep those of us who fly the ensign of fair use best practices busy at the wheel for some time to come. Speaking for myself, I should say that this leg of my copyright voyage has proved to be both challenging and fulfilling.

³³ For my first thoughts about the outcome of the rulemaking in somewhat greater detail, see my blog entry, *Worth the Wait – installment #1*, <http://chaucer.umuc.edu/blogcip/collectanea>.

³⁴ In this connection, it is interesting to note the treatment of transformative fair use in the *Recommendation of the Register of Copyrights* 49-53 (June 11, 2010) (provided to inform the final decision of the Librarian of Congress). See <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.