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Billowing White Goo

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--Jessica Litman*

The title of this symposium is the question: “*Fair Use: “Incredibly Shrinking” or Extraordinarily Expanding?*” I’d argue that the answer to the question is “no.” Fair use isn’t doing either.

The size of the fair use footprint has stayed remarkably constant over the past 30 or even 50 years. What has expanded, extraordinarily, is the size of rights granted by the copyright law. It may seem as if fair use is either expanding or shrinking, because the greater reach of copyright has made a bunch of uses potentially fair that weren’t even potentially infringing 50 years ago. In order to protect those uses under the fair use umbrella we need to reach out, and grab it, and pull it over them. But we aren’t stretching fair use when we do that; we’re just moving it. That makes it look to some people as if fair use is expanding to cover new uses and to others as if fair use is shrinking because it no longer covers uses that used to be deemed fair. The culprit, then, is that we seem willing to tolerate a huge expansion in the scope of copyright rights – most of that expansion, by the way, has been non-statutory – but unwilling to countenance a similar expansion in the scope of fair use.

I. *Moving the fair use umbrella around*

When Congress codified fair use more than 30 years ago, it relied on a Copyright Office study that canvassed more than a century of case law to try to describe fair use.¹ The Copyright Office concluded that courts deciding fair use questions relied, more or less, on factors first articulated in the 1841 case, *Folsom v. Marsh*.² (*Folsom v. Marsh* was decided in an era in which copyright law conferred only “the sole liberty of printing, reprinting, publishing and vending” books, maps, charts, musical compositions and prints.³) The Copyright Office recommended that the revision statute give explicit

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¹ Alan Latman, Study No. 14: Fair Use of Copyrighted Works (1958), reprinted in 2 COPYRIGHT SOCIETY OF THE USA, STUDIES ON COPYRIGHT 781 (1963).

² 9 F. Cas. 342 (1841). See generally R. Anthony Reese, The Story of *Folsom v. Marsh*: Distinguishing Between Infringing and Legitimate Uses, in JANE C. GINSBURG AND ROCHELLE COOPER DREYFUSS, INTELLECTUAL PROPERTY STORIES 259 (2006).

³ Act of February 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436.

recognition to the fair use doctrine, and the ultimate revision bill incorporated statutory language that reflected the *Folsom v. Marsh* factors.⁴ Congress gave little attention to the overall reach of the fair use provision at the time, notwithstanding the fact that the scope of fair use was among the most contentious issue in the revision process. A controversy over the fairness of educational uses erupted early and threatened to derail copyright revision repeatedly until competing lobbyists reached a settlement in March of 1976.⁵ While the dispute was still simmering, the Copyright Office advised Congress to avoid further inflaming debate by taking sides on particular issues.⁶ On the question whether fair use should be treated as an affirmative defense or whether copyright owners should be required to prove a use unfair as part of its prima facie case, for example, the Register of Copyrights urged Congress to leave the question unsettled:

We believe it would be undesirable to adopt a special rule placing the burden of proof on one side or the other. When the facts as to what use was made of a work have been presented, the issue as to whether it is a “fair use” is a question of law. Statutory presumptions or burden-of-proof provisions could work a radical change in the meaning and effect of the doctrine of fair use. The intent of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it.⁷

In the years since the enactment of section 107, the Supreme Court has imposed both statutory presumptions and burden of proof rules,⁸ only to retract them later as unwise.⁹ In *Sony v. Universal Studios*, the Court adopted a presumption that non-commercial use, including personal copying, was fair unless the copyright owner could prove that it would harm the market for the copyrighted work.¹⁰ In *Harper & Row v. Nation Enterprises*, the Court applied the related presumption that every commercial use was “presumptively an unfair exploitation of the monopoly privilege that belongs to the

⁴ Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 24-25 (1961), reprinted in 2 COPYRIGHT SOCIETY OF THE USA, STUDIES ON COPYRIGHT 1199, 1224-25 (1963); Copyright Law Revision part 6: Supplementary Report of the Register of Copyrights on the General Revision of the US Copyright Law: 1965 Revision Bill 25-28 (1965).

⁵ H.R. Rep. No. 1476, 94th Cong. 2d Sess. 65-74 (1976), reprinted in 1976 U.S. Code Cong. & Admin News 5678-88.

⁶ See Jessica Litman, *Copyright, Compromise and Legislative History*, 72 Cornell L. Rev. 857, 883-888 (1987).

⁷ CLR part 6, supra note 4, at 28.

⁸ See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 561 (1985); *Sony v. Universal Studios*, 464 U.S. 417, 451 (1984).

⁹ See *Campbell v. Acuff-Rose*, 510 U.S. 569, 590 (1994).

¹⁰ *Sony*, 464 U.S. at 451-51; See Jessica Litman, *The Story of Sony: Mary Poppins Meets the Boston Strangler*, in Ginsburg & Dreyfuss, supra note 2, at 358, 379-82; Glynn S. Lunney, Jr., Fair Use and Market Failure: *Sony* Revisited, 82 Boston U. L. Rev. 975, 981-85 (2002).

owner of the copyright..."¹¹ While this test for fair use ruled, personal copies and other "noncommercial uses" were presumptively fair;¹² commercial parodies,¹³ and other commercial uses¹⁴ were presumptively unfair.¹⁵ The unavailability of fair use for all but the rare commercial use proved intolerable, and in *Campbell v. Acuff Rose Music*, the Court insisted that it had never meant to adopt any sort of presumption either way.¹⁶ Then, it gave us what in practice has amounted to another one: to what extent is the use "transformative?"

The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." ... The central purpose of this investigation is to see...whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use...the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, ...and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.¹⁷

¹¹ *Harper & Row*, 471 US at 562 (quoting *Sony*, 464 US at 451).

¹² See, e.g., *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519 (9d Cir 1991).

¹³ See e.g., *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992); *United Feature Syndicate v. Koons*, 817 F. Supp. 370, 379 (SDNY 1993); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 832 (SDNY 1990); see generally William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions and Parody*, 11 *Cardozo Arts & Entertainment L.J.* 667 (1993).

¹⁴ See, e.g., *Los Angeles News Service v. Tullo*, 973 F.2d 791, 797-98(9th Cir. 1992) (video newsclip service unfair); *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 635 (SD Cal 1993)(copying of material L. Ron Hubbard lectures for commercial educational purpose unfair), vacated, 53 F.3d 344 (Fed. Cir 1994).

¹⁵ See *Mary Poppins*, supra note 10, at 384-85. The situation for commercially published biographies was complicated by a second presumption adopted by *Harper & Row* against fair use of unpublished works. See 471 U.S. at 552-54. Biographies that made it past the problem posed by the commercial use presumption tended to fail to surmount the presumption against quotation from unpublished papers. See, e.g., *Salinger v. Random House*, 811 F.2d 90, 94-97 (2d Cir. 1987); *New Era Publications v. Henry Holt*, 873 F.2d 576, 583-85 (2d Cir. 1989). Congress amended section 107 in 1992 to disapprove the presumption against pre-publication fair use. See Pub. L. No. 102-492, 106 Stat. 3145, codified in 17 USC § 107. *Campbell* came down not long afterwards.

¹⁶ 510 U.S. at 584-85.

¹⁷ *Id.* at 578-79 (citations and footnotes omitted).

In the wake of *Campbell*, all purported fair uses are evaluated on a scale of transformativeness.¹⁸

These tests differ from each other in meaningful ways, and don't yield the same results on similar facts. When appropriation artist Jeff Koons was sued for copyright infringement, for example, in the period between *Harper & Row* and *Campbell* for copying expression from copyrighted images, he raised a fair use defense and lost.¹⁹ When Koons was sued for essentially the same sin after *Campbell*, he raised a fair use defense and prevailed.²⁰ While the *Sony* presumptions were ascendant, Congress enacted the Audio Home Recording Act exempting consumers from copyright liability for noncommercial copying of recorded music.²¹ At the time, members of Congress believed they were giving consumers a complete free pass to make any copies of recorded music that technology would allow; they thought, moreover, that they were merely confirming what the courts had already held.²² Eight years later, Napster sought to make precisely those arguments: that consumer copying of recorded music was either fair use under *Sony*, permissible under the Audio Home Recording Act, or both.²³ The court didn't think the arguments merited serious consideration, and resolved them against Napster summarily.²⁴

¹⁸ See, e.g., *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, (9th Cir. 2008)(holding that karaoke recordings adding unlicensed lyrics to licensed music recordings not transformative); *Perfect 10 v. Amazon.com*, 508 F.3d 1146, (9th Cir.2007)(holding search engine copying and aggregation of images into image search index to be transformative); *Blanch v. Koons*, 467 F.3d 244, 251-56 (2d Cir. 2006) (holding painting appropriating images from copyrighted photograph to be transformative); *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132 (2d Cir. 1998) (holding "Seinfeld Aptitude Test" containing mock-SAT questions about the Seinfeld TV show is not transformative); *American Geophysical v. Texaco*, 60 F.3d 913 (2d Cir 1995) (holding the photocopying of scientific articles for at the request of researchers to be "archival" rather than "transformative"). See generally Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535 (2004).

¹⁹ *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 , 379 (SDNY 1993);

²⁰ *Blanch v. Koons*, 467 F.3d 244, 251-56 (2d Cir. 2006).

²¹ Pub. L. No. 102-563, 106 Stat. 4237 (Oct. 28, 1992) (codified at 17 USC §§ 1001-1010).

²² See H.R. 873, 102d Cong., 2d Sess. 24 (1992); *Mary Poppins*, supra note 10, at 384-85; William F. Patry, Section 1008, Patry Copyright Blog (Aug. 17, 2005), URL: <http://williampatry.blogspot.com/2005/08/section-1008.html>.

²³ Opening Brief of Appellant Napster, filed Aug. 18, 2000, at 20-24, 32-45, *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

²⁴ *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

In the question-and-answer session following Paul Goldstein's keynote speech at this symposium, an audience member asked whether *Sony* would be decided the same way today. Professor Goldstein was confident that it would not, and nobody in the audience took issue with his conclusion.²⁵

It seems clear that today's fair use test privileges uses that yesterday's test would not, and vice versa. It seems equally clear that uses that were fair under earlier tests are fair no longer. We haven't stretched fair use, or shrunk it; we've simply moved it around. Today's fair use test seems to be optimized for *The Wind Done Gone*.²⁶ It's not obvious how the test should apply to the cases authors and publishers have brought against Google Booksearch²⁷ – (however you want those case to come out), – or to the case Viacom has filed against YouTube²⁸ – (ditto), – or to millions of everyday consumptive uses made by ordinary readers, listeners, viewers of copyrighted works.²⁹ But, at least if we limit our conversation to a room full of copyright lawyers and copyright scholars, fair use remains a doctrine that permits a relatively narrow swathe of exceptional rather than everyday uses.

II. The ordinary and extraordinary expansion of copyright

The 1909 act gave owners of copyrights in different classes of works particular rights defined on the basis of the class to which the work belonged.³⁰ The rights diverged most in the context of public performance rights, in part for historical reasons: Congress had added exclusive performance rights for different classes of copyright works at

²⁵ See also Paul Goldstein, *Fair Use in a Changing World*, 50 J. Copyright Soc'y 133, 136-37(2003)(arguing that when digital rights management systems reduce transaction costs, fair use will become irrelevant for uses like taking movies off the air).

²⁶ *Suntrust Bank v. Houghton-Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)(Finding Alice Randell's Novel *The Wind Done Gone* A Fair Use Of Margaret Mitchell's *Gone With The Wind*).

²⁷ *Authors Guild v. Google*, No. 05 CV 8136 (SDNY filed Sept. 20, 2005); *McGraw Hill v. Google*, No. 05 CV 8881 (SDNY filed Oct. 19, 2005).

²⁸ *Viacom International v. YouTube*, No. 07 CV 2103 (SDNY filed March 13, 2007); see also *Football Association Premier League et al. v. YouTube, Inc.*, No. 07 CV 03582-UA (SDNY filed May 4, 2007); see generally Kurt Hunt, *A TimeLine of YouTube Litigation*, MTTLR Blog, Michigan Telecommunications & Tech. L. Rev., Nov. 14, 2007, at <http://blog.mttl.org/2007/11/timeline-of-youtube-litigation.html> (summarizing status of six lawsuits).

²⁹ See Jessica Litman, *Lawful Personal Use*, 85 Texas L. Rev. 1871, 1897-1903 (2007).

³⁰ See generally Jessica Litman, *Copyright Legislation and Technological Change*, 68 Ore. L. Rev. 275, 280-81, 301-05 (1989).

different times and in response to different threats of infringement. Owners of copyrights in literary works, for example, received what was in essence an exclusive right to present the work in public for profit as well as an exclusive right to transcribe any performance.³¹ Musical work copyrights carried with them the exclusive rights to perform the music publicly for profit except on jukeboxes.³² Owners of copyrights in dramatic works had the exclusive right to perform the work publicly, unqualified by any for-profit limitation.³³

³¹ 1909 Act §1(c):

“to deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever.”

Authors of lectures and sermons designed for oral delivery gained a public performance for profit right in the 1909 Act. The public performance right for literary works and the transcription right were added by Congress in the 1950s, in response to complaints of unauthorized radio broadcast of programs incorporating or adapting books and poems. See Herman Finklestein, *The Copyright Law: A Reappraisal*, 104 Penn. L. Rev. 1025, 1062 (1956); Theodore R Kupferman, *Rights in New Media*, 19 L. & Contemporary Probs. (#2) 172, 175 (Spring 1954); *Kreymborg v. Durante*, 21 U.S.P.Q. (BNA) 557, (SDNY 1934). In *Kreymborg*, a poet sued Jimmy Durante and NBC for singing and broadcasting three of his poems. The court dismissed the complaint:

Under the present Copyright Act, protection against public performance or delivery of copyrighted works is afforded only in the case of a lecture, sermon, address, or similar production, a drama, or a musical composition. Section 1; 17 U.S.C.A. § 1. Other copyrighted works may be recited in public for profit without infringement. The point is of some moment, now that radio broadcasting of novels, poems and so on is widespread. Nevertheless, it is recognized that except as to the classes of copyrighted works referred to above, the author under the existing statute cannot complain of public performance of his copyrighted works.

Id. at 557-58.

³² 1909 act § 1(e):

To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced..... The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

Musical works first received a public performance right in 1897. The 1909 Act limited the right to public performance for profit and added what became the jukebox exemption. See Finkelstein, *supra* note 31, at 1058-59; Jessica Litman, *War Stories*, 20 *Cardozo Arts & Entertainment L.J.* 337, 350-54 (2002).

³³ 1909 Act § 1(d):

In revising the copyright law in the 1976 Act, Congress unquestionably meant to make some changes in the scope of exclusive rights. Most obviously, it increased the duration of subsisting and future copyrights.³⁴ It redefined “perform” to broaden its scope and overrule a line of recent Supreme Court cases construing it narrowly.³⁵ It added a completely new right of public display.³⁶ For the most part, however, Congress’s understanding of the revision bill was that it would reorganize and standardize the treatment of different classes of works under the law without significantly changing the substantive content of exclusive copyright rights. This result was probably dictated by the pervasive involvement of copyright lobbyists in every aspect of the revision process: representatives of copyright-affected interests were unwilling to settle for a new law that gave them substantially less than the law it was designed to replace, so they insisted that any expansion in the scope of exclusive rights be counteracted by exceptions that allowed them to continue to do whatever it was they were already doing.³⁷

Thus, in redefining the meaning of performance, Congress added an exemption in the new law to preserve the copyright exception the Supreme Court had recognized for small restaurant owners when it read the 1909 Act narrowly,³⁸ and subjected the broader

To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.

Dramatic works were the first works to receive a public performance right under United States Law. See Act of August 18, 1956, ch. 169, 11 Stat. 138; Finklestein, *supra* note 31, at 1058.

³⁴ See 17 U.S.C. §§ 201, 302, 303, 304.

³⁵ 17 U.S.C. § 101; see H.R. Rep No. 1476 at 62-65. In *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), the Supreme Court had held that a hotel’s using a speaker system to play radio broadcasts throughout the hotel was an actionable public performance for profit under the 1909 Act. In *Twentieth Century Music v. Aiken*, 422 US 151, 162 (1975), however, the Supreme Court later held that a small restaurant owner playing the radio over loudspeakers did not perform the program within the meaning of the 1909 Act. In *Fortnightly v. United Artists Television*, 392 US 390 (1968), and *Teleprompter v. CBS*, 415 U.S. 394 (1974), the Court held that cable television operators who retransmitted television programming to customers did not perform the programs within the meaning of the 1909 Act. The House Report explains that the intent of the broad definition of “perform” was to restore the construction the Supreme Court had given the term in *Buck v. Jewell-Salle*. H.R. Rep. 1476, at 86-87.

³⁶ 17 U.S.C. § 106(5); see H.R. Rep No. 1476 at 63-65, 1976 USCCAN at 5676-5678.

³⁷ See *Technological Change*, *supra* note 30, at 317-32.

³⁸ Section 110(5) as originally enacted permitted:

performance right to a new compulsory license negotiated by cable television operators, broadcasters, and motion picture and television producers to enable them to retransmit distant television signals without permission on the payment of a statutory fee.³⁹ Although Congress simplified the various public performance rights by eliminating the “for profit” qualifier on the rights enjoyed by the authors of literary and non-dramatic musical works in section 106,⁴⁰ it sought to preserve the extant limitations by exempting particular non-profit uses under section 110.⁴¹ Similarly, it encumbered the new public display right with an exception permitting the owner of any lawful copy to put it on display, essentially confining the scope of the right to remote display via not-yet-common technologies.⁴² Congress’s rewording of the reproduction, adaptation and distribution rights were understood as simplification and codification of the scope of those rights under the law as construed by the courts, and not as enhancements of their reach or strength.⁴³

communication of a transmission embodying a performance of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the performance or display is further transmitted beyond the place where the receiving apparatus is located.

See H.R. Rep. No. 1476, at 86-87 (“Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5)”), 1976 USCCAN at 5700-01.

³⁹ 17 USC § 111.

⁴⁰ 17 U.S.C. § 106(4).

⁴¹ See H.R. Rep. 1476 at 62-65, 81- 88 (“Clauses (1) through (4) of section 110 deal with performances and exhibitions that are now generally exempt under the “for profit” limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation.”), 1976 USCCAN at 5695-5702. Congress also declined to expand the performance right to the owners of sound recording copyrights, despite record companies’ demands. See 1976 Act § 106(4). See generally Performance Royalty: Hearings on S. 1111 Before the Subcom. On Patents, Copyrights and Trademarks of the Senate Comm. On the Judiciary, 94th Cong. (July 24, 1975).

⁴² See H.R. Rep. 1476 at 63-65, 79-80, 1976 USCCAN at 5676-78, 5693-94; Library of Congress Copyright Office, Copyright Law Revision part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 183-86 (discussing how to draft exception to new public display right to preserve extant author rights) (1964) (House Judiciary Committee Print)

⁴³ See H.R. Rep. 1476 at 61-66, 1976 USCCAN at 5674-80. Thus, for example, the revision bill did not incorporate provisions allowing the copyright owner to collect resale royalties, despite the request of authors and publishers. See 1976 Act §§ 106(3), 109(a); Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration

A. Ordinary expansion

Although the statute as enacted largely preserved the scope of established rights and exceptions, its design predisposed it in favor of gradual expansion of copyright owners' exclusive rights. By articulating exclusive rights in general, broad language and delineating exceptions in narrow, detailed, specific language, the drafters of the statute time-proofed the exclusive rights, while leaving the specific exceptions vulnerable to obsolescence.⁴⁴ As technology introduced new ways of enjoying and exploiting copyrighted works, the narrowness of statutory exceptions excluded new users, creating entry barriers for competitors to established players. The drafters of the 1976 Act had anticipated that exploiters of new technology would need to ask Congress for their own tailored privileges.⁴⁵ When new users showed up in Congress asking for exceptions, they discovered that copyright owners and established users insisted on drafting their exceptions in less favorable terms than the exceptions of their predecessors.⁴⁶ Satellite television was forced to settle for a stingier compulsory license than cable television.⁴⁷ Internet and satellite radio face a compulsory licensing regime for the public performance of sound recordings from which legacy radio broadcasters are exempt.⁴⁸ As newer technologies superseded old ones, copyright owners' rights were gradually encumbered by narrower exceptions with fewer general applications. Meanwhile, some of the older exceptions became less useful in the modern world. The first sale doctrine codified in section 109, for example, allows the owner of any lawful copy of a work to sell, loan, rent or give it away.⁴⁹ Section 109 does not, however, permit the recipient of a lawful

of Justice of the House Comm. On the Judiciary, 94th Cong. 469-74 (1975)(testimony of Professor Rondo Cameron).

⁴⁴ See *Technological Change*, supra note 30, at 317-61.

⁴⁵ See Copyright Law Revision: Hearings on H.R. 4347 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. On the Judiciary, 89th Cong. 32-33 (1965)(testimony of George Cary, Register of Copyrights); *Technological Change*, supra note 30, at 342-46.

⁴⁶ See JESSICA LITMAN, DIGITAL COPYRIGHT 58-59 (2d ed. 2006).

⁴⁷ See Satellite Home Viewer Act of 1988, title II of Pub. L. No. 100-667, 102 Stat. 3935, 3949; see generally The Copyright Office Report on Compulsory Licensing of Broadcast Signals: Hearing Before the Senate Comm. On the Judiciary, 105th Cong. (Nov. 5, 1997). Congress ultimately amended the copyright statute in 1999 to bring the two compulsory licenses closer to parity. See Satellite Home Viewer Improvement Act of 1999, title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (codified in 17 USC § 120).

⁴⁸ See 17 U.S.C. § 114; see generally Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: hearing Before the Senate Comm. On the Judiciary, 109th Cong. (April 26, 2006).

⁴⁹ 17 USC § 109.

digital copy to transmit it to someone else, even if she erases her own copy at substantially the same time, because it doesn't privilege the making of an additional copy, even a temporary one.⁵⁰ Copyright owners and the Copyright Office have opposed any amendment of the statute to create a functional equivalent of the first sale doctrine for digital copies.⁵¹

I've argued frequently that this design choice is bad technological policy and that, in the long run, it undermines copyright law's legitimacy.⁵² At the same time, there's no question that, however ill-advised the choice, designing copyright laws that behave this way is a choice that Congress made. I have somewhat more difficulty with a massive recent expansion of section 106 exclusive rights that's occurring without Congressional involvement.

B. Extraordinary expansion

In 1995, Congress added a limited digital performance right for sound recordings to section 106.⁵³ Other than that, it has left the language of section 106 alone for more than thirty years. It has added a number of specific exceptions to the statute,⁵⁴ and revised some of the ones that were already there,⁵⁵ but it has not returned to redefine the scope of the basic exclusive copyright rights.

Nonetheless, our understanding of the scope of each of the bounded exclusive rights has been evolving, so that they are no longer very bounded. Advocates have

⁵⁰ See United States Copyright Office, DMCA Section 104 Report (August 2001), at URL: <http://www.copyright.gov/reports/studies/dmca/dmca_study.html>. If we ignore RAM copies, see *infra* notes 56-58 and accompanying text, section 109 would permit the owner of a digital copy to sell, rent or loan that copy by selling, renting or loaning the computer (or at least the hard disk) on which the copy resided.

⁵¹ See *id.*

⁵² See, e.g., Litman, *supra* note 46.

⁵³ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995)(codified in 17 U.S.C. § 106(6)).

⁵⁴ See, e.g., Computer Maintenance Competition Assurance Act, title III of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2886 (Oct. 28, 1998)(codified in 17 U.S.C. § 117); Family Movie Act of 2005, Title II of the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218, 223(codified in 17 U.S.C. 110(11)).

⁵⁵ See, e.g., Fairness in Music Licensing Act of 1998, title II of Pub. L. No. 105-298, 112 Stat. 2827, 2830 (Oct. 27, 1998) (codified in 17 U.S.C. §110(5)); Computer Software Rental Amendments Act of 1990, title VIII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat 5089, 5134 (Dec. 1, 1990) (codified in 17 USC § 109).

persuaded courts⁵⁶ (and the authors of at least one copyright casebook⁵⁷) that the 106(1) right “to reproduce a work in copies or phonorecords,” initially understood as the right to manufacture the sorts of objects that required notice,⁵⁸ extends far beyond the original meaning of the statutory provision to encompass any transitory appearance of any work in the memory of a computer. Copyright owners have claimed, with mixed success, that the 106(3) right to “distribute copies to the public by sale or other transfer of ownership or by rental lease or lending” is broad enough to cover acts that don’t necessarily involve distributing any copies to the public, or any sale or transfer of ownership, or any rental, lease or lending.⁵⁹ The statute draws a line between public performances and displays, which it subjects to copyright owner control, and private ones, which it does not.⁶⁰ That line is gradually disappearing, as copyright owners argue that individual transmissions to people in their homes should always be deemed public.⁶¹

The forces fuelling this expansion are not obscure.⁶² As new technology and new cultural norms create new ways of enjoying copyrighted works, businesses come up with new possibilities for earning profits by supporting those uses. Copyright owners understandably want to share in any value earned in connection with their works, but

⁵⁶ See, e.g., *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 114 S. Ct. 671 (1994); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999).

⁵⁷ See ROBERT A. GORMAN AND JANE C. GINSBURG, *COPYRIGHT: CASES AND MATERIALS* 87-88 (7th ed. 2007).

⁵⁸ See H.R. Rep. 1476 at 61-62, 1976 USCCAN at 5675.

⁵⁹ See, e.g., *Hotaling v. Church of Jesus Christ of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961(N.D. Tex. 2006); *Capitol Records v. Thomas*, No. 06-cv-1497 (filed April 19, 2006). But see in re *Napster Copyright Litigation*, 377 F. Supp. 2d 796, 803 (N.D. Cal. 2005)(“to the extent that *Hotaling* suggests that a mere offer to distribute a copyrighted work gives rise to liability under section 106(3), that view is contrary to the weight of above-cited authorities. It is also inconsistent with the text and legislative history of the Copyright Act of 1976”).

⁶⁰ 17 U.S.C. § 106(4).

⁶¹ See *Twentieth Century Fox v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

⁶² See Neil Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in *6 New Directions in Copyright Law* (Fiona Macmillan ed., Edward Elgar forthcoming 2008), online at URL: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066241> for a succinct account of the forces underlying copyright’s recent expansion.

don't relish going to Congress and asking it to enact new exclusive rights.⁶³ Stretching the existing rights is a more palatable alternative, and it's been an effective tactic thus far. Thirty years ago, an assertion that the copyright law gave the copyright owner the exclusive right to "use" its copyrighted work would have been dismissed as an obvious misunderstanding.⁶⁴ Recently, it's become almost respectable as a description of the rights copyright owners control or should.⁶⁵

In *Effects Associates v. Cohen*,⁶⁶ the court of appeals for the 9th Circuit considered a copyright infringement claim brought by a special effects company against a motion picture director. Larry Cohen's cult classic motion picture "The Stuff"⁶⁷ tells a modern sci fi/horror tale about aliens who invade the earth disguised as addictively delicious frozen yogurt. As the film progresses, frozen yogurt bubbles out of vats, onto the factory floor, and out the door, until the ground is covered in masses of the stuff. (Our heroes ultimately save the day by blowing everything up, in a scene depicted in the footage that motivated the lawsuit. Cohen didn't think the effects were special enough to merit the pricetag, so he used the footage but declined to pay full price for it.) The recent expansion in the scope of copyright rights reminds me of *The Stuff*. Bounded copyright rights have flowed out all over the place like so much frozen yogurt until the terrain is completely covered by billowing white goo. What used to be five or six discrete exclusive rights is morphing into an all-purpose general use right, and our understanding of copyright is evolving into the view that any use of a copyrighted work that is not authorized by the copyright owner or the statute is infringement.⁶⁸

⁶³ See Jessica Litman, Copyright Reform part 1, MTTLR Blog, Michigan Telecommunications & Tech. L. Rev., Nov. 19, 2007, at URL: <http://blog.mttl.org/2007/11/copyright-reform-part-1.html>.

⁶⁴ See, e.g., Litman, supra note 1, at 5 ("the copyright owner does not enjoy the exclusive right to 'use' his copyrighted work").

⁶⁵ See Motion Picture Association of America, What is Copyright?, RespectCopyrights.org, at URL: < <http://www.respectcopyrights.org/content.html>> ("Simply put, copyrights protect creativity. They do this by giving who creates an original work exclusive control over how it is used.")(visited Feb. 20, 2008); U.S. Copyright Office, Can I Use Someone Else's Work? Can Someone Else Use Mine?, URL: < <http://www.copyright.gov/help/faq/faq-fairuse.html>> ("How do I get permission to use somebody else's work?/You can ask for it.")(visited Feb. 20, 2008).

⁶⁶ 908 F.2d 555 (9th Cir 1990).

⁶⁷ New World Pictures, *The Stuff: A Larry Cohen Film* (1985). Like many copyright teachers, I play some of the special effects scenes for my class when we're talking about this case. The pedagogical value is minor, but scene 23, in which Garrett Morris explodes into a rampaging mass of frozen-yogurt-like glop, is too dreadful not to share.

⁶⁸ See Jessica Litman, *Creative Reading*, 70 L. & Contemporary Problems 175 (2007).

III. Copyright liberties

When we imagine copyright law as a rule that all uses of a copyrighted work must be authorized either by the statute or the copyright owner, we immediately confront a host of common everyday uses that are neither.⁶⁹ Personal uses⁷⁰ are one obvious category of uses the statute doesn't seem to anticipate as coming within its range. Some of these uses, no doubt, are infringing, but many of them are not. There is no express statutory exemption for the copies I make when I back up my hard disk,⁷¹ the public performance I commit when I listen to the music on my iPod in an airplane,⁷² or the derivative work I prepare when I help my son make a Halloween costume that looks as much as possible like a character in his favorite manga or TV show.⁷³ Yet, I am completely confident that none of these uses is actionable.⁷⁴ Purists may want to claim that they're illegal, but if they tried to take that principle to court, they would lose. One could argue that the reason that none of these uses is infringing is that they all come within the fair use doctrine that shelters home videotaping. (Does it?) That approach, though, embraces a very broad version of the fair use doctrine.

If one is determined to keep fair use narrow and exceptional, the sort of doctrine under which *The Wind Done Gone* is fair use but home videotaping is not, then personal uses pose a difficult dilemma. If copyright's exclusive rights reach ordinary personal uses made by readers, listeners and viewers of copyrighted works, the statute doesn't tell us how to treat them. Few personal uses are the subject of express statutory exemptions,

⁶⁹ See Jessica Litman, *Lawful Personal Use*, 85 Texas L. Rev. 1871, 1897-1901 (2007).

⁷⁰ For a definition of personal use, see *id.* at 1893-94.

⁷¹ See *id.* at 1897-1900.

⁷² Listening to my iPod counts as a performance because in doing so I "play" the music "by means of any device or process." 17 USC § 101. The performance is public because it occurs "at a place open to the public," *id.* See *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984). I am not entitled to an exemption under section 110(4) of the statute because the airplane is not a place of which it is accurate to say that there is "no direct nor indirect admission charge..." 17 U.S.C. § 110(4). Moreover, the fact that lots of airline passengers bring along their iPods is one factor in the airlines' discontinuing their in-air canned music services, for which copyright owners were paid royalties, so my use of my iPod has a small but real negative effect on copyright owners' bottom line.

⁷³ See 17 USC § 106(2).

⁷⁴ See *Lawful Personal Use*, *supra* note 69, at 1903-1908. For a discussion of other, similar examples, see *id.* at 1897-1906.

because Congress didn't envision its copyright statute's having any application to them.⁷⁵ While most personal uses might have been impliedly licensed by copyright owners in 1976, at least so long as they were non-public, non-commercial, or both, copyright owners are markedly less sanguine about unlicensed personal uses today. For one thing, to the extent that digital rights management and broadcast flag technology hold out a (possibly illusory) promise that personal uses can be monitored, metered and monetized, copyright owners are loathe to give up the promise of lucrative new markets.⁷⁶ For another, the recent deluge of copyright suits seeking to recover for contributory or vicarious infringement require a predicate direct infringer.⁷⁷ If individual personal uses are outside of the scope of copyright liability, then making zillions of dollars by facilitating millions of individual personal uses is similarly not actionable.

Arguments about whether extant statutory copyright rules apply as written to these personal uses, and whether they should, thus, tend to rely on normative preferences to do most of the heavy lifting. It is difficult to argue that Congress in 1976 imagined that it was drafting rules to govern the behavior of ordinary readers, listeners and viewers,⁷⁸ but relatively easy to argue that if Congress imagined that it was excluding uses by ordinary readers, listeners and viewers, it would have said so explicitly.⁷⁹ The answer in either case follows directly from the placement of the burden of proof.⁸⁰ Congress, of course, gave little thought to the question because none of the lobbyists working on copyright revision had the foresight to bring it up.⁸¹ In either case, we're reaching a conclusion based on what Congress didn't say. If we conceive of copyright as a bundle of bounded exclusive rights to control the exploitation of a work,⁸² it makes sense to see the liberties to read, listen and view as outside of copyright's scope.⁸³ If our

⁷⁵ See *id.* at 1905-07 .

⁷⁶ See, e.g., Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law*, 50 J. Copyright Soc'y 213 (2003); Litman, *supra* note 46, at 201-02.

⁷⁷ See, e.g., *MGM v. Grokster*, 545 U.S. 913 (2005).

⁷⁸ See Litman, *supra* note 46, at 96.

⁷⁹ See *Mary Poppins*, *supra* note 10, at 369.

⁸⁰ See David McGowan, *Copyright Nonconsequentialism*, 69 Missouri L. Rev. 2, 2-7 (2004).

⁸¹ See *Technological Change*, *supra* note 30, at 346-49.

⁸² See L. Ray Patterson & Christopher M. Thomas, *Personal Use in Copyright Law: An Unrecognized Constitutional Right*, 50 J. Copyright Soc'y USA 475, 475-84 (2003).

⁸³ Professor Patterson perceptively cast the distinction as one between use of the copyright and use of the work. See, e.g., *id.* at 478-79; L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights*, 62 Ohio St. L.J. 703, 710 (2003).

idea of copyright is an all-purpose use right with narrow exceptions, then reading, viewing and listening are just like other uses, and absent special exceptions, should fall within the ambit of the copyright owners' control.

Expanding copyright rights to encompass personal uses, while convenient for the purposes of rolling out new technological protection measures and bringing more secondary liability suits, though, poses significant dangers for the overall fabric of copyright law. This is especially true if we accomplish this expansion by claiming that ordinary individuals have always been liable for making personal uses under a thirty-year old law; they just didn't know it.

The most obvious danger of such a move is the threat it poses to copyright law's already wounded legitimacy.⁸⁴ After *Napster*,⁸⁵ the *Eldred*⁸⁶ case, and the recording industry's "John Doe" suits against thousands of individual users of peer-to-peer file sharing networks,⁸⁷ ordinary people are paying more attention to the copyright law, but they don't necessarily approve of what they see. Record labels and motion picture studios have had opportunities to communicate to the public that the money that they collect under the copyright system really goes into the pockets of individual musicians, writers, performers and directors, but have let those opportunities slip away.⁸⁸ The public has little confidence in the underlying fairness of the current copyright rules, and is more likely to focus on just how inconvenient those rules make their lives. Copyright theorists talk about copyright as a system to encourage authors and distributors to invest in creation and dissemination of authorship.⁸⁹ The public invests in the copyright system as well: it invests by paying its legislators to enact copyright laws and it invests by complying with the laws thus enacted. If the public perceives copyright laws to give it a poor return on its investment, it may well respond by divesting – either pressing its

⁸⁴ See Litman, *supra* note 46, at 111-117; Jane C. Ginsburg, How Copyright Law Got a Bad Name for Itself, 26 Colum. J. L & Arts 61 (2002).

⁸⁵ *A&M v. Napster*, 239 F.3d 1004, 1024 (9th Cir. 2001).

⁸⁶ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁸⁷ E.g., *Capitol Records v. Thomas*, No. 06-cv-1497 (filed April 19, 2006). See generally Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 Cardozo Arts & Entertainment L.J. 725 (2005); *Recording Industry v. The People Blog*, <http://recordingindustryvspeople.blogspot.com/> (visited Feb. 20, 2008).

⁸⁸ I will mention two from a very long list: record labels are collecting thousands of dollars in settlement of individual "John Doe" suits, but have declined to pay a penny of the settlements to the artists whose rights they purport to be vindicating. Motion picture studios elected to take a hard line in the recent writers' strike. Both were missed chances to disabuse the public of its cynicism about who really pockets copyright proceeds under our current legal system.

⁸⁹ See, e.g., 1 PAUL GOLDSTEIN, COPYRIGHT § 1.1 at 4-5 (1989).

elected representatives to enact additional limitations and privileges, or simply failing to comply with rules it no longer perceives as legitimate.

The second danger is more subtle. We are at risk of forgetting that encouraging people to read, listen to and view copyrighted works is as much a purpose of copyright law as encouraging people to create and disseminate those works.⁹⁰ When copyright rights are narrow and bounded, they have little impact on readers, listeners and viewers. If they expand to encompass a general “use” right, they threaten to burden reading, listening and viewing in substantial ways.

In an earlier article, I argued that reading, listening and viewing are essential copyright liberties, long implicit in its architecture and essential to its purpose.⁹¹ That assertion is controversial. I haven’t run into anyone who actually argues that, so long as creators are impelled to create and disseminators are willing to invest in those creations, the copyright system would be doing its job, even if nobody read the books, sang the songs, watched the movies or listened to the recordings. Plenty of people, though, don’t think we need to worry about the readers, viewers and listeners of the world, because they can take care of themselves.⁹²

Whether readers, listeners and viewers need protection for core copyright liberties, though, is (predictably) a function of how broadly we define copyright’s exclusive rights.⁹³ If copyright rights spill out all over personal uses like billowing white goo, then we need either some mechanism to contain them, or we need to give serious thought to blowing up the current system and starting again from scratch.

IV. The scope of fair use

Imagine three copyright lawyers at a copyright conference. Let’s make them caricatured types, and say that one is a “copyright maximalist,”⁹⁴ one is a “copyright

⁹⁰ See Lawful Personal Use, *supra* note 69, at 1879-93.

⁹¹ *Id.* at 1893. I’m far from the first to make this claim. See, e.g., L. Ray Patterson & Christopher M. Thomas, *supra* note 82.

⁹² See, e.g., David R. Johnstone, Debunking Fair Use Rights and Copy Duty Under U.S. Copyright Law, 52 *J. Copyright Soc’y USA* 345 (2005).

⁹³ See *Creative Reading*, *supra* note 68, at 179, 183.

⁹⁴ I’ve taken the term from Pamela Samuelson. See Pamela Samuelson, The Copyright Grab, 4 *WIRED* (January 2006) at ___.

minimalist,”⁹⁵ and one is a “copyright traditionalist.”⁹⁶ Let’s imagine that the copyright maximalist favors unbounded exclusive rights and a small, flexible fair use privilege. The copyright minimalist favors bounded exclusive rights and a broad and encompassing fair use privilege. The copyright traditionalist favors bounded exclusive rights and a small, flexible fair use privilege. We can each choose which lawyer we want to play. We meet at conferences like these and debate who is right and who is wrong, whose version of the law violates the Berne Convention and whose version of the law violates the Constitution. These conversations earn lots of CLE credit, but don’t actually change anyone’s minds. At the end of the day, we go home with visions of fair use in our heads that have less and less relevance in tomorrow’s world.

Copyright experts adjust quickly to new reformulations of how fair use is supposed to work. We know that the idea that all non-commercial uses are presumptively fair isn’t the law. Not any more. It may have been the law once, but that was then, and this is now. Ordinary readers, listeners and viewers who are not copyright lawyers, though, understandably don’t share the view of fair use as a malleable doctrine allowing whatever exceptional uses are fashionable this year. They don’t grok that when the Supreme Court decides a different case and applies a different test, that means the law has changed. The Court’s fair use decisions have been understood by lay members of the general public as recognizing broad categories of uses that will always, or almost always be fair. *Sony v. Universal Studios* stands in the public mind for the proposition that home recording of television programming, and other home copying for personal use, are (and have always been) fair uses.⁹⁷ *Campbell v. Acuff Rose* is taken to mean that any parodic use is (and was, and will be) fair.⁹⁸ Cranky commentary and testimony complaining that the public seems to think all sorts of unfair uses are fair⁹⁹ miss two facts: First, we are

⁹⁵ This term comes from Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 287 (1996).

⁹⁶ A designation used by Peter Jaszi, *Caught in the Net of Copyright*, 75 Ore. L. Rev. 299, 303 (1996).

⁹⁷ See, e.g., John Roska, *Copyrighted Material Can Be Duplicated For Personal, Noncommercial Use*, St. Louis Post-Dispatch, July 29, 1999, at 2 (“You should be able to make copies for your personal use, even of copyrighted material. That should fall under the “fair use” exception to the law that otherwise prohibits copying copyrighted material. It’s just like taping a CD to play in your car.”); Mike Snider, *No copying, no trading? No kidding: Copyright fight might narrow our options*, USA Today, March 6, 2001, at 1D (“Today, millions of people videotape TV programs and record music on compact discs, thanks in part to the principle of ‘fair use....’”).

⁹⁸ See, e.g., *Editorial: Purple craze*, L.A. Times, August 27, 2006, at M4 (“The public not only has an interest in discussing cultural icons such as Barney ..., it has the right to parody them”); John Smyntek, *Names and Faces*, Detroit Free Press, Sept. 11, 2007, at 5 (“Sued: By celebute Paris Hilton, Hallmark Cards Inc. over the use of her picture and catchphrase ‘That’s hot’ on a greeting card, entitled ‘Paris’s First Day as a Waitress.’ Hallmark defended the card as parody, which is normally protected under fair-use law.”).

⁹⁹ See, e.g., Goldstone, *supra* note 92.

now trying to apply to the public at large a law that was written by and for entities with copyright lawyers in their back pockets. Second, most people don't have copyright lawyers in their back pockets.

Copyright historians know that copyright owners have experienced persistent difficulty in trying to apply rules drafted to fit familiar actors to the unanticipated business of unfamiliar actors – the new actors insist on crashing the party and trying to rewrite the rules to make them more suitable.¹⁰⁰ If we insist on extending exclusive copyright rights to cover ordinary behavior by readers, listeners and viewers, they will in turn insist on a very broad version of fair use. If we are determined to preserve fair use as a doctrine limited to narrow and exceptional cases, then we will need either to recognize broad exemptions outside of fair use for personal uses that are noncommercial or nonpublic or both, or to revisit the scope of exclusive rights. In that event, we'll have a lot of goo to clean up.

¹⁰⁰ See Litman, *supra* note 46, at 35-63, 122-145.