Billowing White Goo

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Billowing White Goo

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 thirty 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 recognition to the fair use doctrine, and the ultimate revision bill incorporated statutory language that reflected

* Professor of Law and Professor of Information, University of Michigan. I’m grateful to Jon Weinberg, whose perceptive comments improved this paper, as they have all of my earlier work. I’d also like to thank Jane Ginsburg for asking for this paper, and Rob Kasunic for his helpful notes on an earlier draft.

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 issues 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 a copyright owner should be required to prove fair use 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 City 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 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 uses\(^14\) were

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7. CLR Part 6, supra note 4, at 28.
presumptively unfair. 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. 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.

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

These tests differ from each other in meaningful ways, and don’t yield the same results on similar facts. For example, when appropriation artist Jeff Koons was sued for copyright infringement in the period between *Harper & Row* and *Campbell* for copying expression from copyrighted images, he raised a fair use

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

18. *See, e.g.*, Leadsinger, Inc. v. BMG Music Pub'l'g, 512 F.3d 522 (9th Cir. 2008) (holding karaoke recordings adding unlicensed lyrics to licensed music recordings not transformative); Perfect 10, Inc. v. Amazon.com, Inc., 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 Ent'mt, Inc. v. Carol Pub'l'g Group, 150 F.3d 132 (2d Cir. 1998) (holding “Seinfeld Aptitude Test” containing mock-SAT questions about the Seinfeld TV show not transformative); Am. Geophysical v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (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).
When Koons was sued for essentially the same sin after \textit{Campbell}, he raised a fair use defense and prevailed.\textsuperscript{20} While the \textit{Sony} presumptions were ascendant, Congress enacted the Audio Home Recording Act, exempting consumers from copyright liability for noncommercial copying of recorded music.\textsuperscript{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.\textsuperscript{22} Eight years later, Napster sought to make precisely those arguments: that consumer copying of recorded music was either fair use under \textit{Sony}, permissible under the Audio Home Recording Act, or both.\textsuperscript{23} The court didn’t think the arguments merited serious consideration, and resolved them against Napster summarily.\textsuperscript{24}

In the question-and-answer session following Paul Goldstein’s keynote speech at this symposium, an audience member asked whether \textit{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.\textsuperscript{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 \textit{The Wind Done Gone}.\textsuperscript{26} It’s not obvious how the test should apply to the cases authors and publishers have brought against Google Book Search\textsuperscript{27} – (however you want those cases to come out), – or to the case Viacom has filed against YouTube\textsuperscript{28} – (ditto), – or to millions of everyday consumptive uses made by ordinary readers, listeners, viewers of copyrighted works.\textsuperscript{29}

But, at least if we limit our conversation to a room full of copyright lawyers and

\begin{itemize}
\item 20. Blanch v. Koons, 467 F.3d 244, 251-56 (2d Cir. 2006).
\item 23. Opening Brief of Appellant at 20-24, 32-45, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001) (Nos. 00-16401 and 00-16403).
\item 24. \textit{Napster}, 239 F.3d at 1024.
\item 25. \textit{See also Paul Goldstein, Fair Use in a Changing World, 50 J. COPYRIGHT SOC'Y U.S.A. 133, 136-37 (2003) (arguing that when digital rights management systems reduce transaction costs, fair use will become irrelevant for uses like recording movies off the air).}
\item 26. \textit{Suntrust Bank v. Houghton-Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (finding Alice Randell’s Novel \textit{The Wind Done Gone} a fair use of Margaret Mitchell’s \textit{Gone With The Wind}).}
\item 29. \textit{See Jessica Litman, Lawful Personal Use, 85 TEX. L. REV. 1871, 1897-1903 (2007).}
\end{itemize}
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. 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 copyrighted works at 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. Musical work copyrights carried with them the exclusive rights to perform the music publicly for profit except on jukeboxes. Owners of copyrights in dramatic works had the exclusive rights 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 U. Pa. L. Rev. 1025, 1062 (1956); Theodore R. Kupferman, Rights in New Media, 19 L. & CONTEMP. PROBS. (#2) 172, 175 (1954); Kreymborg v. Durante, 21 U.S.P.Q. (BNA) 557 (S.D.N.Y. 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.


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 Finklestein, supra

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.

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.
right to perform the work publicly, unqualified by any for-profit limitation.\textsuperscript{33}

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.\textsuperscript{34} It redefined “perform” to broaden its scope and overrule a line of recent Supreme Court cases construing it narrowly.\textsuperscript{35} It added a completely new right of public display.\textsuperscript{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 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.\textsuperscript{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,\textsuperscript{38} and

\textsuperscript{33} 1909 Act \$ 1(d):

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. \textit{See} Act of August 18, 1956, ch. 169, 11 Stat. 138 (1956); Finklestein, \textit{supra} note 31, at 1058.

\textsuperscript{34} See 17 U.S.C. \textsuperscript{\textcopyright} 201, 302, 303, 304 (2000).

\textsuperscript{35} 17 U.S.C. \textsuperscript{\textcopyright} 101 (2000); see H.R. REP. NO. 94-1476, at 62-65 (1976). In \textit{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 \textit{Twentieth Century Music Corp. v. Aiken}, 422 U.S. 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 \textit{Fortnightly Corp. v. United Artists Television, Inc.}, 392 U.S. 390 (1968), and \textit{Teleprompter Corp. v. Columbia Broad. Sys., Inc.}, 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 \textit{Buck v. Jewell-LaSalle}. H.R. REP. NO. 94-1476, at 86-87.

\textsuperscript{36} 17 U.S.C. \textsuperscript{\textcopyright} 106(5) (2000); see H.R. REP. NO. 94-1476 at 63-65.

\textsuperscript{37} \textit{See} Litman, \textit{supra} note 30, at 317-32.

\textsuperscript{38} Section 110(5) as originally enacted permitted:

\begin{quote}
[C]ommunication 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—
\begin{enumerate}
\item[(A)] a direct charge is made to see or hear the transmission; or
\item[(B)] the performance or display is further transmitted beyond the place where the receiving apparatus is located.
\end{enumerate}
\end{quote}

\textit{See} H.R. REP. NO. 1476, at 86-87 ("Under the particular fact situation in the \textit{Aiken} case, assuming a

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\textsuperscript{31}592 COLUMBIA JOURNAL OF LAW & THE ARTS [31:4

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\textsuperscript{31}592 COLUMBIA JOURNAL OF LAW & THE ARTS [31:4
subjected the broader 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.\textsuperscript{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,\textsuperscript{40} it sought to preserve the extant limitations by exempting particular non-profit uses under section 110.\textsuperscript{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.\textsuperscript{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.\textsuperscript{43}

A. ORDINARY EXPANSION

Although the statute as enacted largely preserved the scope of established rights and exceptions, its design predisposed it to 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.\textsuperscript{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

\textsuperscript{40} 17 U.S.C. § 106(4) (2000).
\textsuperscript{41} See H.R. REP. NO. 94-1476 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."). 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 Subcomm. On Patents, Copyrights and Trademarks of the S. Comm. On the Judiciary, 94th Cong. 10 (1975).
\textsuperscript{42} See H.R. REP. NO. 94-1476 at 63-65, 79-80; 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 (1964) (discussing how to draft exception to new public display right to preserve extant author rights).
\textsuperscript{43} See H.R. REP. NO. 94-1476 at 61-66. 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 of Justice of the H. Comm. On the Judiciary, 94th Cong. 469-74 (1975) (testimony of Professor Rondo Cameron).
\textsuperscript{44} See Litman, supra note 30, at 317-61.
would need to ask Congress for their own tailored privileges.\textsuperscript{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.\textsuperscript{46} Satellite television was forced to settle for a stingier compulsory license than cable television.\textsuperscript{47} Internet and satellite radio faced a compulsory licensing regime for the public performance of sound recordings from which legacy radio broadcasters were exempt.\textsuperscript{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.\textsuperscript{49} Section 109 does not, however, permit the recipient of a lawful 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{B. EXTRAORDINARY EXPANSION}

In 1995, Congress added a limited digital performance right for sound

\begin{itemize}
\item \textsuperscript{46} See JESSICA LITMAN, DIGITAL COPYRIGHT 58-59 (2d ed. 2006).
\item \textsuperscript{49} 17 U.S.C. § 109 (2000).
\item \textsuperscript{50} See UNITED STATES COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (Aug. 2001), available at 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.
\item \textsuperscript{51} See id.
\item \textsuperscript{52} See, e.g., Litman, supra note 46.
\end{itemize}
recordings to section 106.\textsuperscript{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,\textsuperscript{54} and revised some of the ones that were already there,\textsuperscript{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 persuaded courts\textsuperscript{56} (and the authors of at least one copyright casebook)\textsuperscript{57} that the section 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,\textsuperscript{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 section 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.\textsuperscript{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.\textsuperscript{60} That line is gradually disappearing, as copyright owners argue that individual transmissions to people in their homes should always be deemed public.\textsuperscript{61}

The forces fuelling this expansion are not obscure.\textsuperscript{62} As new technology and


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


\textsuperscript{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. Civ. No. 06-1497, 2007 WL 2826645 (D. Minn. Oct. 1, 2007). But see Atlantic Recording Corp. v. Howell, CV-06-02076-PHX-NVW, slip. op. at 10 (D. Ariz. Apr. 29, 2008) ("Merely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder's exclusive right of distribution"); In re Napster Copyright Litig., 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").

\textsuperscript{60} 17 U.S.C. \textsection 106(4) (2000).


\textsuperscript{62} For a succinct account of the forces underlying copyright's recent expansion, see Neil
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 don’t relish going to Congress and asking it to enact new exclusive rights. 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. Recently, it’s become almost respectable as a description of the rights copyright owners do control, or should.

In Effects Associates v. Cohen, 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” 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 price tag, 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.

64. See, e.g., LATMAN, supra note 1, at 5 (“the copyright owner does not enjoy the exclusive right to ‘use’ his copyrighted work”).
66. 908 F.2d 555 (9th Cir. 1990).
67. THE STUFF: A LARRY COHEN FILM (New World Pictures 1985). Like many copyright teachers, I play some of the special effects scenes for my class when we’re talking about this case. See 17 U.S.C. § 110(1) (2000). The pedagogical value is minor, but scene 23, in which Garrett Morris explodes into a rampaging mass of frozen-yogurt-like gloop, is too dreadful not to share.
68. See Jessica Litman, Creative Reading, 70 L. & CONTEMP. PROBS. 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 by 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, because Congress didn’t envision its copyright statute as 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

69. See Litman, supra note 29, at 1897-1901.
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.” See 17 U.S.C. § 101 (2000). The performance is public because it occurs “at a place open to the public.” See id.; 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) (2000). 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.
74. See Litman, supra note 29, at 1903-1908. For a discussion of other, similar examples, see id. at 1897-1906.
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 U.S. Copyright Law, 50 J. COPYRIGHT SOC’Y U.S.A. 113 (2003); Litman, supra

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another, the recent deluge of copyright suits seeking to recover for contributory or vicarious infringement require a predicate direct infringer. 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, 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. The answer in either case follows directly from the placement of the burden of proof. 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. 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, it makes sense to see the liberties to read, listen and view as outside of copyright's scope. If our 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, 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. After Napster, the Eldred case, and the recording industry's "John Doe" suits against thousands of individual users of peer-to-peer file sharing networks, 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 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 the doctrine’s 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

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).

90. See Litman, supra note 29, at 1879-93.

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


93. See Litman, supra note 68, at 179, 183.
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 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 appreciate 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

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97. See, e.g., John Roska, *Copyrighted Material Can Be Duplicated For Personal, Noncommercial Use*, ST. LOUIS POST-DISPATCH, Jul. 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 tape a CD to play in your car."); Mike Snider, *No copying, no trading? No kidding: Copyright fight might narrow our options*, USA TODAY, Mar. 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, Aug. 27, 2006, at M4 ("The public not only
complaining that the public seems to think all sorts of unfair uses are fair
does not miss two facts: First, we are 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. 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, 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.