

Reconstructing the Fair Use Doctrine

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HARVARD LAW REVIEW

RECONSTRUCTING THE FAIR USE DOCTRINE

William W. Fisher III

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ARTICLE

RECONSTRUCTING THE FAIR USE DOCTRINE

William W. Fisher III*

The fair use doctrine, codified at 17 U.S.C. § 107, permits a court to excuse a putatively infringing use of copyrighted material when the circumstances surrounding the use make it "fair." In this Article, Professor Fisher criticizes the doctrine — and in particular the changes wrought by two recent Supreme Court decisions — and considers how it might be improved. The most serious of the many problems with current fair use jurisprudence, he maintains, is that it rests on considerations derived from four disparate philosophic traditions; this incoherent foundation makes the application of the doctrine unpredictable and aggravates the cacophony of contemporary legal argumentation. To alleviate these problems, Professor Fisher considers two alternative strategies for reconstructing the field. First, he examines fair use from an economic standpoint, arguing that, by comparing the various entitlements that might be accorded copyright owners in terms of the incentives they provide for creativity and the costs they impose on consumers, courts could employ the doctrine to increase efficiency in the use of scarce resources. Second, building on a discussion of the limitations of the economic approach, Professor Fisher deploys a "utopian" analysis of fair use, suggesting how the doctrine might be recast to incorporate particular conceptions of the "good life" and the "good society." So formulated, the fair use doctrine would contribute to the realization of a more just social order and a more integrated legal discourse.

INTRODUCTION

ARTICLE I, section 8, clause 8 of the United States Constitution empowers Congress "to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." With regard to original works of art or the intellect, Congress has attempted

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to fulfill its mandate by vesting in the creator of such a work an alienable property right, known as a copyright.

The current version of the governing statute¹ defines this property right through a combination of grants and reservations. Section 106 of the act vests in the "owner" of a copyright an extensive set of exclusive entitlements, including the right "to reproduce the copyrighted work in copies or phonorecords," the right "to prepare derivative works based upon the copyrighted work," and the right publicly to "perform" or "display" the work.² The succeeding twelve sections of the statute set forth "limitations" to the foregoing rights. Most of the enumerated qualifications are narrow or are limited to particular industries.³ However, the first of the series, section 107, is expansive and potentially applicable to any of the copyright owner's entitlements. The backbone of section 107 is its sweeping proviso that, "[n]otwithstanding the provisions of section 106, the fair use of a copyrighted work . . . is not an infringement of copyright."⁴

The fair use doctrine, which section 107 is meant to codify, is the precipitate of a series of decisions, beginning in the mid-nineteenth century, in which federal courts held that conduct seemingly proscribed by the copyright statute in force at the time⁵ did not give rise

¹ 17 U.S.C. §§ 101-810 (1982).

² *Id.* § 106. The exclusive rights to "perform" and "display" copyrighted material apply respectively to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" and to "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work." *Id.* § 106(4)-(5).

³ For example, section 108 accords libraries and archives certain limited rights to reproduce materials for specified purposes; section 111 prescribes an elaborate set of rules governing secondary transmissions of broadcasts embodying performances or displays of copyrighted works; and section 115 establishes a compulsory licensing system for phonorecords of nondramatic musical works. *See id.* §§ 108, 111, 115.

⁴ The full text of the provision is:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. § 107.

⁵ The first Copyright Act was adopted soon after the ratification of the Constitution. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124. Since that time the statute has been amended many times and has undergone four thorough revisions. *See* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, ch. 230, 16 Stat. 198; Act of March 4, 1909, ch. 230, 35 Stat. 1075; Copyright Revision Act of Oct. 8, 1976, 90 Stat. 2541.

to liability.⁶ In the early cases, the question whether the defendant's conduct constituted a "fair use" was not always clearly differentiated from the question whether it infringed the plaintiff's copyright.⁷ In the mid-twentieth century, however, courts began more consistently to refer to "fair use" as a distinct legal issue — specifically, as an affirmative defense excusing putatively infringing behavior.⁸ In 1976, when it overhauled the copyright law, Congress acceded to this emergent view and in section 107 for the first time acknowledged and lent its approval to the fair use defense. Congress' purpose was neither to alter nor to "freeze" the doctrine as it had been developed by the courts, but simply to legitimate it.⁹

Until recently, the lower federal courts molded the fair use doctrine without meaningful guidance from the Supreme Court. Prior to 1982, the Court granted certiorari in only two cases implicating the doctrine, and in both instances an equal division in the Justices' votes prevented the issuance of an opinion.¹⁰ In the past few years, however, two important cases, *Sony Corp. v. Universal City Studios*¹¹ and *Harper & Row Publishers v. Nation Enterprises*,¹² provided the Court opportunities to sculpt and illuminate this area of the law.

This Article criticizes the Supreme Court's performance in *Sony* and *Harper & Row* and considers how we might construct a better fair use doctrine. Part I reviews the facts and holdings of the two

⁶ In developing the doctrine, the courts could and did rely on a substantial body of English case law, initiated by the decision of Chancellor Hardwicke in *Gyles v. Wilcox*, 2 Atk. 141, 26 Eng. Rep. 489 (1740). For a thorough review of these precedents, see W. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6-17 (1985).

⁷ See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 345, 348-49 (C.C.D. Mass. 1841) (No. 4901) (holding that some activities inconsistent with the terms of the copyright statute nevertheless constitute "fair and bona fide abridgement[s]" or "justifiable use[s]" and therefore do not give rise to liability); *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); *Twentieth Century Fox-Film Corp. v. Stonesifer*, 140 F.2d 579, 582 (9th Cir. 1944).

⁸ See, e.g., *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963); *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306-07 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Time v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968); *Meredith Corp. v. Harper & Row, Publishers*, 378 F. Supp. 686, 689 (S.D.N.Y. 1974).

⁹ See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976) ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."); S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

¹⁰ See *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court sub nom.* *Columbia Broadcast Sys. v. Loew's, Inc.*, 356 U.S. 43 (1958); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975).

¹¹ 464 U.S. 417 (1984).

¹² 471 U.S. 539 (1985).

cases. Part II describes the doctrine that emerged from the Court's decisions and contends that it suffers from several minor defects and one fundamental problem: failure to identify and advance a coherent set of values. Part III briefly considers alternative ways in which copyright law might be reorganized so as to mitigate the problems engendered by the Court's current approach. Part IV pursues what to many readers will seem the most promising of those routes — redesigning the fair use doctrine with a view to maximizing efficiency in the use of resources. Part V proposes and defends a less conventional strategy: it first sketches a society more attractive and just than the one in which we now live, and then considers how copyright law might be reshaped to move us in the direction of that utopian vision.

I. THE CASES

The conduct that gave rise to the first of the two disputes was the manufacture and sale by Sony Corporation of videocassette recorders (VCRs), one function of which is to record television programs broadcast over the public airwaves.¹³ In 1976, Walt Disney Productions and Universal City Studios, owners of the copyrights on several such programs, brought an action against Sony,¹⁴ alleging that the use of VCRs to tape copyrighted programs violated section 106 of the Copyright Act, and that the manufacture and sale of the machines themselves constituted contributory copyright infringement. The studios requested damages, injunctive relief, and an equitable accounting of Sony's profits. After a full trial, the district court denied relief, primarily on the grounds that copying copyrighted programs for home viewing was a fair use and that, in any event, Sony's connection with home taping was too attenuated to sustain an action for contributory

¹³ See 464 U.S. at 419–20. Only the essential features of the case will be described here. Various additional details will be provided in the course of the critical analysis contained in Part II. Readers interested in more thorough or consolidated discussion of the background of the controversy should consult: Lardner, *Annals of the Law: The Betamax Case*, THE NEW YORKER, Apr. 6, 1987, at 45; *id.*, Apr. 13, 1987, at 60; Note, Sony v. Universal City Studios: *Can the Marketplace Relationship Between Creator and Consumer Be Preserved?*, 62 DENV. U.L. REV. 873 (1985); *The Supreme Court, 1983 Term — Leading Cases*, 98 HARV. L. REV. 87, 284–95 (1984); Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984) [hereinafter Note, *The Parody Defense*]; Comment, *Betamax Meets the Supreme Court: A Judicial Disappointment*, 20 NEW ENG. L. REV. 285 (1984); Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243 (1979) [hereinafter Note, *The Betamax Case*].

¹⁴ Also named as defendants were four retailers of Sony VCRs, the advertising agency responsible for marketing the machines, and an individual VCR owner. See 464 U.S. at 422 n.2. The principal target of the suit, however, was Sony.

infringement.¹⁵ Disagreeing with both of the district court's conclusions, the Ninth Circuit reversed.¹⁶

The Supreme Court granted certiorari and heard argument but was unable to reach a decision during the 1982 Term.¹⁷ After reargument, the Court, by a vote of five to four, reversed the court of appeals.¹⁸ Justice Stevens, writing for the majority,¹⁹ based the Court's ruling primarily on three nested propositions: (a) recording without permission a copyrighted television program for the purpose of "time-shifting" — i.e., watching the program once and only once at a later time — is a fair use of the copyrighted work;²⁰ (b) evidence adduced at trial established that VCRs are often used for time-shifting;²¹ (c) because Sony's products thus are manifestly "capable of commercially significant noninfringing uses," the manufacture of those products does not constitute contributory copyright infringement,²² regardless of whether Sony is aware that the machines are regularly used in ways that violate the copyright law.²³ Justice Blackmun's dissent²⁴ argued for a less forgiving test for contributory copyright infringement²⁵ and disputed the majority's conclusion that time-shifting constitutes a fair use.²⁶

¹⁵ See *Universal City Studios v. Sony Corp.*, 480 F. Supp. 429 (C.D. Cal. 1979).

¹⁶ See *Universal City Studios v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981).

¹⁷ See 457 U.S. 1116 (1982) (granting certiorari); 463 U.S. 1226 (1983) (scheduling the case for reargument).

¹⁸ See 464 U.S. 417, 421 (1984).

¹⁹ Chief Justice Burger and Justices Brennan, White, and O'Connor joined Justice Stevens' opinion.

²⁰ See 464 U.S. at 447–55. The majority appeared to accept the argument (developed at length by the dissent, *see id.* at 463–75) that using a VCR to make a single copy of a copyrighted program presumptively violates § 106 of the statute and would give rise to liability if it did not qualify as a fair use under § 107.

²¹ See *id.* at 423, 447–56; 480 F. Supp. at 443–47. Justice Stevens also placed some weight on the district court's finding that VCRs are often used to record copyrighted programs with the consent of their owners. See 464 U.S. at 443. However, the linchpin of Justice Stevens' argument was that time-shifting is permissible even when copyright owners object to the recording.

²² See 464 U.S. at 442. The test for contributory copyright infringement was stated in various ways in the Court's opinion. At one point, Justice Stevens asserted that, for a manufacturer to escape liability, "[the machine] need merely be capable of substantial noninfringing uses." *Id.*

²³ Evidence at trial indicated that VCRs are sometimes used for "librarying" — making permanent or semi-permanent copies of recorded programs that can be viewed several times. See 480 F. Supp. at 436–37. All parties and all members of the Court assumed, at least for the sake of argument, that librarying is not a fair use and that therefore a substantial number of VCR owners often violate the copyright law.

²⁴ Justice Blackmun was joined by the unusual combination of Justices Marshall, Powell, and Rehnquist.

²⁵ See 464 U.S. at 490–91 (Blackmun, J., dissenting).

²⁶ See *id.* at 493–98.

While *Sony* was being decided, the second of the two controversies was brewing.²⁷ In 1977, former President Gerald Ford entered into a contract giving Harper & Row and *The Reader's Digest*²⁸ the exclusive right to publish his as yet unwritten memoirs and to license prepublication serialization of those memoirs. In 1979, *Time Magazine* purchased from Harper & Row the right to publish immediately before the release of the book excerpts of Ford's account of his decision to pardon President Nixon. A few weeks before the *Time* article was to appear, someone, without authorization from Ford, Harper & Row, or *Time*, provided a copy of the manuscript to Victor Navasky, editor of *The Nation*. Navasky quickly drafted an article describing the book. A significant portion of the article was made up of paraphrases of passages in the memoirs, and approximately 300 words of the article consisted of direct quotations from Ford's manuscript. When *Time*, upon seeing the article, abandoned its plans to publish excerpts from the book and refused to pay the balance of the purchase price of the serialization rights, Harper & Row brought a copyright infringement action against *The Nation*.²⁹

The district court held that although Ford could have copyrighted neither the facts he described nor memoranda prepared by others upon which he relied, "the totality of these facts and memoranda collected together with Ford's reflections" were "protected by the copyright laws," and *The Nation's* article had infringed that copyright.³⁰ By a

²⁷ Again, only the essential features of the case will be described here. For thorough treatments of the factual or procedural background, see Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986); Hamel, *Harper & Row v. The Nation: A First Amendment Privilege for News Reporting of Copyrightable Material?*, 19 COLUM. J.L. & SOC. PROBS. 253 (1985); Note, *When "Fair is Foul": A Narrow Reading of the Fair Use Doctrine in Harper & Row Publishers, Inc. v. Nation Enterprises*, 72 CORNELL L. REV. 218 (1986); Note, *Two Approaches to the Fair Use Doctrine: A Look at the Harper & Row Publishers, Inc. v. Nation Enterprises Decisions*, 2 ENT. & SPORTS L.J. 89 (1984); *The Supreme Court, 1984 Term — Leading Cases*, 99 HARV. L. REV. 120, 292–302 (1985); Note, *Harper & Row Publishers, Inc. v. Nation Enterprises: Pirating Unpublished Copyrighted Works: Does the Fair Use Doctrine Vindicate First Amendment Rights?*, 19 J. MARSHALL L. REV. 501 (1986); Note, *Copyright and the First Amendment: Nurturing the Seeds for Harvest*, 65 NEB. L. REV. 631 (1986); Note, *Fair Use of Copyrighted Work Under Harper & Row Publishers, Inc. v. Nation Enterprises*, 61 TUL. L. REV. 415 (1986); Note, *Copyright: The Public Figure Expansion of the Fair Use Doctrine Rejected*, 25 WASHBURN L. REV. 385 (1986).

²⁸ For convenience, this Article will refer to the two publishers collectively as "Harper & Row."

²⁹ See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 543 (1985). The complaint also asserted pendent claims based upon the New York law of conversion and tortious interference with contract, but those claims were dismissed by the district court, the dismissal was affirmed by the court of appeals, see *Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 199–201 (2d Cir. 1983), and the Supreme Court did not reconsider them.

³⁰ See *Harper & Row, Publishers v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983).

vote of two to one, the Second Circuit repudiated the district court's view of the case, holding that Ford could acquire a copyright only in his original expression and that, especially in view of the public importance of the memoirs, the reproduction of short passages from the book should be deemed a fair use.³¹

By a vote of six to three, the Supreme Court reversed.³² Justice O'Connor, writing for the Court,³³ avoided the issue of what portions of the memoirs were protected by the statute, assuming *arguendo* that only the 300 words directly quoted from the manuscript constituted copyrighted material.³⁴ Navasky's unauthorized copying of those words, she held, could not qualify as a fair use.³⁵ Justice Brennan's dissent did reach the issue of how much of the book was copyrightable, agreeing with the court of appeals that only Ford's original expression was protected.³⁶ Turning to the issue of fair use, Justice Brennan argued that the proper question was whether *The Nation's* unauthorized use of the "literary form" of the quoted passages was legitimate.³⁷ Taking into account the importance of protecting the "robust public debate essential to an enlightened citizenry,"³⁸ Justice Brennan contended that it was.

II. THE DOCTRINE AND ITS DEFECTS

This Part describes the current state of the fair use doctrine, paying special attention to the changes wrought by *Sony* and *Harper & Row*, argues that we should strive to improve the doctrine, and provides the raw material for the project of reconstruction begun in Part III.³⁹

³¹ See 723 F.2d at 205-09.

³² See 471 U.S. 539, 542 (1985).

³³ The other members of the majority were Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens.

³⁴ See 471 U.S. at 548-49.

³⁵ See *id.* at 555.

³⁶ See *id.* at 579-87 (Brennan, J., dissenting). Justice Brennan was joined by Justices White and Marshall.

³⁷ See *id.* at 587.

³⁸ *Id.* at 579.

³⁹ Because the principal objective of the Article is to show that the fair use doctrine can and should be improved, the analysis of this Part concentrates on the ways in which the Court defined and applied the doctrine in *Sony* and *Harper & Row* and does not address the question whether the cases were rightly decided. The reader should not infer from the paucity of overt criticism of the Court's judgments that *Sony* and *Harper & Row* were "easy cases" — that, no matter how the doctrine was construed, they should have and would have been decided as they were. One indication of their difficulty is the level of disagreement among the judges who passed upon them; in each case, the district court was reversed by the court of appeals, the court of appeals was reversed by the Supreme Court, and the Supreme Court was closely divided. The penultimate section of the Article returns to the cases and considers how they might have been resolved had the Court employed the "reconstructed" doctrine outlined in Part V.

A. "An Equitable Rule of Reason"⁴⁰

The first thing one notices when reading the opinions in the two cases is the absence of any effort to prescribe a rule to govern future controversies. The consensus of the Court was that "fair use analysis must always be tailored to the individual case."⁴¹ "The inquiry is necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules."⁴²

What the Justices offered instead was a list of "factors" to be considered by lower courts when deciding whether particular uses are fair. Some of these criteria consisted of glosses on the four statutory considerations;⁴³ others were creations of the Court. In neither case did the Court venture a precise or exhaustive enumeration of the factors.⁴⁴ However, a close reading of the two majority opinions reveals a set of questions the Court deemed relevant. In approximate order of importance, they are: (1) Did the infringement have a material impact on the "potential market" for the copyrighted work? (2) Was the use "commercial" or "noncommercial"? (3) Had the copyrighted work been published at the time of the copying? (4) How much — quantitatively and qualitatively — of the putatively infringing work was drawn from the copyrighted work? (5) Was the unauthorized use consistent with customary standards of propriety?

In the course of explicating these factors, the Court identified four objectives that copyright law in general and the doctrine of fair use

⁴⁰ *Sony*, 464 U.S. at 448; *Harper & Row*, 471 U.S. at 560; *id.* at 588 (Brennan, J., dissenting). This phrase appears in the House Report on section 107, *see* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679, which in turn derived the language from several lower-court opinions developing the fair use doctrine.

⁴¹ *Harper & Row*, 471 U.S. at 552.

⁴² *Sony*, 464 U.S. at 479–80 (Blackmun, J., dissenting). The reference in the text and in Justice Blackmun's opinion to "rules" calls to mind the conventional distinction between a rule and a standard and suggests that the doctrine crafted by the Court is simply an example of the latter. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1975) (describing a "rule" as a legal norm that provides that simultaneous occurrence of a set of "easily distinguishable factual aspects of a situation" shall have a determinate consequence and a "standard" as a norm that requires adjudicators to assess the facts of each situation in light of a designated substantive objective or social value). The plausibility of that characterization of the Court's rulings is undercut, however, by the importance to the doctrine of a set of "factors," *see infra* section II.B, and by the incoherence of the values the doctrine ostensibly serves, *see infra* section II.C. Under such conditions, use of the traditional nomenclature would be more distracting than helpful.

⁴³ The list of statutory factors is set forth in note 4 above.

⁴⁴ Indeed, the Court left open the possibility that lower courts in future cases would identify other factors relevant to the problems presented to them. *See Harper & Row*, 471 U.S. at 560 ("The factors enumerated in [section 107] are not meant to be exclusive . . ."); *id.* at 588 (Brennan, J., dissenting) ("The [four] statutory factors . . . provide substantial guidance to courts undertaking the proper fact-specific inquiry" but "are not necessarily the exclusive determinants of the fair use inquiry.").

in particular ought to serve: (a) advancing social utility by increasing the supply of intellectual products and facilitating their distribution; (b) enforcing an author's natural right to a reasonable portion of the fruits of his labor; (c) protecting an author's interest in controlling the way in which his creations are presented to the world; and (d) aligning the law with custom and popular conceptions of decent behavior. Attention to these underlying goals, the Court suggested, would facilitate both interpretation of the factors enumerated above and identification of other appropriate criteria in future cases.

Detailed studies of the components of this composite test follow.

B. The Factors

1. *Impact on the Potential Market.* — Justice Stevens, writing for the Court in *Sony*, centered the fair use analysis on the fourth of the considerations mentioned in section 107: "the effect of the [putatively infringing] use upon the potential market for or value of the copyrighted work."⁴⁵ "The purpose of copyright," he contended, "is to create incentives for creative effort."⁴⁶ "[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create" — and therefore should be deemed "fair."⁴⁷ Justice Stevens argued that application of this factor to the facts of the case suggested that time-shifting should be considered a fair use. Pointing to the district court's finding that the studios had failed to prove "that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm,"⁴⁸ he maintained that it would be senseless to forbid it.

Justice Blackmun disagreed. Relying on a case decided a few years earlier by the Second Circuit,⁴⁹ Justice Blackmun argued that Justice

⁴⁵ 17 U.S.C. § 107(4) (1982).

⁴⁶ 464 U.S. at 450. Fuller discussion of the utilitarian premises of Justice Stevens' opinion can be found in section II.C below.

⁴⁷ *Id.* at 450–51. In the course of his analysis, Justice Stevens discussed several other considerations, but all of them either depended on or were subordinated to the market-impact factor.

⁴⁸ *Id.* at 421.

⁴⁹ *Iowa State Univ. Research Found. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980). The case provides a nice illustration of Justice Blackmun's argument. Iowa State owned the copyright on a short film about the life of a college wrestler who subsequently qualified for the United States Olympic team. ABC obtained a copy of the film and, without permission, used some of the footage in a brief biography of the wrestler broadcast during its coverage of the Olympics. *See id.* at 59. In response to the infringement action filed by Iowa State, ABC contended that, because it enjoyed the exclusive right to televise the Olympics, the unauthorized copying did not "harm" Iowa State in any way, because, without ABC's permission, Iowa State

Stevens' analysis presupposed an indefensibly narrow conception of the "market" for the studios' works. "[P]ersons who find it impossible or inconvenient to watch . . . programs at the time they are broadcast, and who wish to watch them at other times," he contended, surely constitute in some sense a "potential market" for the programs; privileging the use of VCRs has the effect of denying to the copyright owners the opportunity to exact fees from the members of that market.⁵⁰ Generalizing the point, Justice Blackmun argued that, to avoid an adverse finding on the market-impact factor:

the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work. . . . [T]he fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder.⁵¹

Justice Blackmun's argument is powerful. Only on the basis of a conception of a "market" more restrictive than a "group of persons who would . . . be willing to pay to see" the work can it be rebutted.⁵² In view of Justice Stevens' failure to provide any such conception in

could not have obtained access to the television viewers. In rejecting ABC's contentions, the court of appeals reasoned:

ABC did foreclose a significant potential market to Iowa — sale of its film for use on television in connection with the Olympics. . . . Iowa had no right to insist that the network use its film, but its copyright entitled it to attempt to exploit the commercial market controlled by ABC, and, if it could not, to withhold permission to use the film in that market.

Id. at 62.

⁵⁰ 464 U.S. at 485 (Blackmun, J., dissenting); *see also id.* at 497–98.

⁵¹ *Id.* at 485.

⁵² If Justice Blackmun's definition of "potential market" is accepted, the only questionable aspect of his reasoning is his contention that finding time-shifting to be a fair use would prevent the studios from exploiting the market constituted by the time-shifters. The owners of copyrighted programs ordinarily derive their compensation not through direct payments from viewers, but from license fees paid to them by the networks. Those fees are determined in substantial part by the number of persons who see the advertisements embedded in the programs when broadcast. The operation of this scheme might not appear to be affected by whether the viewers see the programs at the time they are broadcast or at a later time. Of the many responses to this point, the following is sufficient: a substantial proportion of the persons who watch taped programs use the "fast-forward" buttons on their VCRs to minimize the amount of time they must spend watching advertisements. *See id.* at 483 n.35 (noting that surveys submitted by both parties indicated that time-shifters "avoided [commercials] at least 25% of the time"). The advertisers, who are aware of this practice, are understandably reluctant to pay for the portion of the audience who engage in it. *See Advertising: If Viewers Tune out TV Ads*, N.Y. Times, Aug. 12, 1982, at D17, col. 3; *cf. Mandese, Tale of the Tape*, ADWEEK (Eastern ed.), Aug. 11, 1986, at 1 (documenting the advertisers' continued unhappiness with the situation). Thus, at a minimum, the copyright holders have been denied the opportunity to derive a profit from the market composed of the subset of time-shifters who delete the advertisements.

Sony, it is not surprising that Justice O'Connor, writing for the Court in *Harper & Row*, quietly adopted Justice Blackmun's definition of "potential market."⁵³

Unfortunately, Justice O'Connor simultaneously adopted Justice Stevens' severe view of the significance of adverse impact on such a market. In *Sony*, Justice Stevens suggested that, to avoid a finding of fair use, a plaintiff need only "show[] by a preponderance of the evidence that *some* meaningful likelihood of future harm exists."⁵⁴ In *Harper & Row*, Justice O'Connor took an equally rigid position: "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."⁵⁵ What Justice O'Connor failed to recognize is that, in almost every case in which the fair use doctrine is invoked, there will be *some* material adverse impact on a "potential market" as Justice Blackmun — and now the Court — define that phrase. After all, in any such suit, the defendant is seeking to use the plaintiff's copyrighted work in a fashion ostensibly forbidden by section 106 of the Copyright Act. To permit the defendant to engage in the activity for free prevents the plaintiff from exacting a fee from the defendant.⁵⁶ Thus, in all but the rare cases in which the defendant for some reason would be unwilling to pay the plaintiff anything,⁵⁷ a finding that the defendant's conduct is "fair" will "impair the marketability of the work."

In short, fairly applied, the version of the market-impact factor adopted in *Harper & Row* will almost always tilt in favor of the plaintiff — and is therefore nearly useless in differentiating between

⁵³ The crucial passages in her opinion are: "To negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work,'" 471 U.S. at 568 (quoting the majority opinion in *Sony* but adding emphasis to the word "potential" and citing the portions of Justice Blackmun's dissent in which he defines the phrase expansively); "[t]his inquiry must take account not only of harm to the original but also of harm to the market for derivative works," *id.* (citing *Iowa State*).

⁵⁴ 464 U.S. at 451 (emphasis in original); *see also id.* at 456 (using similar language). Indeed, Justice Stevens argued that the likelihood of such harm could be presumed in cases involving commercial uses. *See id.* at 451; *infra* note 60.

⁵⁵ 471 U.S. at 566–67 (quoting 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10[D], at 1-87 (1984)); *see also id.* at 568 ("If the defendant's work adversely affects the value of any of the rights in the copyrighted work . . . the use is not fair.") (quoting 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[B], at 13-77–13-78 (1984)).

⁵⁶ All of the rights conferred on the copyright owner by section 106 are alienable and, in practice, are commonly alienated.

⁵⁷ It might be objected that such cases would not be so rare — because many potential users if denied the right to copy modest portions of a copyrighted work would refuse "on principle" to purchase permission to do so. Perhaps so, but surely it would be odd to let the availability of the fair use defense turn on whether the defendant was convinced that he *ought* to be able to use the plaintiff's work for free. Moreover, defendants' incentive to misrepresent their attitudes on this score would make it hazardous to try to take their convictions into account when administering the doctrine.

fair and unfair uses of copyrighted materials. To be helpful, it must be modified. At least one change is essential: if Justice Blackmun's understanding of "potential market" is to be retained — and no alternative definition is in the offing — then a court confronted with a fair use defense must estimate the *magnitude* of the market impairment caused by privileging the defendant's conduct; merely ascertaining the *existence* of adverse impact will not suffice.⁵⁸

2. "*Commercial*" and "*Noncommercial*" Uses.⁵⁹ — With the exception of market impact, the factor that looms largest in the two opinions is the one specified first in section 107: whether the putatively infringing use is "commercial" in nature.⁶⁰ Two dangers attend use of this criterion to separate fair from unfair uses. The first is that of "double counting." The only plausible justification for the test — as Justice Stevens implicitly recognized⁶¹ — is that it may indicate the

⁵⁸ How the magnitude of injury ought to figure in the fair use calculus remains to be seen — and will be considered in some detail in Parts IV and V. But that it should be the magnitude that matters seems undeniable.

⁵⁹ This factor has a complex pedigree. In several early fair use cases, lower courts emphasized the "commercial character" of the challenged activity in refusing to excuse it. See, e.g., *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938). In 1966, an influential decision by the Second Circuit repudiated this factor; in *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), the court reasoned that, "whether an author or publisher has a commercial motive . . . is irrelevant to a determination of whether a particular use . . . constitutes a fair use." *Id.* at 307. Other courts were not willing to go so far, asserting instead that commercial motives, though not decisive, were relevant in deciding whether to privilege a particular use of a copyrighted work. See, e.g., *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1175 (5th Cir. 1980) (holding that "any commercial use tends to cut against a fair use defense"). Eventually even the Second Circuit retreated from the stand it had taken in *Rosemont*, concluding that, "[f]or a determination whether the fair use defense is applicable . . . it is relevant whether the [copyrighted work was] used . . . predominantly for commercial exploitation." *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977); see also, e.g., *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) (stating that the commercial nature of the use is relevant but not decisive). For a thorough review of this line of cases, see W. PATRY, cited above in note 6, at 72–91. Section 107(1) of the 1976 Act reflects what had become more-or-less orthodox doctrine by the time of its enactment; in deciding whether a particular use is fair, a court is directed to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1) (1982).

⁶⁰ In his majority opinion in *Sony*, Justice Stevens highlighted this issue: "Although not conclusive, the first factor [mentioned in section 107] requires that 'the commercial or nonprofit character of an activity' be weighed in any fair use decision." 464 U.S. at 448–89 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976)). More specifically, Justice Stevens used this factor to allocate the burden of proof on the question of market impact. To prevail in a suit challenging "a noncommercial use of a copyrighted work," the copyright holder must prove "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists"; by contrast, "[i]f the intended use is for commercial gain, that likelihood may be presumed." *Id.* at 451. In *Harper & Row*, Justice O'Connor took a similar line, expressly approving Justice Stevens' use of this factor to establish a presumption of injury. See 471 U.S. at 562. At least one lower court has since taken this presumption seriously. See *Financial Information, Inc. v. Moody's Investors Serv.*, 751 F.2d 501, 508–09 (2d Cir. 1984).

⁶¹ See *supra* note 60.

severity of the probable harm to the copyright owner of allowing the defendant to engage in his activity. Although one can imagine non-commercial activities that would seriously impair a potential market for a work,⁶² it seems likely that commercial uses usually result in more severe injuries to copyright owners than noncommercial uses. If that is the significance of the commercial character of an activity, however, to tally it as a separate factor is misleading. At a minimum, its status as an adjunct to the market-impact test should be borne in mind.

The second danger derives from the ambiguity of the term "commercial" — an ambiguity the Court has enhanced. In the various opinions in *Sony* and *Harper & Row*, the term was used in three markedly different ways. Justice Stevens equated it with money-making.⁶³ Justice Blackmun, in his dissent, contrasted commercial activities with activities motivated by "humanitarian impulse[s]," implicitly defining commercial as selfish.⁶⁴ Justice O'Connor eschewed Justice Blackmun's inquiry into the user's motivations and ventured a more objective definition: "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."⁶⁵ Each of these defi-

⁶² For example, suppose that 25 law students pooled their resources and bought a home photocopier, then borrowed from the library a set of the casebooks assigned in their courses and made 25 copies of each volume. Arguably, this activity would not fit the colloquial definition of "commercial," but it would materially reduce the demand for the casebooks. An activity with greater economic importance is the common practice of taping phonorecords or compact discs on cassette recorders. Were this practice forbidden, the profits available to record and "CD" manufacturers — and thus to performing artists — would undoubtedly be substantially higher. (It is not altogether clear that the activity is in fact lawful; for discussion of the issue, see Leete, *Betamax and Sound Recordings: Is Copyright in Trouble?*, 23 AM. BUS. L.J. 551 (1986).) Finally, consider the longstanding practice of the National Institutes of Health of copying articles in medical journals and distributing the copies free to medical researchers and libraries. The activity could fairly be described as "noncommercial," but it nevertheless adversely affects the market for the journals in which the articles are published. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (holding the use fair), *aff'd per curiam* by an equally divided Court, 420 U.S. 376 (1975).

⁶³ Thus, he repeatedly used the term as the opposite of "nonprofit." If the monetary benefits to the user exceed the costs, he implied, the use is "commercial." See, e.g., 464 U.S. at 449. A similar understanding of the term seems to have guided the district court in *Sony*. See 480 F. Supp. at 449–50, 453–54. Justice Stevens' express reliance on the district court's finding that time-shifting is "a noncommercial, nonprofit activity," 464 U.S. at 449, suggests that he found the lower court's definition congenial.

⁶⁴ 464 U.S. at 496 (Blackmun, J., dissenting).

⁶⁵ 471 U.S. at 562. Applying this test, Justice O'Connor reasoned that, because *The Nation* had profited from its use of excerpts of President Ford's memoirs and did not pay the customary price for serialization rights, its conduct must be deemed commercial. Justice Brennan in dissent argued that the inclusion of "news reporting" in the introductory sentence of section 107 required that the presumption against commercial uses established by *Sony* not be applied to news businesses. See *id.* at 592 & n.16 (Brennan, J., dissenting). However, Justice Brennan did not

nitions is problematic,⁶⁶ but more serious than their individual defects is the fact that the Court has not indicated which is authoritative.

Again, therefore, if the commercial/noncommercial factor is to be retained as a component of the fair use doctrine, it should be modified. At a minimum, the Supreme Court ought to make clear which of the definitions now in circulation the lower courts should employ.⁶⁷

3. *Publication*. — A factor unmentioned in section 107 that the Court identified and emphasized in *Harper & Row* is whether, at the time of the copying, the copyrighted work had been published. Prior to 1976, unpublished works were protected not by the Copyright Act, but by common law copyright rules administered for the most part by state courts, which accorded little scope to the idea of “fair use.”⁶⁸ The 1976 reform of the Copyright Act extended its coverage to unpublished materials.⁶⁹ In *Harper & Row*, Justice O'Connor argued that some of the concerns that underlay the common law doctrine forbidding most unauthorized uses of unpublished works should inform the interpretation of section 107 of the enlarged federal statute.

Specifically, three considerations supported the conclusion that “the unpublished nature of a work is ‘[a] key, though not necessarily determinative, factor’ tending to negate a defense of fair use.”⁷⁰ First, Justice O'Connor contended, the unauthorized copying of unpublished materials is likely to have a large impact on the economic value of the copyright in those materials.⁷¹ Second, a risk that his manuscript

challenge either Justice O'Connor's general definition of “the profit/nonprofit distinction” or the applicability of the *Sony* presumption to activities not enumerated in section 107 itself.

⁶⁶ In particular, Justice O'Connor's definition, insofar as it differs from Justice Stevens', is circular: there will be a “customary price” to be paid for the right to engage in a particular use if and only if unauthorized engagement in that use is held to violate the Copyright Act; the existence of a customary price, therefore, cannot determine whether the use violates the Act.

⁶⁷ For examples of recent cases in which courts have struggled to determine whether the use in question was “commercial,” see *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1152–53 (9th Cir. 1986) (rejecting the district court's conclusion that copying an obscene parody for the purpose of raising money to finance a suit against the parodist was not a commercial use), and *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (suggesting that “many parodies . . . may be ‘more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work’” (quoting *Pillsbury Co. v. Milky Way Prods.*, 215 U.S.P.Q. 124, 131 (BNA) (N.D. Ga. 1981))).

⁶⁸ See, e.g., *Stanley v. Columbia Broadcasting Sys.*, 35 Cal. 2d 653, 661, 221 P.2d 73, 78 (Cal. 1950) (en banc); W. PATRY, *supra* note 6, at 439–41; cf. 3 M. NIMMER, NIMMER ON COPYRIGHT § 1305, at 13-62 & n.2 (1987) (observing that, although under common law copyright the fact that a work was unpublished was “a factor tending to negate the defense of fair use,” it did not bar invocation of the doctrine).

⁶⁹ See 17 U.S.C. §§ 102(a), 104(a) (1982).

⁷⁰ 471 U.S. at 554 (quoting S. REP. NO. 473, 94th Cong., 1st Sess. 64 (1975)).

⁷¹ Justice O'Connor argued that “the potential damage to the author from judicially enforced ‘sharing’ of the first publication right with unauthorized users of his manuscript is substantial,” *id.* at 553, in part because this practice would threaten the author's valuable “property interest in exploitation of prepublication rights,” *id.* at 555.

will be released (in whole or in part) to the public by someone else will induce an author to publish prematurely and will therefore deprive readers of the benefits associated with well-polished works.⁷² Third and finally, the unauthorized publication of excerpts of unpublished material creates a danger that readers will be shown a garbled or distorted version of the author's creation before they have access to the creation itself; selective prepublication copying thus threatens the author's "personal interest in creative control" over his work.⁷³ The implication of this combination of considerations, Justice O'Connor argued, is that "the scope of fair use is narrower with respect to unpublished works."⁷⁴

The publication factor adopted in *Harper & Row* stands up better to critical scrutiny than either the market-impact or commercial/non-commercial factors. To be sure, there is force to Justice Brennan's contention that not all cases of prepublication copying implicate the three concerns identified by the majority.⁷⁵ But it is not obvious that we should therefore abandon the factor in favor of an open-ended analysis of the degree to which the concerns themselves are implicated by particular cases. That issue, along with the larger question of the relevance of the unpublished nature of a work to alternative general theories of copyright, is taken up in Part V. For now it suffices to observe that this factor does not seem seriously defective.

4. *Amount of Copying.* — Since the inception of the fair use doctrine in this country, most courts have expressly considered the *extent* of a defendant's copying in determining whether his activity should give rise to liability.⁷⁶ Unfortunately, to date they have failed to devise a reliable method of determining how much is too much. One situation has commonly been thought clear-cut: prior to the decision in *Sony*, the courts were almost unanimous in holding that copying an entire copyrighted work would certainly give rise to liability.⁷⁷ But the question of how much usage short of appropriation

⁷² See *id.* at 555.

⁷³ *Id.* at 555, 564.

⁷⁴ *Id.* at 564; see also *id.* at 555 ("Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.").

⁷⁵ See *id.* at 595-96 (Brennan, J., dissenting).

⁷⁶ For example, in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), perhaps the most famous of the early cases, Justice Story, riding circuit, was called upon to determine whether reproducing several copyrighted letters as part of a biography of their author constituted a "justifiable use" of those letters. Among the factors Justice Story identified as critical to the analysis was the "quantity and value of the materials used." *Id.* at 348.

⁷⁷ See, e.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (denying that "wholesale copying and publication of copyrighted material can ever be fair use"). But see *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 & n.12 (Ct. Cl. 1973) (calling *Leon's* assertion an "overbroad generalization"), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975).

of an entire work would result in loss of the fair use shield has never been settled.⁷⁸ Even the terms of the inquiry have remained unclear. Should a court consider the quality of the copied material or only the quantity? Should it attend to the ratio between the amount of material appropriated and the size of the *defendant's* work or only the ratio between the amount taken and the size of the *copyrighted* work?⁷⁹ Section 107(3) of the 1976 Act incorporates without clarifying this amorphous set of concerns: in determining whether a given activity should be considered a fair use, courts are directed to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."⁸⁰

Perhaps sensing the stubborn vagueness of the "amount of copying" factor⁸¹ — or perhaps merely aware of the degree to which it threatened his argument — Justice Stevens discounted its importance in *Sony*.⁸² In *Harper & Row*, Justice O'Connor accorded it much more

⁷⁸ Thus, in his opinion in *Folsom*, Justice Story quoted approvingly Lord Cottendam's comment:

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

9 F. Cas. at 348 (quoting *Bramwell v. Halcomb*, 40 Eng. Rep. 1110 (1836)). For a similar admission, see, for example, *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797, 799 (7th Cir. 1921) (stating that substantiality "cannot be determined alone by lines or inches").

⁷⁹ In the *Folsom* case itself, Justice Story shifted confusingly from discussion of the portion (quantitative and qualitative) of the allegedly infringing biography that consisted of copied material to discussion of the importance of the copied material to the copyrighted volume from which it was taken. See 9 F. Cas. at 349. Similar uncertainty as to how the amount of copying is to be measured infects most other opinions addressing the issue. See, e.g., *Roy Export Co. v. CBS, Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (discussing both qualitative and quantitative substantiality), *aff'd on other grounds*, 672 F.2d 1095 (2d Cir. 1982). An exception is *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936), where Judge Learned Hand tried (unsuccessfully) to lay one of the questions to rest: "[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate," *id.* at 56-57.

⁸⁰ 17 U.S.C. § 107(3) (1982).

⁸¹ Although Justice Stevens' opinion in *Sony* makes no explicit reference to the ambiguity of this factor, his sensitivity to the difficulties created by the precisely analogous aspect of current "takings" doctrine, see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248 (1987) (Stevens, J.), suggests that concerns other than a desire to let Sony escape liability might have led him to try to reduce the role the "amount of copying" factor plays in the fair use calculus.

⁸² As the plaintiff studios pointed out, and as Justice Blackmun insisted in his dissent, time-shifting ordinarily entails the verbatim copying of an entire copyrighted television program — a fact that would seem to incline strongly toward a finding of liability. See 464 U.S. at 497 (Blackmun, J., dissenting). Justice Stevens rejected this inference in a single sentence:

[W]hen one considers the nature of a televised copyrighted audiovisual work, and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use.

464 U.S. at 449-50.

importance. Emphasizing “the expressive value of the excerpts [taken from President Ford’s manuscript] and their key role in the infringing work,” Justice O’Connor concluded that the extent of the copying was substantial and counted against *The Nation’s* invocation of the fair use doctrine.⁸³

As revived and explicated in *Harper & Row*, the “amount of copying” factor has two defects. The first is its notorious fuzziness. Indeed, the long-acknowledged difficulty of applying this factor to particular cases has been increased by the manner in which Justice O’Connor elaborated on it. At the outset of the pertinent paragraph, Justice O’Connor brushed aside *The Nation’s* argument that it had copied only a tiny portion of Ford’s manuscript.⁸⁴ That the material copied was “[i]n absolute terms . . . insubstantial” she deemed irrelevant.⁸⁵ What mattered was the importance to the book of the passages reproduced — how “powerful” they were, their “expressive value.”⁸⁶ In effect, Justice O’Connor directed courts applying this factor in future cases to consider primarily “the qualitative nature of the taking.”⁸⁷ The difficulty of making a judgment of that sort will be exacerbated by another aspect of the test enunciated in *Harper & Row*. Although Justice O’Connor purported at one point to adopt Learned Hand’s position that the ratio of the amount of copied material to the size of the *defendant’s* work is irrelevant to the fair use analysis,⁸⁸ she went on to treat that fraction as a good indicator of the importance the “plagiarist” ascribes to the copied material and therefore of its qualitative importance.⁸⁹ Justice O’Connor thus perpetuated a crucial ambiguity in this factor — whether “amount of copying” is to be assessed with reference to the copyrighted work or the infringing work.

The second defect of the factor is that, by according importance to the question of how a copyrighted work is defined, it creates a bizarre and inefficient system of incentives. Artists who wish to maximize their protection against unauthorized copying will devise ways

⁸³ 471 U.S. at 566.

⁸⁴ See *id.* at 564–65. Justice O’Connor assumed, arguendo, that only the direct quotation of 300 words from the book violated section 106 of the Act. See *supra* p. 1667. The book itself was approximately 200,000 words long. See 471 U.S. at 598 (Brennan, J., dissenting). Thus, *The Nation* reproduced only 0.15% of the manuscript.

⁸⁵ See 471 U.S. at 564–65.

⁸⁶ *Id.* at 565, 566.

⁸⁷ *Id.* at 565.

⁸⁸ See *id.* (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56–57 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936) (discussed in note 79 above)).

⁸⁹ See *id.* On this basis, Justice O’Connor emphasized the fact that, although the ratio of copied material to the size of Ford’s manuscript was tiny, see *supra* note 84, the ratio of the copied material to the size of *The Nation’s* article was 13% — which she deemed a sizeable figure. See 471 U.S. at 565–66.

of subdividing or registering their works that make the copying of even short passages appear "substantial." Courts' efforts to distinguish legitimate from sham identifications of the boundaries of copyrighted works can be expected to produce confusion.⁹⁰

Even if these two problems could be alleviated or tolerated, it would still be important, when applying this factor, to bear in mind its derivative character. Like the commercial/noncommercial factor, its principal function seems to be that of a proxy for the amount of injury sustained by the copyright owner. To avoid "double counting," that status must not be forgotten.

5. *Propriety and Custom.* — In fair use cases decided prior to 1976 courts occasionally referred either to the decency of the defendant's behavior or to its consistency with customary practices.⁹¹ Ex-

⁹⁰ The problem is illustrated by a pair of cases. In 1977, the publisher of the *Miami Herald* reproduced and published copyrighted covers of *TV Guide* magazine to promote by comparative advertising its own competing listing of TV programs. One of the factors relied upon by the Fifth Circuit in concluding that the *Herald's* behavior constituted a fair use was the small proportion of an issue of *TV Guide* represented by its cover. The court dismissed as inconsistent with "logic and common sense" the plaintiff's contention that the cover of a magazine "is separately copyrighted and that therefore [the defendant had] reproduced an entire copyrighted work." *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1177 & n.15 (5th Cir. 1980) (emphasis in original). In 1984, the Eleventh Circuit was presented with a similar problem. A commercial "newsclipping organization" recorded a brief "news feature" aired by a local television station as part of a half-hour news program and then sold the recording to the college that was the subject of the story. In ruling that the copyist could not invoke the fair use doctrine, the court found that the news story "stands alone as a copyrighted work in this case" and that therefore the defendant had "copied an entire work." The court rested its finding on the facts that:

[t]he Floyd Junior College story stands alone as a coherent narrative, and WXIA saves it as a distinct unit for future reference apart from the rest of the March 11 broadcast. [Moreover, t]he Register of Copyrights issued a certificate of copyright for the Floyd Junior College segment [as well as] for the entire broadcast.

Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1497 (11th Cir. 1984). The considerations invoked by the Eleventh Circuit to distinguish the case before it from *Triangle Publications* have little to recommend them. The manner in which a copyright owner stores his materials and the way in which he frames his copyright applications would seem to have little bearing on the legitimacy of copying portions of those materials. The establishment of such criteria is likely merely to induce sophisticated authors and publishers to submit multiple applications and to subdivide their files. And the question whether a segment of a larger work "stands alone as a coherent narrative" is nearly useless as a test. Would the cover of a magazine, often produced by an independent artist, qualify? What of the chapter of a scholarly book that could be published as an article?

⁹¹ For example, in *Time v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), the district court argued that "[f]air use presupposes 'good faith and fair dealing'" and based its conclusion that the defendants' use of copyrighted photographs of President Kennedy's assassination did not give rise to liability partly on its finding that the defendants' conduct met that standard. *Id.* at 146 (quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968)). Taking a slightly different tack in *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), the Second Circuit emphasized that, when writing a biography, "it is both reasonable and customary . . . to refer to and utilize earlier works." *Id.*

press invocation of either morality or custom was, however, uncommon prior to 1976 reform of the Copyright Act. Not surprisingly, section 107, which was designed to codify the common law doctrine,⁹² makes no mention of those considerations.

The majority opinion in *Sony* continued the trend established by the lower-court decisions. Although Justice Stevens might well have invoked the fact that by 1980 time-shifting was a widespread practice regarded by most people as legitimate, he did not. In *Harper & Row*, by contrast, Justice O'Connor treated a combination of fairness and custom as an important factor in the fair use analysis.⁹³ "Also relevant to the 'character' of the [challenged] use," she held, "is 'the propriety of the defendant's conduct.'"⁹⁴ Her opinion was salted with references to the improper way in which *The Nation* obtained and made use of the Ford manuscript.⁹⁵ The overall message was that a defendant's conformity with customary standards of "good faith" and "fair dealing" should affect significantly his ability to avail himself of the fair use defense.⁹⁶

The first thing to observe about this factor is that it requires a decisionmaker to look beyond the positive law for standards by which to evaluate the defendant's conduct. As Justice Brennan implicitly

at 307. On that basis, the Court held that the inclusion in a biography of Howard Hughes of paraphrases of portions of two copyrighted magazine articles about Hughes did not give rise to liability. See *id.*; see also *Holdridge v. Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963) (holding that appropriation so extensive as to be "neither reasonable nor customary" cannot constitute a fair use).

⁹² See *supra* note 9.

⁹³ The importance of this factor to Justice O'Connor's approach is suggested by the way in which she frames her discussion. At one point she suggests that the fair use analysis might be reduced to the following inquiry: "[W]ould the reasonable copyright owner have consented to the use [in question]?" 471 U.S. at 550 (quoting A. LATMAN, *FAIR USE OF COPYRIGHTED WORKS* 15 (1958)). The "reasonable person" who figures in this formula cannot be the rational economic actor familiar to modern lawyers, because an actor whose sole interest is maximizing his own welfare would demand a fee from every person who wished to use his work — unless the use in question would somehow indirectly redound to the actor's benefit. Thus, the "reasonable person" envisioned by Justice O'Connor must be someone whose reasonableness consists of something like neighborliness — either decency itself or a willingness to defer to popular conventions of decent behavior.

⁹⁴ *Id.* at 562 (quoting 3 M. NIMMER, *NIMMER ON COPYRIGHT* §13.05[A], at 13-72 (1984)).

⁹⁵ See, e.g., *id.* at 563 ("The *Nation* knowingly exploited a purloined manuscript Fair use 'distinguishes between a "true scholar and a chiseler who infringes a work for personal profit.'"⁹⁶ (quoting *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (quoting *Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1706 (1966))); *id.* at 542 ("Working directly from the purloined manuscript"); *id.* at 556 (disdaining "the piracy of verbatim quotations for the purpose of 'scooping' the authorized first serialization").

⁹⁶ For indications that the lower courts have gotten the message, see *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986); *Haberman v. Hustler Magazine*, 626 F. Supp. 201, 211 (D. Mass. 1986); and *Radji v. Khakbaz*, 607 F. Supp. 1296, 1300-01 (D.D.C. 1986).

recognized in his dissent in *Harper & Row*,⁹⁷ if one defines propriety in terms of legality, the factor is circular. If "good faith and fair dealing" mean engaging only in activities not violative of the Copyright Act, then it is impossible to decide whether a given activity violates the Act by considering its propriety.

But if courts must look beyond positive law, how are they to identify or determine the ethical standards with which the defendant's conduct is assessed? One possible answer is that "industry practice" should be the gauge. Justice Brennan seemed to have such a theory in mind when he criticized the majority in *Harper & Row* for ignoring the fact that *The Nation's* behavior was consistent with "standard journalistic practice."⁹⁸ This approach has much to recommend it if all parties to a copyright infringement suit are active participants in the industry or community whose practices are invoked. In many areas of property law, courts have been willing, when determining litigants' entitlements, to rely upon a custom prevailing in a group to which they both belong,⁹⁹ and the considerations that justify that willingness¹⁰⁰ are readily applicable to disputes over intellectual prop-

⁹⁷ See 471 U.S. at 593-94 (Brennan, J., dissenting).

⁹⁸ *Id.* at 593. In a footnote, Justice Brennan cited five articles by the *New York Times* reporting on the contents of forthcoming books, arguing that the custom evidenced by those articles suggested that *The Nation's* similar conduct constituted a fair use. See *id.* at 591 n.14. Justice O'Connor dismissed this argument on the ground that the articles cited by Justice Brennan had not been properly introduced into evidence and were "not a proper subject for this Court's judicial notice." 471 U.S. at 562 n.7. Another example of invocation of industry practice to resolve a fair use case is provided by *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980). See *supra* note 90. In justifying its decision, the court of appeals emphasized that the *Miami Herald's* confrontational advertising campaign was "done in a manner which is generally accepted in the advertising industry." 626 F.2d at 1176 & n.13.

⁹⁹ An example familiar to most first-year law students involves the whaling industry in the nineteenth century. When disputes between two whalers claiming ownership of the same whale reached the courts, judges often deferred to the customs prevailing in the sector of the industry in which the disputants were operating. See, e.g., *Swift v. Gifford*, 23 F. Cas. 558 (D.C.D. Mass. 1872) (No. 13,696); cf. H. MELVILLE, *MOBY-DICK* 1216-19 (1st ed. 1851; Library of America ed. 1983) (describing different customs prevailing in different parts of the whale fishery).

¹⁰⁰ In combination, three such arguments have considerable force. First, in cases of this sort, both parties usually have participated in the industry or community in question for some time. The party disadvantaged in the case at bar by the customary standard probably benefitted from it in the past and ought not question it now. Second, many customary practices arise because the members of the community come to recognize that they are "efficient" — in the sense that they will maximize the total profits available to industry participants and that each participant is more likely to gain by them than lose by them. See *Ghen v. Rich*, 8 F. 159 (D.C.D. Mass. 1881) (recognizing the reasonableness and efficiency of a whaling industry custom); Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 685-87 (1986). Third, most participants in a community or industry are aware of prevailing customs, but relatively few are aware of the content of relevant positive law. If the two systems of norms diverge, the result will be wasteful conflict between the people who assume custom governs and those who know and stand upon their legal rights.

erty. Unfortunately, however, the parties to most fair use suits are not members of a community sharing a set of customary practices. For example, although both Harper & Row and *The Nation* are publishers, it is unlikely that Harper & Row belongs to the portion of the industry that engages in the activity, described by Justice Brennan, of publishing without permission stories on forthcoming books.¹⁰¹ In short, in the majority of fair use cases, courts could not rely upon industry practice to make sense of and justify the "propriety and custom" factor.

What else might a court look to? Justice O'Connor seemed to assume that popular morality can and should be the yardstick. Her opinion appeared to take for granted that everyone knows the meaning of "fair dealing" and the difference between "'a true scholar and a chiseler.'" ¹⁰² Fair use doctrine, she implied, simply incorporates that common understanding. The hazards of this sort of argument are well recognized in other fields. In constitutional law, for example, most scholars and judges for years have acknowledged the difficulty of deriving substantive standards from "society's widely shared values." In a culture as fractured as that of the United States today, as to few issues does there exist any "consensus to be discovered^[103] (and to the extent that one may seem to exist, [it] is likely to reflect only the domination of some groups by others)."¹⁰⁴ Were there by chance a consensus on a relevant issue, it would not be "reliably discoverable, at least not by courts."¹⁰⁵

¹⁰¹ Certainly no evidence was introduced by *The Nation* that Harper & Row engaged in such activities. The chances are somewhat more likely that *The Reader's Digest*, the other plaintiff, was a participant in the relevant sector of the industry.

¹⁰² 471 U.S. at 563 (quoting *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (quoting *Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary*, *supra* note 95, at 1706)).

¹⁰³ Cf. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 94-100 (1977) (discussing the difficulties of ascertaining the "dominant" popular view regarding the legitimate scope of governmental authority to interfere with property rights). That the Supreme Court in *Harper & Row* was wrong to suppose such a consensus existed with regard to the legitimacy of *The Nation's* behavior is suggested by the diversity of public reactions first to the court of appeals' decision and then to the Supreme Court's ruling. See, e.g., Serrill, *When a Scoop Is Piracy*, *TIME*, June 3, 1985, at 64; Kaplan, *No Unity Over Nation*, *Nat'l L.J.*, Dec. 5, 1983, at 3.

¹⁰⁴ J. ELY, *DEMOCRACY AND DISTRUST* 63 (1980) (criticizing constitutional theories founded on the proposition that "constitutional law must now be understood as expressing contemporary norms" (quoting Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1193 (1977))). For general discussion both of the processes by which a society's widely shared values come to reflect the interests of its dominant groups and of the limits on those processes, see P. RICOEUR, *LECTURES ON IDEOLOGY AND UTOPIA* 261-66 (1986), and Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567 (1985).

¹⁰⁵ J. ELY, *supra* note 104, at 64. For discussion of the general problems entailed by

There remains a final possibility. Instead of attempting to derive an ethical standard from extant public opinion, a court could invoke or invent a moral philosophy — a theory that would enable it to distinguish good behavior from bad. Whether development of such a theory would be feasible and helpful is considered at length in Part V. For the time being, it suffices to observe that, when Justice O'Connor urged lower courts to take into account "the propriety of the defendant's conduct" in deciding fair use cases,¹⁰⁶ she undoubtedly had nothing of that sort in mind.

6. *Vestigial Considerations.* — In addition to the five factors examined in detail above, traces of three other considerations can be found in the majority opinions in *Sony* and *Harper & Row*. Despite their relevance to the facts of the two cases, they receive only modest play, suggesting that their role in the fair use doctrine as it emerges from the two cases is marginal. The histories and present statuses of these three considerations are discussed briefly in this subsection to round out the analysis of the current state of the law. The question whether they ought to play more of a role than they do now is deferred to Parts IV and V.

(a) *Fact and Fiction.* — Some of the lower federal courts responsible for the development of the fair use doctrine took the position that copyrighted works that are "primarily informational" are entitled to less protection than works that are primarily "creative."¹⁰⁷ In an influential article, Professor Robert Gorman identified four concerns that, in combination, seem to have given rise to that bias.¹⁰⁸ First, there is a strong "public interest in access to facts about ourselves, the world about us, and our history and future." Second, in many nonfiction works, the underlying facts are inseparable from the author's expression; facilitating the dissemination of the facts thus requires reducing copyright protection for the expression. Third, both the first amendment and the fair use doctrine require that room be given to "commentary concerning political, social, and historical phe-

invocation of "shared values" to stabilize adjudication, see R. UNGER, *KNOWLEDGE AND POLITICS* 100-03 (1975).

¹⁰⁶ 471 U.S. at 562.

¹⁰⁷ See, e.g., *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984); *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983).

¹⁰⁸ See Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC. 560, 562 (1982). Gorman actually identified five concerns, but the one not mentioned in the text — that "because many fact works do not permit of varieties of expression by later artists, similarity of appearance between their works and their predecessors" is often excused, *id.* — is best seen as a premise of the second factor discussed below. Gorman's analysis built upon his own prior treatment of the topic, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963), as well as a recent study by Professor Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981).

nomena." Fourth, works produced mainly by "the sweat of the brow" appear somehow less deserving of copyright protection than the fruits of artistic genius.¹⁰⁹

In his dissent in *Sony*, Justice Blackmun invoked this distinction, arguing that the fact that most of the material copied using VCRs consists of "entertainment shows" rather than "informational works" weakened the claim that time-shifting is a fair use.¹¹⁰ Justice Stevens did not flatly reject the argument, but gave it short shrift, implicitly deemphasizing the factor on which it rested.¹¹¹ Disagreement over the relevance of the fact/fiction distinction persisted in *Harper & Row*. Citing Justice Blackmun's dissent in *Sony*, Justice Brennan contended that "the scope of fair use is generally broader when the source of borrowed expression is a factual or historical work."¹¹² Justice O'Connor, writing for the Court, admitted that there was some force to Justice Brennan's point, but then, in a subtle analytical maneuver, limited its impact upon both the case at hand and future fair use cases. She conceded that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy," but argued that this principle permits direct quotation only when "necessary adequately to convey the facts."¹¹³ Because direct quotation is seldom "necessary" to disclose facts¹¹⁴ (which cannot be copy-

¹⁰⁹ Gorman, *Fact or Fancy*, *supra* note 108, at 562. Gorman acknowledges that, in some circumstances, these concerns may not be compelling. In particular, the first of the four reasons (the public interest in access to facts) may sometimes suggest that the copyright protection for nonfiction works be strengthened (in order to increase incentives for the discovery and compilation of such facts) rather than weakened. *See id.* at 562, 586. As applied to "works of history and biography," the second of the concerns has little force. *See id.* at 586. And the inability of a nonfiction author to claim copyright protection for her "story line" arguably makes it even more critical that the language in which she expresses her argument be protected from piracy. *See id.* at 586. For further discussion of these and related matters, see sections IV.D.5 and V.C.1.b below.

¹¹⁰ *See* 464 U.S. 417, 496-97 (1984) (Blackmun, J., dissenting).

¹¹¹ Justice Stevens' discussion of the issue is confined to a few sentences in his final footnote. *See id.* at 455 n.40. In keeping with his view that economic impact ought to be the central consideration in a fair use analysis, Justice Stevens conceded that some types of copyrighted works, because their value inheres substantially in "secondary markets," may be more vulnerable to devaluation through copying than other types. On that basis, he acknowledged that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture." *Id.* But the placement of this discussion in a concluding footnote, divorced from his analysis of time-shifting, suggests that he considered it relatively unimportant.

¹¹² 471 U.S. at 594 (Brennan, J., dissenting).

¹¹³ 471 U.S. at 563.

¹¹⁴ The example that Justice O'Connor selected to indicate how her theory would apply to the facts of *Harper & Row* suggests how rare will be the occasions in which it could be invoked successfully: "Some of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the 'smoking gun' is perhaps so integral to the idea expressed as to be inseparable from it." *Id.* at 563.

righted in any event),¹¹⁵ the net effect of Justice O'Connor's interpretation of this factor will be to limit sharply the role it plays in the administration of fair use doctrine.¹¹⁶

(b) *Necessity*. — A question often asked by lower courts construing the fair use doctrine was: assuming the defendant's objective was laudable, could he have achieved it without copying the plaintiff's copyrighted material? If so, the courts held, the defendant's invocation of the fair use defense was less persuasive than it would have been otherwise.¹¹⁷ An ambiguity latent in this factor from its inception was whether copying the plaintiff's material had to be truly essential to the achievement of the defendant's goal, or whether he could avail himself of the fair use doctrine as long as the copying somewhat enhanced his ability to realize his objective.¹¹⁸ Perhaps wary of the dangers inherent in this ambiguity, the authors of the majority opinions in *Sony* and *Harper & Row* discounted the necessity factor. Justice Stevens made no explicit mention of it in *Sony*.¹¹⁹ In Justice O'Connor's analysis, the idea of necessity figured only in her concession that copying essential to communicate facts may be privileged — a circumstance that will rarely arise.¹²⁰

(c) *Productivity*. — The most dramatic change wrought by *Sony* and *Harper & Row* in the fair use doctrine was the subordination of the idea of productivity. The notion that, to qualify as a fair use, a putatively infringing activity had to advance the common good by

¹¹⁵ See, e.g., *Miller v. Universal City Studios*, 650 F.2d 1365, 1368 (5th Cir. 1981).

¹¹⁶ This reading of Justice O'Connor's opinion is further supported by her assertion that the primary objective of copyright law — rewarding authors in order to benefit the public — “applies equally to works of fiction and nonfiction.” 471 U.S. at 546.

¹¹⁷ For example, in *Rosemont Enters. v. Random House, Inc.* 366 F.2d 303 (2d Cir. 1966), the Second Circuit held that the question of fair use “turns initially” on whether the author “requires some use of prior materials dealing with the same subject.” *Id.* at 307 (emphasis added); see also *Meeropol v. Nizer*, 560 F.2d 1061, 1070–71 (2d Cir. 1977) (implying that the fair use doctrine applies to verbatim quotations from copyrighted letters only if they are needed for historical accuracy). In *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), the same court was asked whether a manufacturer had a right to include in advertisements for its vacuum cleaner excerpts from a favorable copyrighted review of the product. The court's affirmative answer was based in part on its judgment that direct quotation may be “the only valid way precisely to report” such an evaluation. *Id.* at 1049.

¹¹⁸ Compare *Time v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (finding the fair use privilege undiminished even though use of copyrighted photographs merely made the copyist's work “easier to understand”) with *W. PATRY*, *supra* note 6, at 98 (arguing that a use is not fair merely because it makes an unauthorized user's task easier).

¹¹⁹ Some sensitivity to this consideration may perhaps be inferred from Justice Stevens' recitation of the district court's factual finding that time-shifting enables many persons to see programs they would otherwise be unable to view because of “the basic need to work” or “the competitive practice of counterprogramming,” 464 U.S. at 425 n.8 (quoting *Universal City Studios v. Sony Corp.*, 480 F. Supp. 429, 454 (C.D. Cal. 1979)), but Justice Stevens made no reference to necessity in any of his criteria for finding a fair use.

¹²⁰ See *supra* p. 1683.

somehow adding to the collection of intellectual products available to the public was either emphasized or taken for granted by most of the lower courts that shaped the doctrine. In the typical fair use case, the defendant had somehow folded copyrighted material into an original work of his own such as a biography, a critical essay, a parody, or a comparative advertisement. In their opinions, courts often explicitly considered whether the social value of the defendant's original contribution was sufficient to entitle him to the defense.¹²¹ That the defendant had to have made *some* contribution was usually assumed.¹²² Leading commentators generally concurred with this view.¹²³

In his dissent in *Sony*, Justice Blackmun argued strenuously that the productivity of a defendant's activity should be a crucial consideration in the fair use calculus. The primary purpose of the doctrine, he contended, was "to facilitate the creation of new works."¹²⁴ Uses of copyrighted material that did not entail the creation of something new should therefore almost never be deemed fair.¹²⁵ In contrast, Justice Stevens came close to declaring the idea of productivity irrelevant to a fair use determination. Justice Stevens' analysis of the permissibility of time-shifting made no mention of productivity. Only in the last footnote of his opinion did he address the issue, and he was distressingly evasive. He began with the apparent concession that "[t]he distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance, but it cannot be wholly determinative."¹²⁶ The thrust of the balance of the footnote, however, was that productivity is too vague or controversial a criterion to be of any analytical use. Teachers who copy educational programs for their own edification, voters who copy news programs in order to decide how to vote, hospital patients who copy entertainment pro-

¹²¹ See, e.g., *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 308 (2d Cir. 1966) (arguing that biographies advance the public interest because "their subject matter is human nature and they reflect the social, economic and political forces of the particular era involved").

¹²² See, e.g., *Universal City Studios v. Sony Corp.*, 659 F.2d 963, 969-70 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); *Rubin v. Boston Magazine*, 645 F.2d 80, 83 (1st Cir. 1981). The one major exception to this pattern was *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975), in which the Court of Claims held that the fair use doctrine shielded the photocopying of copyrighted articles in medical journals. See *supra* note 62.

¹²³ See, e.g., L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 23-24, 27-28 (1978); 3 M. NIMMER, NIMMER ON COPYRIGHT §13.05[A][1] (1987).

¹²⁴ 464 U.S. at 495 (Blackmun, J., dissenting).

¹²⁵ At several points in his opinion, Justice Blackmun implied that productivity should be a prerequisite to qualification as a fair use. See, e.g., *id.* at 473. However, when it came time to state his view on this point, he softened his stance somewhat, contending merely that, "when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use *usually* does not apply." *Id.* at 480 (emphasis added).

¹²⁶ 464 U.S. at 455 n.40.

grams they would otherwise miss in order to improve their "psychological well-being" are all engaged in arguably productive uses.¹²⁷ If those activities fit the bill, Justice Stevens implied, what does not?

In *Harper & Row*, Justice Brennan argued for a more limited version of the approach advocated by Justice Blackmun in *Sony*. Instead of proposing a general productivity requirement, Justice Brennan contended that uses of copyrighted material that contribute to "the spread of knowledge and information" should be treated especially leniently under the fair use doctrine.¹²⁸ Surprisingly, Justice O'Connor accepted Justice Brennan's implicit equation of news reporting with productivity, but she went on to minimize its importance. She began by acknowledging the relevance of "[t]he fact that an article arguably is 'news' and therefore a productive use."¹²⁹ However, the manner in which Justice O'Connor analyzed *The Nation's* invocation of this factor effectively reduced it to insignificance. She insisted that, although *The Nation* was free "to be the first to publish information," it was not entitled to "mak[e] a 'news event' out of [an] unauthorized first publication of a noted figure's copyrighted expression."¹³⁰ As Justice O'Connor conceded, information is never protected by the copyright laws,¹³¹ so a person who merely reports information would never need to invoke the fair use doctrine. Fair use only becomes an issue when the reporter has reproduced "copyrightable expression."¹³² Under those circumstances, she seemed to hold, the reporter stands on no better footing than any other plagiarist.

It would be an exaggeration to say that the decisions in *Sony* and *Harper & Row* have expunged the concept of productivity from the fair use doctrine.¹³³ In combination, however, the two decisions have sharply reduced the role played by this factor.

C. The Underlying Objectives

Resolution of a fair use case using the catalogue of factors just reviewed will rarely be a mechanical exercise.¹³⁴ The individual cri-

¹²⁷ See *id.*

¹²⁸ 471 U.S. at 590-91 (Brennan, J., dissenting). More specifically, relying on the introductory clauses of section 107, Justice Brennan contended that copying for the purpose of "news reporting" should receive favored treatment. See *id.*; *supra* note 65.

¹²⁹ 471 U.S. at 561.

¹³⁰ *Id.*

¹³¹ See *supra* p. 1684.

¹³² 471 U.S. at 561 (quoting W. PATRY, *supra* note 6, at 119) (emphasis omitted).

¹³³ At least two lower courts, presumably attempting to follow the Supreme Court's lead, have recently taken into account the degree to which a copyist's use was "creative." See *Financial Information, Inc. v. Moody's Investors Serv.*, 751 F.2d 501, 509 (2d Cir. 1984); *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984). Both cases were decided after *Sony* but before *Harper & Row*.

¹³⁴ See *Harper & Row*, 471 U.S. at 588 (Brennan, J., dissenting) (insisting that the four factors set forth in section 107 "do not mechanistically resolve fair use issues").

teria will often be difficult to construe and apply.¹³⁵ When they point in different directions, weighing the various factors will not be easy.¹³⁶ And there always remains the possibility that a factor other than those discussed by the Court should be taken into account.¹³⁷

Confronted with these various sources of uncertainty, a judge trying to decide a fair use case is likely to refer directly to the underlying purposes of the doctrine. In other words, to resolve the dispute before him, he will ask the questions that Professor Fuller contended must always be asked if a piece of positive law is to be interpreted responsibly: "What can this rule be for? What evil does it seek to avert? What good is it intended to promote?"¹³⁸ For answers, he most likely will return to the two Supreme Court opinions.¹³⁹ A close reading of them will unearth four objectives that the Court apparently believes are and should be served by copyright law in general and by the fair use doctrine in particular.

The first and most prominent of the goals is social utility. As Justice Stevens explained in *Sony*, the elaborate combination of grants and reservations that comprise the Copyright Act is designed to advance the public welfare by rewarding creative intellectual effort sufficiently to encourage talented people to engage in it, while at the same time making the fruits of their genius accessible to as many people as possible as quickly and as cheaply as possible.¹⁴⁰ Congress cannot anticipate and provide a resolution for every situation in which these two policies stand in tension. The fair use doctrine enables the judiciary to permit unauthorized uses of copyrighted works in particular situations when doing so will result in wider dissemination of those works without seriously eroding the incentives for artistic and intellectual innovation.¹⁴¹

¹³⁵ See *supra* pp. 1673-74, 1675-78 (discussing the fuzziness of the "commercial/noncommercial" and "amount of copying" factors); cf. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A][5] (1987) ("Because the protean factors enumerated in Section 107, standing by themselves, lack the concreteness to provide definite answers to difficult cases, another test must be invoked . . . to determine whether a given use . . . constitutes a fair use . . .").

¹³⁶ The Supreme Court provided the lower courts virtually no guidance regarding how such a balancing process might proceed. In both *Sony* and *Harper & Row*, the Court contended that all of the relevant factors pointed toward a single result. How a court should handle a less clear-cut situation was never considered.

¹³⁷ See *supra* note 44. At least one lower court has accepted the Supreme Court's invitation to develop new factors. See *DC Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984).

¹³⁸ Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 665 (1958). On the likelihood that a puzzled judge would look for guidance to the purposes of doctrine, see R. UNGER, cited above in note 105, at 94-99.

¹³⁹ But cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 118 (1977) (arguing that a judge, when relying upon prior judicial decisions for guidance in resolving a "hard case," should "assign . . . only an initial or prima facie place in his scheme of justification" to the principles that the authors of those opinions asserted as the bases of their rulings).

¹⁴⁰ See 464 U.S. at 431-32.

¹⁴¹ See *id.* at 450-56; *supra* p. 1669.

The utilitarian theory just outlined is undoubtedly the most venerable and oft-recited of the justifications for the American law of intellectual property. The constitutional provision upon which the pertinent statutes rest emphasizes the maintenance of incentives for creativity,¹⁴² and the Supreme Court, when construing provisions of those acts, has frequently stressed that the public interest in generating and disseminating original works is the ultimate goal of the law.¹⁴³ Most commentators¹⁴⁴ and lower courts¹⁴⁵ have taken the same position. It is therefore not surprising that this theme looms large in all of the opinions in *Sony* and *Harper & Row*.¹⁴⁶

The second of the four goals is distilled in a single sentence: "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."¹⁴⁷ This statement, though it appears in the midst of Justice O'Connor's discussion of the need to balance incentives for creativity against public access, describes an objective fundamentally different from social utility. The notion it embodies is that authors and inventors *deserve* a reward for

¹⁴² See *supra* p. 1662.

¹⁴³ See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932); *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 327-28 (1858); *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 241-42 (1832) (patent statute).

¹⁴⁴ See, e.g., B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 78 (1966); Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970).

¹⁴⁵ See, e.g., *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1151 (9th Cir. 1986); *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044, 1048 (2d Cir. 1983); *Iowa State Univ. Research Found. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977); *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966).

¹⁴⁶ Justice Blackmun, dissenting in *Sony*, contended that the majority was overly interested in fostering dissemination of original works and insufficiently concerned with sustaining the incentives for creating them. Unlike Justice Stevens, see 464 U.S. at 454, Justice Blackmun saw no "public benefit" in "increase[d] public access to" television programs, *id.* at 480 (Blackmun, J., dissenting), and fretted that the Court's application of the fair use doctrine "risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentives to create," *id.* at 481. However, Justice Blackmun agreed with Justice Stevens that the doctrine was centrally concerned with balancing those two goals. See *id.* at 477. In *Harper & Row*, Justice O'Connor quoted the passages from *Sony* explicating the instrumental theory, see 471 U.S. at 546, and several of the arguments she advanced in the course of her analysis of *The Nation's* conduct manifest her desire both to maintain incentives for creativity and to facilitate the dissemination of creations, see, e.g., *id.* at 557 (arguing that liberalization of the fair use doctrine when the memoirs of public figures are copied would sharply reduce the "incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information"). Justice Brennan, like Justice Stevens, was less concerned with providing incentives for creative effort than with fostering the dissemination of intellectual work, but he agreed with Justice O'Connor that balancing those two goals is the principal purpose of copyright law. See *id.* at 589-90 (Brennan, J., dissenting).

¹⁴⁷ 471 U.S. at 546.

their labor and should be given it regardless of whether they would continue their work in the absence of such compensation.

This conception of authors' entitlements, though it has never dominated the Anglo-American law of intellectual property, has long had a place in it. For example, in an influential early statement of the function of the law, Lord Mansfield mingled the notions of desert and social planning:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹⁴⁸

In an important modern opinion, Justice Stewart relied upon Lord Mansfield's statement in depicting as consistent the goals of "secur[ing] a fair return for an 'author's' creative labor" and "stimulat[ing] artistic creativity for the general public good."¹⁴⁹ Lower court opinions crafting the fair use doctrine have also occasionally drawn upon the idea that creative labor ought to be rewarded.¹⁵⁰ The imprimatur of the majority opinion in *Harper & Row*¹⁵¹ will undoubtedly contribute to the currency and influence of the theory.

¹⁴⁸ Sayre v. Moore, *quoted in* Cary v. Longman, 1 East 358, 361 n.b, 102 Eng. Rep. 138, 140 n.b (1801). Early American commentary on copyright law also frequently invoked labor-desert theories. *See, e.g.,* Report of Henry Clay, submitted with S. 223, 24th Cong., 2d Sess. 148 (1837), *reprinted in* Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100, 1100 n.3 (1971) ("That authors and inventors have, according to the practice among civilized nations, a property in the respective productions of their genius is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence.").

¹⁴⁹ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Justice O'Connor cited Justice Stewart's opinion to support her allusion to an author's right to a "fair return" for his labor. *See Harper & Row*, 471 U.S. at 546.

¹⁵⁰ *See, e.g.,* Wainwright Sec. v. Wall Street Transcript Corp., 558 F.2d 91, 96 (2d Cir. 1977) (criticizing the defendant for appropriating the plaintiff's financial analyses, "which represent a substantial investment of time, money and labor"); Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1174 (5th Cir. 1980) (describing the fair use doctrine as a "'rule of reason" fashioned by Judges to balance the author's right to compensation . . . against the public's interest in the widest possible dissemination of ideas and information'" (quoting Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 51 (1971))).

¹⁵¹ Of the four opinions in *Sony* and *Harper & Row*, Justice O'Connor's most clearly invokes the labor-desert theory. Justices Stevens and Brennan, in their respective opinions, purport to reject it outright; both quote approvingly a 1909 report of the House Judiciary Committee to the effect that "[t]he enactment of copyright legislation . . . is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted" by it. *See Sony*, 464 U.S. at 429 n.10; *Harper & Row*, 471 U.S. at 580 (Brennan, J., dissenting). But some phrases and arguments in even their opinions suggest a sensitivity to concerns other than pure instrumen-

The third of the objectives identified by the Court is the protection of what may loosely be described as “personal rights” of artists and authors. This idea surfaces in two contexts in the majority opinion in *Harper & Row*. First, in the course of her rejection of *The Nation*’s first amendment defense, Justice O’Connor insists that the law must take into account, not only a copyist’s right to speak, but also the copyright owner’s “right to refrain from speaking,”¹⁵² suggesting that the doctrine should be construed to protect the privacy rights of authors and artists.¹⁵³ The other, related manifestation of this general theme is the Court’s expressed concern to protect an author’s “personal interest in creative control.”¹⁵⁴ One of the facts that counted against *The Nation* was that its article “was hastily patched together and contained ‘a number of inaccuracies.’”¹⁵⁵ The premise of the Court’s invocation of this circumstance is that an artist’s desire to shape the manner in which his creations are apprehended should be considered in deciding what uses are fair.

Like the desert theory, the notion that artists’ personal rights deserve protection has long played a subordinate but significant role in Anglo-American intellectual property law.¹⁵⁶ When it reformed the Copyright Act in 1976, Congress in several provisions implicitly approved this objective.¹⁵⁷ Prior to the decision in *Harper & Row*, however, few judicial decisions construing the fair use doctrine took into account either privacy rights or rights of artistic integrity. By explicitly incorporating such concerns in her analysis, Justice O’Connor has significantly expanded the set of principles upon which the doctrine rests.

talism. For example, Justice Stevens refers at one point to “the interests of authors and inventors in the control and exploitation of their writings and discoveries,” 464 U.S. at 429, and occasional passages in his opinion bespeak resentment of what he sees as the studios’ greed in demanding the right to exploit a market developed by someone else — in other words, the attitude that the plaintiffs were asking for more than they were, in some moral sense, entitled to. In any event, because Justice O’Connor’s analysis is the most recent opinion of the Court construing the fair use doctrine, its invocation of the idea of desert is more important for the purposes of this article than the skepticism of Justices Stevens and Brennan.

¹⁵² 471 U.S. at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

¹⁵³ See *id.* at 550–52; see also *id.* at 564 (emphasizing “the author’s right to control the first public appearance of his expression”).

¹⁵⁴ *Id.* at 555; see also *supra* p. 1675.

¹⁵⁵ 471 U.S. at 564 (quoting Appendix to Petition for Cert. at 300b–300c, *Harper & Row*, No. 83-1632 (testimony of Victor Navasky)).

¹⁵⁶ For a description of the protection afforded such interests prior to 1976 under state law, see Note, *An Author’s Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1496–1500 (1979). For discussion of the more important role this notion plays in most European copyright systems, see DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC. 1 (1980). The question whether such concerns ought to receive greater attention in the administration of copyright law is considered briefly in note 494 below.

¹⁵⁷ See Note, *Artistic Reputation*, *supra* note 156, at 1501–05.

The fourth and final of the underlying objectives has already been discussed at length in connection with the "propriety and custom" factor.¹⁵⁸ As noted there, the notion that seems to have prompted Justice O'Connor to add this criterion to the fair use doctrine is that copyright law should track (or at least take into account) popular conceptions of decent behavior and the habits of communities to which disputants belong.

Unfortunately, having identified these objectives, the judge struggling with a difficult case is likely to discover that, for two reasons, they are no more helpful than the enumerated "factors." First, the generality of the goals makes them hard to apply. What exactly is a "fair return" for creative labor? How exactly should the policies of encouraging creativity and disseminating creations be balanced? More precise answers than the Court has yet provided would be necessary to give these considerations bite.

Second, the judge will probably find that the underlying goals, like the "factors," point in different directions.¹⁵⁹ To a large extent, this difficulty derives from the fact that the four objectives are drawn from four separate and markedly different traditions in political or legal theory, and the Court has failed to combine them into an integrated approach. The tradition that underlies the first and primary theme is utilitarianism; the idea that the fair use doctrine should be adjusted to advance the public good by providing incentives both for creating original works and for facilitating their dissemination is just a particular application of the general proposition that the law should be consciously crafted to promote "general happiness."¹⁶⁰ The tradition corresponding to the second theme is the version of the theory of natural rights popularized by John Locke; the seed of the idea that authors deserve a fair return for their creative labor is Locke's argument in chapter five of *The Second Treatise* that labor upon an unowned object gives rise to a natural property right in that object, and that the principal duty of the state is to protect through the

¹⁵⁸ See *supra* section II.B.5.

¹⁵⁹ Consider, for example, the question of what uses of a work of historical scholarship should be deemed fair. As Justice Brennan conceded in his *Harper & Row* dissent, an answer designed to optimize the balance between encouraging the writing of history and fostering the dissemination of historical information is likely to have the effect of denying "historians a return commensurate with the full value of their labors." 471 U.S. at 589 (Brennan, J., dissenting). Justice Brennan regarded this effect as acceptable, primarily because "Congress made the affirmative choice that the copyright laws should apply in this way." *Id.* A judge who, like Justice O'Connor and unlike Justice Brennan, concludes that the fair use doctrine seeks to reconcile social utility and individual desert would find Justice Brennan's concession paralyzing.

¹⁶⁰ See J. BENTHAM, FRAGMENT ON GOVERNMENT 393 (1776); J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-12 (1789). See generally H. SIDGWICK, METHODS OF ETHICS 411-509 (7th ed. 1907). Section V.A.3 below briefly returns to the teachings of utilitarianism.

positive law natural property rights so acquired.¹⁶¹ The foundation of the third objective is the notion, first developed by Hegel and his followers, that property rights should be allocated in the fashion that best enables persons to develop and exercise their faculties.¹⁶² Finally, the fourth objective issues from a tradition emphasizing the limited power of the positive law and the degree to which it must and should track customs and popular understandings — a tradition whose most insightful exponent was David Hume.¹⁶³

Arguments that spring from such diverse outlooks do not mesh comfortably. They may not be altogether incompatible; the Justices might have been able, had they put their minds to it, to knit the four objectives into a coherent vision of the fair use doctrine — or at least to provide some guidance as to which of the four goals should predominate in which contexts. But none of the opinions in *Sony* or *Harper & Row* ventures such an integration. In its absence, a judge who recurs to the Court's discussion in the hope of determining what resolution of a fair use case would advance the ultimate ends of the doctrine will likely receive several inconsistent signals.

D. Confusion and Its Costs

The preceding two sections identified a number of independent defects in the current fair use doctrine. As currently formulated, the

¹⁶¹ See J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT* 303–20 (1789) (P. Laslett ed. 1970). Justice O'Connor's statement of this objective in *Harper & Row* does embody two substantial modifications of the Lockean labor-desert theory. First, the idea that by devising a unique way of expressing an idea, one deserves to own that form of expression constitutes a substantial extension of the proposition that, by mixing one's labor with a physical object, one acquires a property right in that object. Second, the adjective "fair" in Justice O'Connor's formulation is the precipitate of the gradually acquired insight that, to make normative sense, Locke's theory must be supplemented with an idea of proportionality between the labor exerted and the right to which it gives rise. See L. BECKER, *PROPERTY RIGHTS* 32–56 (1977); A. RYAN, *PROPERTY AND POLITICAL THEORY* 32–35 (1984); Brody, *Redistribution Without Egalitarianism*, 1 *SOC. PHIL. & POLICY* 71, 74–75 (1983). But the heart of Justice O'Connor's contention remains the Lockean notion that natural entitlements arise out of the activity of labor, and that positive law should respect and enforce those entitlements.

¹⁶² See G. HEGEL, *PHILOSOPHY OF RIGHT* 33–66 (T. Knox trans. 1942); T.H. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* 163–78 (1927). For good secondary studies, see A. RYAN, cited above in note 161, at 118–41; Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 971–78 (1982); and Stillman, *Property, Freedom and Individuality in Hegel's and Marx's Political Thought*, 22 *NOMOS* 130 (1980).

¹⁶³ See D. HUME, *A TREATISE OF HUMAN NATURE* 484–513 (1739–1740) (L.A. Selby-Bigge ed. 1975). Further provocative reflection on these matters can be found in the writings of Justice Holmes. See, e.g., Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897), reprinted in *COLLECTED LEGAL PAPERS* 199–200 (1920); cf. M. Horwitz, *The Place of Justice Holmes in American Legal Thought* 30–33, 38–40, 46–69 (unpublished manuscript) (discussing the development of Holmes' ideas concerning the proper relationship between custom and positive law).

market-impact factor that the Court has pushed to the center of the field is unhelpful.¹⁶⁴ Two of its satellite factors — the commercial/noncommercial and amount-of-copying tests — suffer from crucial ambiguities.¹⁶⁵ The latter test, moreover, fosters wasteful registration and storage practices.¹⁶⁶ In most cases, there will be no defensible referent for the newly minted “propriety and custom” factor.¹⁶⁷ Last but not least, the normative foundation of the doctrine is fragmented.¹⁶⁸

Of the many reasons to regret such a state of affairs, two bear emphasis. First, the disarray of the doctrine impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly.¹⁶⁹ The most telling indication of the seriousness of this problem is the character of the advice currently being given the members of those groups by their lawyers. A few examples should make the point. A recent article in the *Journal of College and University Law*, the stated purpose of which is to assist lawyers representing universities in counselling their clients, concludes lamely:

The implications of *Nation Enterprises* for scholars who wish to use unpublished materials in scholarly publications are unclear but encourage caution College and university counsel advising scholars . . . need to create an awareness of the copyright implications in materials which many researchers may not be aware carries with it significant copyright concerns. In the absence of permission from the copyright owners of the unpublished material, careful consideration should be given to the copyright implications of using unpublished materials and alternatives suggested which do not intrude upon the rights granted by copyright.¹⁷⁰

¹⁶⁴ See *supra* pp. 1671–72.

¹⁶⁵ See *supra* pp. 1673–74, 1677.

¹⁶⁶ See *supra* p. 1678.

¹⁶⁷ See *supra* p. 1681.

¹⁶⁸ See *supra* pp. 1691–92.

¹⁶⁹ Each of the defects just summarized contributes to this uncertainty, but the most deep-seated of causes is the fragmentation of the normative base of the doctrine. Cf. R. DWORKIN, *LAW'S EMPIRE* 188–89 (1986) (arguing that coherence in a system of rules fosters “efficiency” by enabling persons to predict better courts’ decisions); Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 *YALE L.J.* 90 (1977) (showing how tensions between the seven “animating principles” that underlie the law of corporate taxation and the absence of an overarching theory knitting the principles together give rise to uncertainty and frequent litigation).

¹⁷⁰ Olson, *Copyright and Fair Use: Implications of Nation Enterprises for Higher Education*, 12 *J.C. & U.L.* 489, 508 (1986). A previous article in the same journal reached similar conclusions. See Cardozo, *To Copy or Not to Copy for Teaching and Scholarship: What Shall I Tell My Client?*, 4 *J.C. & U.L.* 59 (1976–77) (emphasizing the confusion and uncertainty generated by the fair use doctrine and by other ambiguous provisions of the Copyright Act).

Another article, directed at professional historians, also pertaining to the use of unpublished materials,¹⁷¹ is rife with equally tentative judgments and suggestions.¹⁷² Finally, as almost any college teacher can attest, the information presently being given faculty by university counsel regarding how much copyrighted material they may reproduce for classroom use is distinctly unhelpful.¹⁷³ That persons affected by the fair use doctrine do not know — and cannot find out — their entitlements¹⁷⁴ may not be the worst imaginable situation, but it is not a happy one.

Second and more fundamentally, the incoherence of the doctrine exacerbates the stagnation and inconclusiveness of contemporary moral and political discourse. It is routine nowadays for both popular and academic arguments over how a person or government ought to behave to devolve into shouting matches, in which the participants invoke competing “standards of justice or generosity or duty,”¹⁷⁵ each torn from the historical or philosophical context in which it evolved, without advancing our understanding of either the competing standards or the matter at issue.¹⁷⁶ If we wish to escape such conceptual

¹⁷¹ Note that the Supreme Court explicitly addressed this topic in *Harper & Row*. See *supra* section II.B.3. If uncertainty persists on this question, the confusion regarding the applicability of the fair use doctrine to other problems is probably even greater.

¹⁷² See Benedict, *Historians and the Continuing Controversy over Fair Use of Unpublished Manuscript Materials*, 91 AM. HIST. REV. 859 (1986). An example of the hesitancy with which the author expresses his conclusions: “As of 1986, then, it is very possible, perhaps probable, that the law of fair use of unpublished materials may return to something very close to what it was before Congress passed the Copyright Revision Act of 1976.” *Id.* at 875.

¹⁷³ See, e.g., Multiple Copying and the Copyright Laws: A Guide for Harvard Faculty (prepared by the Office of the General Counsel, Harvard University, Dec. 1986). The guide concludes:

In short, if you copy a very brief portion of a non-fiction work, for classroom use, in such a way that the value of the work will not be adversely affected, you have a relatively high degree of protection. If you copy a substantial portion of a work, for profit, harming the work's value, you have little or no protection. Between these extremes, your protection rises or falls depending on the relationship of the four [statutory] factors discussed [above].

Id.

¹⁷⁴ For other manifestations of artists' and users' uncertainty, see Adamo, *Problems Connected with Acquisition, Licensing and Enforcement of Intellectual Property*, 50 ALB. L. REV. 475, 493 (1986) (advising practitioners that “[t]he concept of fair use” is “something you've got to worry about”); and Blau, *High Court Refuses to Review Salinger Book Ruling*, N.Y. Times, Oct. 6, 1987, at C17 (recounting practitioners' predictions of “a lot of confusion in publishing houses and among biographers and historians” resulting from the unsettled state of the law concerning if and when a biographer may reproduce portions of an author's copyrighted letters).

¹⁷⁵ A. MACINTYRE, *AFTER VIRTUE* 9 (2d ed. 1984).

¹⁷⁶ The most insightful account of this condition is A. MACINTYRE, cited above in note 175, at 6–11. See also Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 292–93, 300–02, 307–08 (1985). For a provocative piece of legal scholarship — partly descriptive, partly symptomatic of the disease — see Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

ruts — and especially if we also wish to foster a culture less riven and more nourishing than the one in which we live¹⁷⁷ — we must develop a new way of talking. Legal thought and practice afford some of us opportunities to contribute to that project. The current fair-use doctrine, far from aiding in the effort, helps perpetuate the problem, by reinforcing the impression that, when confronted with a question of public policy, we can do no better than “balance” inconsistent claims derived from conventional, incommensurable premises.¹⁷⁸

III. WHAT IS TO BE DONE?

Assuming the federal courts will continue for the foreseeable future to be responsible for the differentiation of fair from unfair uses of copyrighted materials, how might they do it better?¹⁷⁹ Two answers to that question are considered and compared in the following pages. The premise of the first approach is that the objective of copyright law in general and the fair use doctrine in particular should be the efficient allocation of resources. Using analytical tools developed in recent years by economists and economically oriented legal scholars, Part IV tries to determine what single-minded pursuit of that objective

¹⁷⁷ This aspiration is important to the argument of Part V of the Article. For theorists who share it, see note 366 below.

¹⁷⁸ See A. MACINTYRE, *supra* note 175, at 8. This is not to suggest, of course, that a well-built fair use doctrine would solve our quandary, but every incoherent field of law represents both a part of the problem and a neglected opportunity to begin to solve it.

¹⁷⁹ This is not the only question that might occur to a reader of Parts I and II. At least two others spring to mind. First, what institutional arrangement would work better than the delegation of authority over such matters to the federal courts? Cf. Minami, *Copyright in Japan*, in FAIR USE AND FREE INQUIRY 237–41 (J. Lawrence & B. Timberg eds. 1980) (describing the Japanese fair use system, which combines detailed statutory provisions with mandatory mediation of disputes). The main reasons this issue will not be pursued here are: (i) for better or worse, we are most likely stuck for the time being with the current intellectual property regime; and (ii) in any event, before turning our attention to institutional alternatives, it makes sense to consider whether judges might be able to reconstruct a field of law that they invented.

Second, what could explain the Supreme Court's unfortunate choice of the system of factors and competing purposes described in Part II? To develop a plausible answer to that question, one would need to do more than simply advert to the proliferation in American law, during the second half of the twentieth century, of “balancing tests.” See, e.g., C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 116–92 (1978); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). One would have to explain why the Court opted to employ a particular (and particularly unsatisfactory) kind of balancing test. Cf. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3 (1987) (“Not whether, but how, one balances is the interesting question.”) In a separate essay, I venture a partial explanation. See Fisher, *The Legacy of Legal Realism* (forthcoming 1989) (observing that, in the past 25 years, the Supreme Court and lower courts have handled several other doctrines in ways remarkably similar to their treatment of the fair use doctrine and suggesting connections between that doctrinal form and the conception of wise adjudication bequeathed us by the Legal Realists).

would entail. The propositions that underlie the second approach are that copyright law has a significant effect on the shape of our culture and that a vision of the sort of culture we would like is a prerequisite to wise administration of the law. Proceeding on those suppositions, Part V adumbrates a conception of the good life and an associated conception of the good society and then considers how the fair use doctrine might be modified to move us some distance in the direction of those ideals.

Most readers will be reluctant to pursue one or another of these routes, and the bases of their reservations deserve some attention at the outset. One group of readers will find the plan to analyze the fair use doctrine from an economic standpoint unpromising.¹⁸⁰ Of the various arguments that might undergird that sentiment, three are fundamental. First, insofar as such an inquiry must take as given the existing distribution of wealth and entitlements (other than those whose content the analysis aims to prescribe), it is indefensibly conservative.¹⁸¹ Second, use of economic analysis is pernicious because it reinforces our regrettable tendency to view and treat all objects, relationships and conditions as commodities, presumptively subject to exchange.¹⁸² Third, it is doubtful that maximization of wealth (even in the expansive sense in which that term is used by conscientious economists) is either desirable in itself or will facilitate achievement of a better society.¹⁸³

Each of these arguments is powerful, but two considerations warrant suppressing at least temporarily the doubts they produce. First, many judges are likely to be attracted to an economic approach — not only because of the current general popularity of the method, but also because intellectual property law has long been considered a field especially amenable to instrumental modes of analysis.¹⁸⁴ Relying in part on the courts' orientation, several commentators have also argued that interpretation and assessment of the Copyright Act should be guided primarily or exclusively by economic considerations.¹⁸⁵ Under

¹⁸⁰ See, e.g., W. PATRY, *supra* note 6, at 456 n.520.

¹⁸¹ See Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 966–72 (1980); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 422–29 (1981).

¹⁸² See Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859–70 (1987).

¹⁸³ See, e.g., Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUD. 191, 194–210 (1980).

¹⁸⁴ See *supra* note 143 and accompanying text. That attitude derives in part from the utilitarian cast of the constitutional provision on which intellectual property law is based. See U.S. CONST. art. I, § 8, cl. 8 (indicating that Congress' goal in granting authors and inventors "exclusive rights to their respective Writings and Discoveries" should be "[t]o promote the Progress of Science and useful Arts").

¹⁸⁵ See, e.g., Breyer, *supra* note 144, at 291; Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602–05 (1982); Hurt & Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, in THE ECONOMICS OF PATENTS AND COPYRIGHTS 181, 188 (Research in Law and Economics

these circumstances, it would be unwise to eschew the approach altogether. Second, as will be seen, economic analysis proves capable of providing insights into the fair use doctrine that all but the staunchest critics of the methodology would find helpful. In particular, it yields various practicable proposals for simultaneously increasing the production of intellectual products we value and facilitating their dissemination, and it generates an understanding of the nature and function of copyright law that can be put to good use by an analyst with a richer sense than the economists of what values the law ought to serve.

A different group of readers will react with alarm or unease to the proposal that the fair use doctrine be rebuilt with an eye to advancing a utopian vision. Moral skeptics will, of course, balk at the effort to develop a conception of the good life and the good society. Nonskeptical liberals, who believe in the existence of "objective" or "transpersonal" criteria of the good life but who contend that responsibility for virtue is inescapably individual,¹⁸⁶ are likely to regard the proposed inquiry as, at best, self-defeating and, at worst, a prescription for elitist tyranny. Liberals whose outlook is grounded in the principle that every government has an obligation to treat its citizens with equal concern and respect¹⁸⁷ will be unsympathetic to an approach that promises to denigrate certain life-styles and celebrate others. Even some readers not in principle opposed to the enterprise will be pessimistic about the progress that can be made in a single essay — especially in view of the underdeveloped state of the literature upon which the argument would have to draw¹⁸⁸ and the likelihood that the intuitions and yearnings to which the argument must appeal are partly the products of the very culture that it proposes to criticize and transcend.

Once again, although some of these objections should give us pause, a combination of three concerns warrant making at least a foray along the utopian path. First, the economic approach, helpful

No. 8, J. Palmer & R. Zerby eds. 1986). Some of these commentators defend their approaches partly on the ground that noneconomic goals either are too vague to be helpful in construing the law or are ill-served by the creation of intellectual property rights. See, e.g., Breyer, *supra* note 144, at 284–91; Hurt & Schuchman, *supra*, at 421–25; Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615, 619–20 (1979). Those claims are assessed indirectly in Part V.

¹⁸⁶ See, e.g., Fried, *Liberalism, Community, and the Objectivity of Values*, 96 HARV. L. REV. 960, 968 (1983).

¹⁸⁷ See, e.g., Dworkin, *Why Liberals Should Believe in Equality*, N.Y. Rev. Books, Feb. 3, 1983, at 32.

¹⁸⁸ See A. MACINTYRE, *supra* note 175, at 1–5; Michelman, *Art as a Public Good — Commentary*, 9 COLUM. J. ART & L. 158, 161 (1985) (observing that, although "we have not quite lost touch with the trans-empirical, trans-positivistic, trans-individualistic, trans-subjective notion of a truly public interest," such a notion has little currency in contemporary American "political culture" or legal scholarship).

as it is, cannot answer some questions¹⁸⁹ and deliberately neglects others that deserve attention.¹⁹⁰ The chances that we could develop plausible answers to those questions by consulting the political and moral theories now in general circulation¹⁹¹ seem slim; a fresh approach of some sort appears essential. Second, like economic analysis, the utopian approach will prove capable of producing practicable suggestions for doctrinal change — the attractiveness of which will lend credibility to the methodology.¹⁹² Finally, with regard to the last-mentioned source of pessimism, it would indeed be foolhardy to attempt (in the midst of an article on the fair use doctrine, no less) to develop a complete and durable theory of the good. But the proper response to recognition of the limits of one's powers of imagination is not to keep one's peace, but to study other cultures and eras, read as broadly as one can in the relevant literature, and then venture one's best guess regarding the direction in which we ought to proceed — expecting that the plan will be at least modified and perhaps transformed through conversation and experience. Part V is written in that spirit.

One last disclaimer is in order. The principal objective of both of the analyses deployed below is to develop a system for distinguishing permissible from impermissible uses of copyrighted materials. Neither Part dwells on the questions of how or by whom that system should be adopted. Thus, although most of the discussion concerns topics traditionally handled under the rubric of the fair use doctrine, when an argument crosses a border into another subheading of copyright law, it is pursued rather than abandoned. And, although the analyses occasionally take into account differences in the information-gathering and remedial powers of courts and legislatures in considering the feasibility of particular reforms, the question of whether those changes would comport with the proper allocation of functions between the three branches of our government receives no attention.¹⁹³

IV. ECONOMIC ANALYSIS

It is important, at the threshold, to be clear regarding the species of “economic analysis” to be used. The method employed in the

¹⁸⁹ See *infra* section IV.D.7.

¹⁹⁰ For example, do artists and authors *deserve* some reward other than the amount of income necessary to keep them plying their trades?

¹⁹¹ See *supra* pp. 1694–95.

¹⁹² Cf. J. RAWLS, A THEORY OF JUSTICE 48–51 (1971) (discussing reflective equilibrium).

¹⁹³ I happen to believe that, leaving aside the pragmatic concerns mentioned in the text, there exists no principled objection to the adoption by the judiciary of even the most sweeping of the changes considered below, but defense of that proposition would take us far outside the law of intellectual property. Readers who disagree may treat the proposed reforms as suggestions for amendments to the copyright statute.

following pages compares alternative legal rules on the basis of their capacity to promote "economic efficiency," which is defined as "that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before."¹⁹⁴ More specifically, the method takes as given the existing distribution of income and wealth in American society¹⁹⁵ and the monetary values¹⁹⁶ placed by each member of the society on different combinations of goods, services, and states of affairs. It then asks what legal rule governing unauthorized uses of copyrighted materials would yield the combination of production and dissemination of works of the intellect that is most efficient in the sense just described.

The ensuing discussion of the analytical paths a lawmaker might take in answering that question is divided into five sections. The first sets forth the economic rationale for the copyright system as a whole and shows the relationship between that rationale and the fair use doctrine. The second sketches a hypothetical fair use problem, simplifies it with a number of assumptions, and then outlines a method that a well-informed and underworked judge might use to identify its

¹⁹⁴ Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 (1972). Among the aliases for this conception of efficiency are the "Kaldor-Hicks criterion," the "potential Pareto superiority test," and the "wealth maximization criterion." See Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice*, 8 HOFSTRA L. REV. 671, 671 n.2 (1980); Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 651-52 (1984); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119-35 (1979). For divergent treatments of the relationship between this definition of efficiency and the concepts of "Pareto superiority" and "Pareto optimality," see B. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* xi-xiv (1975); Coleman, *supra*, at 649-52; Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 229-34 (1980); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488-91 (1980).

¹⁹⁵ No effort is made in this paper to consider the impact of alternative formulations of American copyright law on the production or dissemination of works of the intellect in other countries. For some speculations on that topic, see Adelstein & Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L. REV. L. & ECON. 209 (1985).

¹⁹⁶ Following the lead of most economic analysts of the law, this article will most often use "offer" rather than "asking" prices when the two measures diverge. In other words, when the amount of money a person would offer to purchase a good or service if he were not already entitled to it differs from the amount he would demand in return for surrendering the good or service if he were entitled to it, the former figure will be used. For discussion of when and why these two figures will differ, see, for example, Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979), and Spitzer & Hoffman, *A Reply to Consumption Theory, Production and Ideology in the Coase Theorem*, 53 S. CAL. L. REV. 1187 (1980). For a discussion of the problems attendant upon the (necessarily arbitrary) choice of one or the other measure, see Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975).

most efficient solution. The third pauses to consider the uses and lessons of the proposed method. The fourth discusses how the method might be refined to make it applicable to complex cases. The fifth distills from that more sophisticated approach a set of guidelines federal courts might practically employ.

A. Determining Optimal Levels of Copyright Protection

From an economist's standpoint, the trouble with works of the intellect is that they are "public goods."¹⁹⁷ Unlike most goods and services, they can be used and enjoyed by unlimited numbers of persons without being "used up." It is thus difficult to deny access to such works to persons who have not paid for the right to enjoy them.¹⁹⁸ These conditions create a risk that inventions and works of art that would be worth more to consumers than the costs of creating them will not be created because the monetary incentives for doing so are inadequate. Laws forbidding members of the public from copying or making other use of intellectual products without the permission of their creators are designed in part to eliminate this source of economic inefficiency. By granting inventors and artists a type of property right in their products, the law induces creative persons to develop and exercise their talents and thereby avoids the underproduction of useful ideas and original forms of expression.¹⁹⁹

Unfortunately, this solution may foster economic inefficiency of a different sort. Granting an artist or inventor a property right in his creation may make him a monopolist, giving rise to familiar economic distortions. To the extent that consumers regard other intellectual products as only imperfect substitutes for a particular copyrighted or patented work, the holder of the copyright or patent will confront a downward sloping demand curve for the right of access to his work. Under such conditions, if he wishes to maximize his profits, he will continue granting access to his work only up to the point where the marginal revenue he reaps from affording access to an additional

¹⁹⁷ For a general discussion of public goods and the special challenges they present to economic analysts and policymakers, see E. MANSFIELD, MICROECONOMICS 481, 489-95 (5th ed. 1985); Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609-25 (National Bureau of Economic Research 1962); Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

¹⁹⁸ The development of increasingly convenient and inexpensive copying technologies has exacerbated this difficulty. See Liebowitz, *supra* note 185, at 184; Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1337-38 (1987).

¹⁹⁹ See B. V. HINDLEY, THE ECONOMIC THEORY OF PATENTS, COPYRIGHTS, AND REGISTERED INDUSTRIAL DESIGNS 1-33 (Economic Council of Canada 1971); Gordon, *supra* note 185, at 1610-12.

consumer equals the marginal cost²⁰⁰ — while at the same time charging a price substantially higher than his marginal cost.²⁰¹

Adoption of the foregoing strategy by a copyright or patent holder will have two economic consequences. First, he will reap a monopoly profit; in other words, money that would have remained in the pockets

²⁰⁰ If the creator is in the business of manufacturing and selling physical embodiments of his work (e.g., the publication of copies of a book or the production of “floppy disks” containing a software program), this “marginal cost” will be a positive (and usually relatively stable) number. If the creator is merely granting permission to use his work (e.g., patent licensing or authorizing the copying of software programs), “marginal cost” will be zero. Most of the graphs and illustrations in this section treat marginal cost as positive and constant. None of the conclusions would change if marginal cost were zero or variable.

²⁰¹ This strategy may be represented graphically as follows:

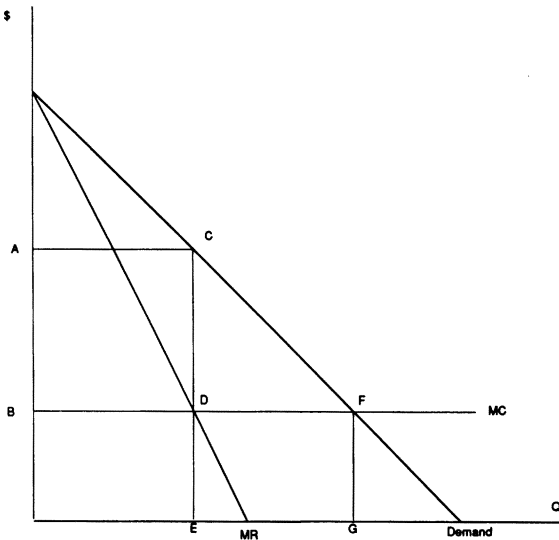


Figure 1

The level of output that will enable the monopolist to maximize his profits is indicated by point E; the corresponding monopoly price is indicated by point A. For more elaborate discussion of profit maximization by a monopolist, see J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 238–42 (3d ed. 1984).

The marginal revenue (MR) curve in Figure 1 declines more steeply than the demand (D) curve because, in order to sell an additional copy of the work, the copyright or patent holder ordinarily must lower the price charged to all purchasers of the work. To the extent that the copyright or patent holder is able to engage costlessly in price discrimination (adjusting the price he charges each consumer to match the value the consumer places on the work), the foregoing generalization does not hold, the marginal revenue curve will approach the demand curve, and the “deadweight loss,” see *infra* p. 1702, ordinarily associated with the exercise of monopoly power will diminish. See J. HIRSHLEIFER, *supra*, at 255–61. The implications for the design of the fair use doctrine of the availability of opportunities for price discrimination are discussed at pp. 1709–10 below.

of consumers, had the work been priced at the level at which the marginal cost of producing it equalled the demand for it, will now go into the pocket of the copyright or patent holder.²⁰² Second, consumers who value the work at more than its marginal cost but less than its monopoly price will not buy it.²⁰³ The former effect is usually thought to have no predictable impact on allocative efficiency.²⁰⁴ The latter, however, results in a "deadweight loss," measured by the total of the consumer surplus that would have been reaped by the excluded consumers and the producer surplus that would have been reaped by the copyright owner had he sold the work to them.²⁰⁵

The degrees of market power enjoyed by different copyright holders²⁰⁶ — and thus the severity of the dangers just recounted —

²⁰² These so-called "monopoly profits" are represented by the rectangle ABDC in Figure 1.

²⁰³ In other words, they will either go without intellectual products of that sort altogether, or they will shift to what they regard as less satisfactory substitutes.

²⁰⁴ See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 256 (3d ed. 1986) (treating "the transfer of wealth from consumers to producers brought about by increasing the price from the competitive to the monopoly level . . . as a wash" for the purposes of the "economic . . . conception[] of welfare"). As Judge Posner acknowledges, see *id.*, at 257–59; Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 807–15 (1975), in some contexts the existence of these monopoly profits may lead to efficiency costs — for example, by reducing the monopolist's incentive to innovate. The magnitude and even the existence of these consequential losses are disputed, however, and the debate is especially inconclusive as regards patent or copyright monopolies. See F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 450–54 (2d ed. 1980).

The fact that, in the view of most economists, this transfer of wealth from consumers to producers by itself has no impact on efficiency does not mean that it need not be taken into account in an economic analysis of intellectual property law; on the contrary, it is the source of the monetary incentive emphasized in the preceding paragraph. Thus, much of the discussion in this Part of the Article will concern the relationships in various contexts between the magnitude of this transfer and the magnitude of the concomitant monopoly losses.

²⁰⁵ In Figure 1, the lost consumer surplus is represented by the triangle CDF. Because, by hypothesis, marginal cost is constant, see *supra* note 200, the copyright holder whose activities are depicted in the figure forgoes no producer surplus by producing quantity E rather than quantity G. If marginal cost were not constant, the monopoly pricing strategy would result in a loss of producer surplus. For discussion of these effects, see Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 954, 991–96 (1981).

²⁰⁶ Patent law differs from copyright law in several respects. For example, patent law has stricter standards of originality and creativity, compare 35 U.S.C. §§ 102(a), 103 (1982 & Supp. IV 1986) and *Graham v. John Deere Co.*, 383 U.S. 1, 12–19 (1966) with 1 M. NIMMER, *NIMMER ON COPYRIGHT* §§ 1.06[A], at 1-37, 1.08[C][1], at 1-48, 2.01, at 2-5 (1987), protects ideas as well as the expression thereof, compare 35 U.S.C. § 101 (1982) with *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936), and excludes the second of two persons to develop an idea independently, compare 35 U.S.C. § 102(g) (1982) with 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 2.01[A] (1987). These differences make it somewhat more likely that a patent holder will enjoy significant market power. However, the fact that many patented products and processes have what consumers regard as close substitutes means that even patent holders are not assured of such power. See Kitch, *Patents: Monopolies or Property Rights?*, in *THE ECONOMICS OF PATENTS AND COPYRIGHTS*, *supra* note 185, at 31–49.

vary considerably. At one extreme are copyrighted works that consumers consider irreplaceable.²⁰⁷ At the opposite extreme are works for which (in the eyes of consumers) there are readily available, nearly perfect substitutes.²⁰⁸ Most types of copyrighted material lie somewhere between these poles.²⁰⁹

In summary, to avoid underproduction of original works, it is necessary to empower the creators of such works to charge fees for the privilege of using them, but granting the creators that right causes monopoly losses, which vary between types of copyrighted works. The task of a lawmaker who wishes to maximize efficiency, therefore, is to determine, with respect to each type of intellectual product, the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses.²¹⁰ Roughly speaking, the "gains" associated with a given combination of rights are the value to consumers of those intellectual products that would not have been generated were creators not accorded those rights. More precisely, they equal the present value of what consumers would be willing to pay in the future for the works whose creation is induced by the rights, minus the present value of the costs that

²⁰⁷ Examples that have figured in important fair use cases are the letters and papers of J.D. Salinger and George Washington, *see* *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), the Zapruder photographs of the assassination of President Kennedy, *see* *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), and the movie "Gas Light," *see* *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court sub nom.* *CBS, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958). The "consumer" in the last-mentioned case who seems to have regarded the movie as virtually unique was a parodist. Moviegoers undoubtedly would have been much more likely to shift to other movies if the price of admission to "Gas Light" had risen sufficiently. The general point is that the degree of market power enjoyed by a given copyright holder may vary dramatically between different types of consumers (that is, within different markets).

²⁰⁸ Examples include B-grade pornographic movies and most law-review casenotes. The holders of the copyrights in such works face nearly flat demand curves. In other words, if they raise their prices even a modest amount, the quantity of copies purchased will decline sharply because consumers will shift to works they regard as almost as good.

²⁰⁹ Much of the confusion in economic analyses of the copyright system derives from the failure of most analysts to acknowledge the existence of this spectrum. A few economists take the position that there exist nearly perfect substitutes for most copyrighted works and that, therefore, a policymaker in this field need not worry about the inefficiency that would ensue if copyright holders enjoyed monopoly power. *See, e.g.,* Smith, *Collective Administration of Copyright*, in *THE ECONOMICS OF PATENTS AND COPYRIGHTS*, *supra* note 185, at 139, 144. Most take the opposite position and assume that all copyright holders enjoy substantial market power. *See, e.g.,* Liebowitz, *supra* note 185, at 184-86. In reality, the market power enjoyed by the holders of the copyrights in works of different sorts varies enormously, and a lawmaker who wishes to tune the copyright system to maximize efficiency must take those variations into account. *See infra* pp. 1720-21.

²¹⁰ For economic analyses of intellectual property regimes that describe the lawmaker's task in similar terms, *see* Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1827-28 (1984); Liebowitz, *supra* note 185, at 184-88; Menell, *supra* note 198, at 1367-69.

would be incurred in producing them. The associated "losses" are the deadweight costs discussed above.²¹¹

A lawmaker setting up a copyright regime "from scratch" could pick from a large array of possible entitlements when considering which combination would work best in the sense just described.²¹² The range of options available to a judge, when exercising his authority under section 107 of the statute, would seem to be much narrower. Other provisions of the Copyright Act seem to settle most of the relevant issues, thus consigning the judge to the job of making minor adjustments to the overall system of entitlements.²¹³ A review of the language and legislative history of section 107, however, suggests that the judge's sphere of action is not so limited. The mandate of the provision is expansive: the "factors" courts are required to consider in assessing fair use claims are deliberately vague;²¹⁴ the list of factors is incomplete;²¹⁵ and the judiciary is encouraged to modify the doctrine in response to changing conditions and technology.²¹⁶ Moreover, the potential reach of the doctrine is broad: a judicial determination that a given use of copyrighted material is "fair" relieves the defendant of all liability, "notwithstanding" the statutory provisions vesting in a copyright owner certain exclusive rights.²¹⁷ Thus, if the package of entitlements created by the provisions of the Copyright Act other than section 107 enabled the creators of a type of intellectual work to collect monopoly profits from consumers in greater than optimal amounts, a judge could use the fair use doctrine to chip away at that package until it approximated the most efficient combination.

In short, at least with regard to works of some sorts, economic analysis of the fair use doctrine is nearly coterminous with economic

²¹¹ See *supra* note 205 and accompanying text.

²¹² For example, he could adjust the duration of copyrights (in general or in particular sorts of works); he could permit some uses of copyrighted works (e.g., public performance and display) while forbidding others (e.g., copying, preparing derivative works, or borrowing a copy from a public library without paying a fee); and he could regulate the prices a copyright owner could charge for permission to engage in particular uses of his work.

²¹³ For example, the options discussed in note 212 above are settled by sections 302, 106, 111(d), 115, 116, and 118 of the current statute. In contrast to the copyright statutes in several European countries, American copyright law does not accord a copyright owner "public lending rights," enabling him to charge persons who borrow his works from libraries. See Treece, *Library Photocopying*, 24 UCLA L. REV. 1025, 1025-26 (1977).

²¹⁴ For the text of the provision, see note 4 above. Each of the factors identifies an area of inquiry but does not purport to determine its relevance. In addition, the relative weights that the four factors should be accorded in the analysis are unspecified.

²¹⁵ See *supra* sections II.B.3 and II.B.5 (discussing factors the Supreme Court has already added to the list contained in the statute).

²¹⁶ See H.R. REP. NO. 1476, *supra* note 9; S. REP. NO. 473, *supra* note 9.

²¹⁷ See 17 U.S.C. § 107 (1982).

analysis of the copyright system as a whole.²¹⁸ We now turn to how that analysis should be conducted.

B. Fair Use as Efficient Use: The Basic Approach

Two months ago, Plaintiff, a famous mystery writer, published a hardcover edition of a volume of detective stories, *More Adventures of Mr. Holmes*. The current retail price of her book is \$20. Defendant, a college professor, recently distributed photocopies of one of the stories in *More Adventures* to the twenty students in his seminar, "The Art of the Short Story," charging the students only the cost of the copying. Hoping to deter other teachers from engaging in similar conduct, Plaintiff has brought an infringement action against Defendant, seeking compensatory or statutory damages.²¹⁹ Defendant argues that his activity constituted a "fair use." The judge²²⁰ wishes to decide the case in a way that promotes economic efficiency. What should he do?

The complexity of the problem necessitates approaching it in stages. This section begins the job by adding a large number of simplifying assumptions to the hypothetical question and showing how the judge might proceed in such an imaginary world. The section after next introduces a series of refinements to that basic method in the hope of developing a set of tools a real judge might use on a real case.²²¹

²¹⁸ Cf. Liebowitz, *supra* note 185, at 188 (proposing a similar interpretation of the fair use doctrine). But cf. Gordon, *supra* note 185, at 1613 n.81 (arguing that courts interpreting the fair use doctrine should not strive to achieve "optimal" levels of copyright protection, but rather should accept that "the copyright law treats the outcome of the ordinary copyright transaction as normatively equivalent to an 'optimal' result," and should recognize the fair use defense only in "settings" different from "an ordinary transactional setting"). Justice Kaplan has suggested that we "dispense" with the fair use doctrine altogether and consider the "policy" questions "fair use" has come to incorporate under the more general doctrinal heading of "infringement." See B. KAPLAN, *supra* note 144, at 67-70. This and the succeeding Parts of the Article consider an alternative way of partially combining these two strands of copyright law — namely, by subsuming, under the heading of "fair use," many of the questions currently addressed by courts when determining whether a copyright has been "infringed."

²¹⁹ See 17 U.S.C. § 504(a) — (c) (1982).

²²⁰ "Fair use is a mixed question of law and fact." *Harper & Row*, 471 U.S. at 560. Either party, consequently, may insist that the issue be decided by a jury. See A. LATMAN, *THE COPYRIGHT LAW* 295-97 (W. Patry 6th ed. 1986); W. PATRY, *supra* note 6, at 480. For simplicity, it will be assumed throughout this and subsequent Parts that (as is typical in copyright cases, see A. LATMAN, *supra*, at 295) all parties waive their rights to a jury trial and that the judge must therefore both ascertain the facts of the cases and determine their legal significance.

²²¹ Cf. A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 2-4 (1983) (describing the use of assumptions in economic analysis); Spitzer & Hoffman, *supra* note 196, at 1190-91 (recommending proceeding in stages of this sort).

The judge's first task is to expand his frame of reference. For reasons that will become evident later,²²² it will not suffice for the judge to concern himself solely with Defendant's conduct. To decide the case, he must identify and compare (on efficiency grounds) all of the uses of copyrighted detective stories²²³ that might be considered fair or unfair. In other words, he must determine the universe of activities vis-a-vis detective stories that would violate the Copyright Act if not excused by section 107.

Assume that the judge concludes that there exist only five such uses of copyrighted detective stories. Conveniently, *More Adventures* is about to become the target of an example of each one of those activities, Plaintiff has learned of these threats and has sought to enjoin all of them, and the judge himself will hear all five suits. The activities in addition to Defendant's copying are:

(i) Pirate Publishing Company is about to release a nearly identical hardcover edition of *More Adventures*, which will retail (at least when it first appears) for \$15.

(ii) Bestseller Book Club will soon make available to its members a paperback edition of *More Adventures* at a price of \$4.

(iii) Barker Brothers, the dominant manufacturer of board games in the United States, has developed a game called "Detection," the variations of which correspond closely to the plots of the stories in Plaintiff's book.²²⁴ The game will soon be available in toy and hobby stores for \$10.

(iv) The *New York Times* plans soon to publish a review of *More Adventures* written by Calvin Critic. Critic's principal arguments are that Plaintiff's style is more turgid than in her previous sets of stories, but that the plots of the new stories are more clever. To substantiate these points, Critic quotes several passages from *More Adventures* and from Plaintiff's earlier works.

The judge's job, then, is to decide which (if any) of the activities should be deemed fair and which (if any) should not. Assume, finally, that the conditions for taking on such a project are ideal: the judge

²²² See *infra* section IV.C.

²²³ The reader may wonder why the relevant category is "detective stories." That issue is taken up in section IV.D.1 below.

²²⁴ Taking into account (i) that the Copyright Act accords a copyright owner the exclusive right "to prepare derivative works based upon the copyrighted work," see *supra* p. 1662; (ii) that many of the components of a board game (albeit not the game itself) are copyrightable, see 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.18[H][3][a], at 2-213 (1987); and (iii) that substantial mimicry of the plot of a copyrighted work will be deemed infringement, see, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), cert. denied, 298 U.S. 669 (1936), Barker's conduct most likely would be actionable were it not excused as a fair use.

has no other cases on his docket; he has unlimited research capabilities; and he knows that his decision will not be reversed and will be accepted in all other jurisdictions. How should he proceed?

His first move should be to rank the five uses of Plaintiff's stories in order of the relative benefits and costs of legitimating them. To do that, he must determine for each putatively infringing activity what hereinafter will be called its "incentive/loss ratio." The numerator of this fraction is the net reward a detective writer of Plaintiff's stature²²⁵ could reap if the activity in question were forbidden and the writer could therefore demand a fee from any person who wished to engage in the activity.²²⁶ The denominator is the efficiency loss that would result from empowering the writer to set the terms on which others could engage in the activity.²²⁷ The purpose of the ratio is to provide the judge with a preliminary indication of the net economic benefits of according authors the entitlement in question.

Set forth below are speculative accounts of how determination of the incentive/loss ratio might proceed in each of Plaintiff's five suits.

(i) The judge's analysis of the case of Pirate Publishing Company reveals the following. Many readers of detective stories regard Plaintiff as one of the best contemporary writers in the field and would much rather read her stories than stories by other authors. Plaintiff, because of her prominence, was able to negotiate a favorable contract with her publisher, pursuant to which the publisher agreed to abide by Plaintiff's instructions with regard to the manufacture and marketing of the book and to retain a modest portion of the purchase price of each book.²²⁸ Plaintiff's estimate of the demand for *More Adventures* was accurate, and the retail price of \$20 was shrewdly designed to provide her with the maximum monopoly profit possible

²²⁵ Why the judge should consider a writer of Plaintiff's stature when making these calculations is taken up at p. 1715 below.

²²⁶ Shouldn't the judge be interested in the *efficiency gains* from holding out that reward, not in the reward itself? The answer is yes, *see supra* p. 1703, but those efficiency gains cannot be determined without knowing how much money writers could make if they could not demand fees from this particular group of users. (The increase in the production of detective stories caused by raising the average annual income of writers from \$10,000 to \$20,000 is likely to be much greater than the increase caused by raising their average annual income from \$100,000 to \$110,000.) That depends, in turn, on what other putatively infringing activities are declared fair and unfair — which is precisely what the judge does not yet know. Only after the judge has determined the impact upon authors' incomes of permitting or forbidding each activity will he be in a position to ascertain the optimal *package* of entitlements. *See infra* pp. 1715–16.

²²⁷ This approach parallels in several (but, as will be seen, not all) respects the method developed by Professor Kaplow in his analysis of patent law, *see* Kaplow, *supra* note 210, at 1829–34 & n.54.

²²⁸ It is customary for an author's royalties to be set at a percentage of the retail price of the book. *See* Brockway, *Business Management and Accounting*, in *WHAT HAPPENS IN BOOK PUBLISHING* 200–02 (C. Grannis ed. 1967). The alternative arrangement described in the text — in which Plaintiff pays her publisher a fixed amount for each book sold and keeps the remainder of the revenues — is selected in order to simplify the discussion and to facilitate illustration of the central economic principles. For the same reasons, it is also assumed that

on the hardcover edition²²⁹ of the book. Plaintiff has enjoyed those monopoly profits for the past two months and would like to continue to do so. Pirate selected a price of \$15 for its competing edition in hopes of garnering some of Plaintiff's monopoly profits. That price, however, is highly unstable. If Pirate's conduct were held to be noninfringing, Plaintiff would lower the price of her book to match Pirate's price. Pirate would, in turn, retaliate with an even lower price.²³⁰ Continued competition would quickly drive the retail price down to the cost of manufacturing and marketing a copy.²³¹

On the basis of those findings and projections, the judge could estimate with comparative ease the incentive/loss ratio associated with the use of detective stories exemplified by Pirate's behavior. If Pirate's activity were held to be fair, price competition of the sort just described would soon eliminate both Plaintiff's monopoly profits and the concomitant deadweight losses. In the simple case represented graphically in the margin,²³²

Plaintiff is not obliged to pay her publisher anything for books printed but not sold. For discussion of the divergence of interest between author and publisher under the typical royalty arrangement, see J. HIRSHLEIFER, cited above in note 201, at 247-48.

²²⁹ The possibility that Plaintiff anticipated releasing the book later in another form is considered at pp. 1718-22 below.

²³⁰ It is assumed, for the sake of simplicity, that both Plaintiff and Pirate have complete control over the retail prices of their editions, that the production costs of Plaintiff's publisher and Pirate are similar, and that the profit margins demanded by distributors and retailers for carrying the two editions are the same.

²³¹ Professors Hurt and Schuchman and Judge Breyer argue that the ability of publishers to engage in price competition of this sort and in other forms of "retributive" behavior would deter copyists like Pirate from producing unauthorized, lower-priced editions even if the copyists were not restrained by the copyright laws. See Breyer, *supra* note 144, at 300-01; Hurt & Schuchman, *supra* note 185, at 428. For a convincing rebuttal, see Tyerman, cited above in note 148, at 1112-13.

²³² Assume the judge's research exposes the following economic conditions:

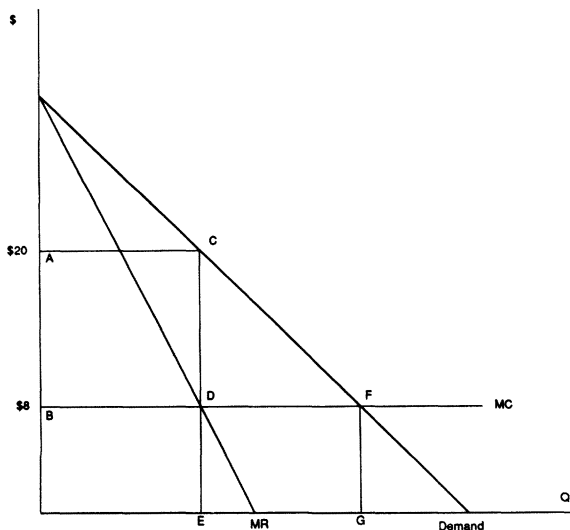


Figure 2 Sale of Hardcover Copies of *More Adventures*

the ratio of the former to the latter would be 2 to 1.²³³

(ii) The judge turns next to the behavior of Bestseller Book Club and discovers the following. The reason that, as yet, Plaintiff has released only a hardcover edition of *More Adventures* is that she is engaged in price discrimination.²³⁴ Potential purchasers of her book vary in their eagerness to read it; in general, the more eager a purchaser, the more he is willing to pay for a copy. Knowing this, Plaintiff plans to delay release of a paperback edition (which will retail for \$4) for another six months, thereby forcing avid readers who do not mind soft covers to purchase a hardcover edition, on which Plaintiff's profit margin is high.²³⁵ By offering its members a cheap paperback edition, Bestseller would force Plaintiff to release her own paperback edition earlier than she had planned, thereby depriving her of the profits from the sale of the hardcover edition.

Based on these findings, the judge concludes that, for two reasons, prohibition of Bestseller's activity would result in a substantially higher incentive/loss ratio than would prohibition of Pirate's conduct. First, price discrimination enables a monopolist to increase his profits without materially increasing the deadweight losses associated with his profitmaking.²³⁶ Consequently, the ratio between the reward to

Although some mystery-story readers have already purchased copies of *More Adventures*, many have not. The demand curve in Figure 2 represents the remaining demand for the book. The marginal cost curve (which represents the cost, from Plaintiff's standpoint, of producing and selling each additional copy) is derived from the provision of the publishing contract governing the portion of the purchase price retained by the publisher, *see supra* p. 1707, plus the portion of the price retained by the distributors and retailers, *see supra* note 230.

²³³ Plaintiff's monopoly profits are represented by the area of rectangle ABDC. The associated deadweight losses are represented by area of triangle CDF. On the assumptions embodied in Figure 2, the former is twice the size of the latter. Were the demand curve shaped differently or were the marginal cost curve shaped or sloped differently, that figure could be significantly different. Here, as in the rest of Part IV, what is important is not the numerical ratios suggested by the illustrations, but the method of deriving them.

²³⁴ More specifically, she is engaged in what is known as "third-degree price discrimination" partly through "product differentiation." *See* E. MANSFIELD, *supra* note 197, at 296-99; F.M. SCHERER, *supra* note 204, at 316-19.

²³⁵ In the eyes of some consumers, hardcover editions have sufficient advantages over paperback editions because of durability, larger print, or snob appeal to be worth the extra money. *See* Tyerman, *supra* note 148, at 1110. However, many if not most purchasers of hardback editions of popular tradebooks would purchase paperback editions if they were available.

²³⁶ That price discrimination increases monopoly profits is indisputable. *See, e.g.,* E. MANSFIELD, *supra* note 197, at 297; F.M. SCHERER, *supra* note 204, at 319-20. The direction and magnitude of the associated effect on deadweight losses is not so clear; economists differ as to whether, assuming a manufacturer continues to enjoy monopoly power, allocative efficiency is enhanced by allowing or forbidding him to engage in third-degree price discrimination. *See* F.M. SCHERER, *supra* note 204, at 320-22 (discussing the literature). However, the former effect is so substantial that, even if price discrimination by Plaintiff increased the misallocation of resources to a modest degree, the incentive/loss ratio would almost certainly rise. *Cf.* Kaplow, *supra* note 210, at 1875 (making a similar argument regarding the desirability of permitting patentees to engage in price discrimination).

Plaintiff and the concomitant monopoly losses caused by protecting Plaintiff's price discrimination scheme would substantially exceed the 2:1 ratio associated with the sort of "ordinary" monopoly pricing described above. Second, even though the competitive price for a paperback edition would be less than \$4, Plaintiff probably will not engage in price competition with Bestseller but will allow Bestseller to reap higher-than-competitive profits from its members, enabling Plaintiff to retain higher-than-competitive profits from nonmembers.²³⁷ As compared to a situation in which the only paperback edition on the market were Plaintiff's (selling for \$4), this equilibrium would result in a diminution of Plaintiff's profits with only a slight reduction in monopoly losses. The judge concludes, therefore, that the incentive/loss ratio associated with Bestseller's activity is very high.

(iii) The judge's study of the case of Barker Brothers reveals the following. Barker's size enables it to produce and sell board games much more cheaply than its competitors and, therefore, to engage in monopoly pricing of "Detection."²³⁸ The manufacture and sale of "Detection" is unlikely to have any effect on either the sale of *More Adventures* or Plaintiff's reputation. Accordingly, if Barker were forbidden to make and sell the game without Plaintiff's permission, the two parties would negotiate an agreement, under which Barker would pay Plaintiff a royalty for each game it sold.²³⁹ From Barker's standpoint, that royalty would increase the cost of each game. Barker

²³⁷ If Plaintiff plans to sacrifice to Bestseller the portion of the market for her book that consists of Bestseller's members, why would Plaintiff release her own paperback edition any earlier than she had originally planned? The answer (the judge discovers) is that, if the only two versions of the book available to consumers are Plaintiff's hardcover edition and Bestseller's much cheaper paperback edition, Bestseller's share of the market will expand in two ways: more readers will join Bestseller Book Club, and retail bookstores will contrive ways of obtaining copies of Bestseller's paperback edition. It is those two effects that Plaintiff wishes to prevent.

²³⁸ The judge learns that \$10 is the retail price at which Barker expects to maximize its profits. To preserve its position in the market, Barker might be obliged periodically to raze the undergrowth of competitors by sharply lowering its prices. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697-99 (1975). However, Barker does not anticipate pursuing that strategy in its marketing of "Detection."

²³⁹ Because Plaintiff is a monopolist and Barker is, for practical purposes, a monopsonist, it would be hard for the judge to predict the amount of the royalty they would agree upon. See E. MANSFIELD, *supra* note 197, at 295-96 (discussing the indeterminacy of the outcome of negotiations in situations of bilateral monopoly). Assume that the judge is somehow able accurately to estimate the royalty at \$2 per game.

Support for the prediction that the parties would employ a simple arrangement of the sort described in the text may be found in Schroeder, *Licensing of Rights to Intellectual Property*, 50 ALB. L. REV. 455, 457-58, 460 (1986). More complex licensing schemes and their effects on the incentive/loss ratio are considered in section IV.D.4 below.

would respond by increasing the price at which it sells the game.²⁴⁰ The results of this series of actions and reactions would be: Barker's monopoly profits from the sale of the game would decline;²⁴¹ dead-

²⁴⁰ This response might be depicted graphically as follows:

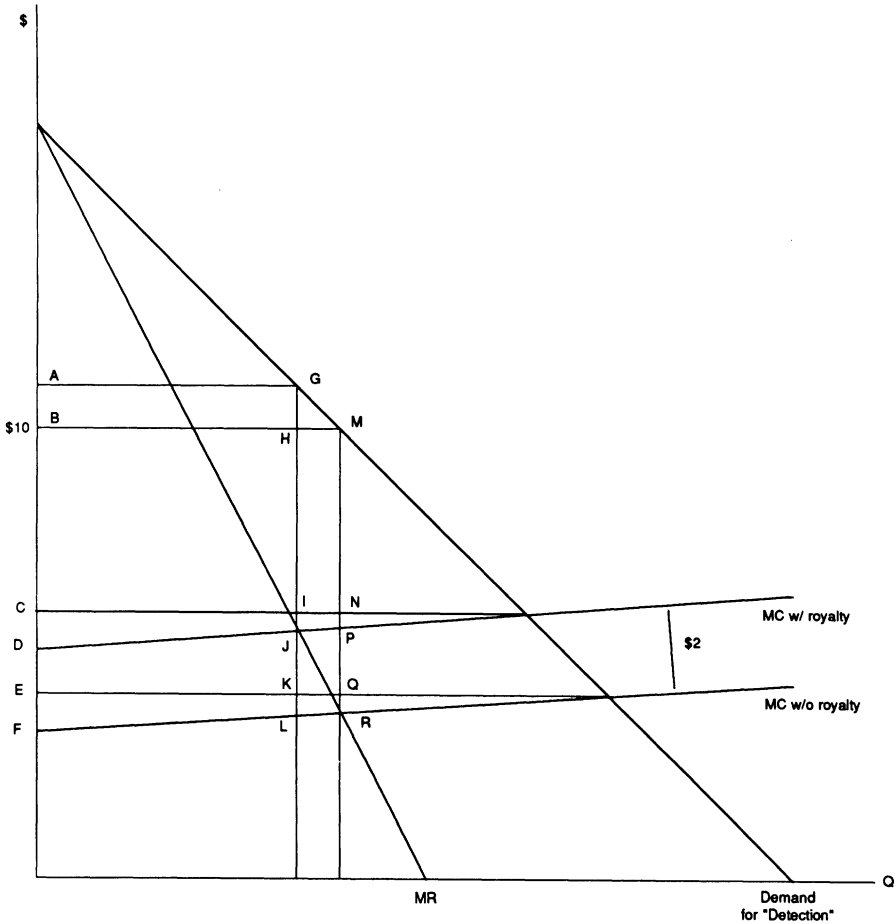


Figure 3

The price of the game would rise from point B to point A.

²⁴¹ The decline would equal the difference between the areas of rectangles BEQM and ACIG.

weight losses associated with game sales would increase because fewer potential consumers of the game would be able to buy it;²⁴² and Plaintiff would keep a portion of the monopoly profits from the sale of the game.²⁴³ The ratio the judge must ascertain is that between Plaintiff's new-found income and the increase in deadweight losses.²⁴⁴ On the assumptions embodied in Figure 3 in the margin,²⁴⁵ the ratio would be 1.76, somewhat less than the ratio associated with Pirate's behavior.

(iv) Next on the judge's agenda is the behavior of Calvin Critic. The judge's investigation reveals that Calvin's comments are accurate (in the sense that most readers of *More Adventures* would agree with Calvin's judgments after reading the book) and that the net effect of publication of the review would be to reduce slightly the demand for the book and consequently Plaintiff's income. The efficiency losses associated with preventing that diminution in demand would be very large, however, because forbidding publication of Critic's comments would prevent many consumers from making informed decisions to purchase or not to purchase the book and thereby prevent them from maximizing their welfare.²⁴⁶ Consequently, the incentive/loss ratio associated with prohibiting Critic's activity is very low.²⁴⁷

(v) The judge turns finally to the behavior of Defendant. He discovers that the practice (in which Defendant and many similarly situated professors are now engaged) of making copies of individual copyrighted stories for distribution to their students affects Plaintiff's

²⁴² The increase would equal the area of Figure GLRM.

²⁴³ That profit is represented by the area of Figure DFLJ.

²⁴⁴ If either the quality of games of this sort or the likelihood that they would be developed varied with the amount of profit Barker stood to reap from their sale, the judge would have to take into account the efficiency losses associated with the decline in Barker's monopoly profits. See *supra* p. 1711. For the time being, it is assumed that the size of Barker's income has no such effect. This assumption is removed in section IV.D.5 below.

²⁴⁵ See *supra* note 240.

²⁴⁶ See Gordon, *supra* note 185, at 1634.

²⁴⁷ The size of the denominator of that fraction might suggest to the judge that the comparison made in the text is misleading. If so many consumers would benefit so substantially from publication of the review, perhaps they can be charged for access to it — charged enough by Plaintiff, directly or indirectly, to offset the reduction in the demand for her book. In other words, the outcome of holding that the review was an infringement might not be its suppression, but rather the negotiation of an agreement that would satisfy (for a price) consumers' thirst for information and increase the net reward to Plaintiff. Further investigation by the judge, however, reveals that this happy scenario is unlikely to occur. Accorded the right to grant or refuse permission to print reviews, authors would be likely to withhold their consent whenever the reviewer's comments were hostile. Not only would readers thereby be denied the benefits of the information contained in negative reviews, but their awareness of the situation would impair their confidence in the accuracy of the reviews that did pass the authors' muster. Thus, assuming for the moment that the judge's only options are to declare the use fair or unfair, *but cf. infra* section IV.D.3 (discussing mandatory licensing), the ratio stated in the text is the right one.

revenues in three distinct ways. First, some students who otherwise would have bought copies of *More Adventures* find their desire or curiosity satisfied by reading a photocopy of a single story and decide not to purchase the book, thereby depriving Plaintiff of income she might otherwise have earned. Second, the interest of some students who would have been unaware of the existence or quality of Plaintiff's work is piqued by reading a single story, and they purchase copies of *More Adventures* or of Plaintiff's other books, thereby increasing Plaintiff's income. Third, the prices Plaintiff can exact from publishers producing anthologies of short stories for use in courses of the sort taught by Defendant are less than they would be if professors had more incentive to assign such anthologies.

Keeping these impacts in mind, the judge next tries to determine what would happen if he were to declare Defendant's conduct unlawful. Research persuades him that professors in Defendant's position would respond in three ways.²⁴⁸ Some would abandon their current syllabi and would instead assign (and require their students to purchase) anthologies containing one of Plaintiff's tales. The result, the judge determines, would be to enhance Plaintiff's revenues modestly.²⁴⁹ Adoption of this approach would have two economic costs, one of which would be substantial. First, by increasing the total cost of the courses in question, it would deter a few students from enrolling.²⁵⁰ Second, and much more important, by preventing teachers from using the combination of readings that best matches their conceptions of the appropriate content of their courses, this reaction would impair the quality of the education provided to the students not so deterred, thereby reducing their welfare without enhancing the welfare of anyone else. In sum, the incentive/loss ratio associated with this response would be fairly low.

Another group of professors would respond by abandoning their current syllabi and assigning anthologies that did *not* include one by

²⁴⁸ The judge concludes that transaction costs preclude a fourth possible response: negotiation of an agreement with Plaintiff under which Plaintiff would receive a royalty for each story distributed to a student. *Cf.* Liebowitz, *supra* note 185, at 189 (suggesting that transaction costs would make it uneconomical for copyright owners to extract fees from persons who wish to photocopy their works in libraries). *But cf. id.* at 192–94 (sketching a price discrimination scheme that might enable copyright owners to collect such fees indirectly). The judge also concludes that a fifth possible response — requiring students to purchase hardcover copies of *More Adventures* in order to read one of the stories — would be so rare as not to affect the calculus.

²⁴⁹ The reason: the substitution and exposure effects discussed above, would remain unchanged because students would still be assigned one of Plaintiff's stories, but Plaintiff's royalties from the sale of anthologies would increase somewhat.

²⁵⁰ The measure of the resulting efficiency loss would be the difference between the cost of a course using photocopied materials and the price at which each deterred student valued the course.

Plaintiff. This strategy would result in economic losses of the same sort and magnitude as those just discussed.²⁵¹ Because it would not increase Plaintiff's royalties, the impact of this course of action on Plaintiff's revenues would depend on the relative magnitude of the substitution and exposure effects. The judge ascertains that the benefit to Plaintiff caused by the elimination of the substitution effect and the injury to Plaintiff caused by the elimination of the exposure effect would approximately offset each other, and therefore the ratio associated with this response would be extremely low.

The third and last group of professors would not alter their syllabi but instead would request their college libraries to purchase and place "on reserve" a few copies of *More Adventures* and would require students to read the assigned story in the library. The consequent increase in Plaintiff's royalties (from the sale of copies of her book to the libraries) would enhance her net income significantly.²⁵² The increased inconvenience to some students²⁵³ and the reduced quality of the education afforded the remainder²⁵⁴ would result in some economic costs, but they would not be as substantial as those associated with the first two responses. The judge therefore concludes that the incentive/loss ratio associated with this response would be relatively high.

To assign an aggregate ratio to Defendant's conduct, the judge would have to multiply each of the incentive/loss ratios derived in the preceding three paragraphs by the percentage of professors²⁵⁵ who would adopt the course of action in question, and then add the products. Following this procedure, he concludes that the composite ratio is larger than that associated with Critic's conduct but smaller than that associated with Barker's.

At long last, the judge is in a position to rank the five uses. The activity with the highest incentive/loss ratio is the publication of a paperback edition contemplated by Bestseller. Next comes Pirate's competing hardback edition, then Barker's game, then Defendant's copying, and finally Critic's review.

²⁵¹ Indeed, the economic costs might be even higher; a significant number of students would now remain ignorant that they could improve their welfare by reading Plaintiff's work, which would result in an efficiency loss similar to that discussed in connection with Critic's review. See *supra* p. 1712.

²⁵² The other sources of Plaintiff's income would not be materially affected. The exposure effect described above would not change at all. The substitution effect would increase slightly — insofar as students enthralled by Plaintiff's writing would now be somewhat more inclined to continue reading the library copy of *More Adventures* and not to purchase copies of their own — but not enough to affect the calculus.

²⁵³ That is, those who would now be obliged to go to the library.

²⁵⁴ That is, those who would have read Plaintiff's story (in photocopy form) in their rooms but who would not read the story if forced to make the trip to the library.

²⁵⁵ Or, more precisely, by the percentage of the total number of students taking short-story courses who are enrolled in those professors' courses.

Now what? The judge's ultimate objective is to select the combination of entitlements that will maximize net efficiency.²⁵⁶ By adding up the denominators of the fractions he has just derived, the judge can determine the efficiency losses associated with any given set of entitlements. To ascertain the efficiency gains, however, the judge must perform one last set of calculations. Remember that the point of allowing Plaintiff to demand from each consumer of his book more than the marginal cost of producing an additional copy is to induce both Plaintiff and other actual and potential writers of detective stories to write more and better stories in the future. The source of the efficiency gains referred to above is the increased consumer satisfaction that results when detective-story readers have access to a better menu of stories. The judge thus must estimate the present value of the change in detective-story writing that would be caused by each increase in the aggregate reward offered to successful writers like Plaintiff.²⁵⁷ To make that estimate, the judge must take into account a host of variables: the strength of motives other than thirst for financial remuneration that impel people to enter and ply the trade of detective-story writing,²⁵⁸ the other occupations available to detective-story writers and the incomes associated with them, the ability of an incipient writer accurately to predict the likelihood that he would succeed in the business, the risk aversion of the typical writer, and the discount rate.

Our judge diligently makes the necessary computations and determines the efficiency gains associated with each level of total income

²⁵⁶ See *supra* p. 1703.

²⁵⁷ What this way of describing the judge's task takes for granted is that, to the extent actual and potential artists of a particular type are influenced by the prospect of monetary gain, they are affected most by the rewards available to successful or prominent artists of the sort they are considering becoming. That assumption, although plausible, is by no means obviously correct. Self-confidence, fear of mediocrity, and the "vividness" heuristic, see R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 43-62, 122-27 (1980), would all lead artists to concentrate on the most accomplished members of their fields, but risk-aversion, "success anxiety," and the "representativeness heuristic," see *id.* at 24-28, might lead them to concentrate on more ordinary members. The judge would therefore have to ascertain through empirical investigation whether prospective detective-story writers are more concerned with the incomes of writers like Plaintiff or with those of less famous practitioners of the trade. If the latter is the case, he would have to recalculate all of the fractions discussed above, using demand functions of the sort that confront "average" detective-story writers, which would be more elastic than those confronting Plaintiff. See *supra* pp. 1702-03.

²⁵⁸ In attempting to identify and weigh such noneconomic motives, the judge would do well to start with the list provided by Hurt & Schuchman, cited above in note 185, at 425-26:

[Such] desires include the propagation of partisan ideas; notions of altruism, as in the case of religious and moral tracts; desire for recognition; and enhancement of one's reputation. There are also cases where authors pay for the costs of publication in order to promote some other pecuniary interest than the sale of the writing itself, such as advertising copy and scholarly publication induced by the 'publish-or-perish' rule of most universities.

that Plaintiff could be permitted to reap from the sale and usage of her book.²⁵⁹ His findings are plotted on the following graph.²⁶⁰

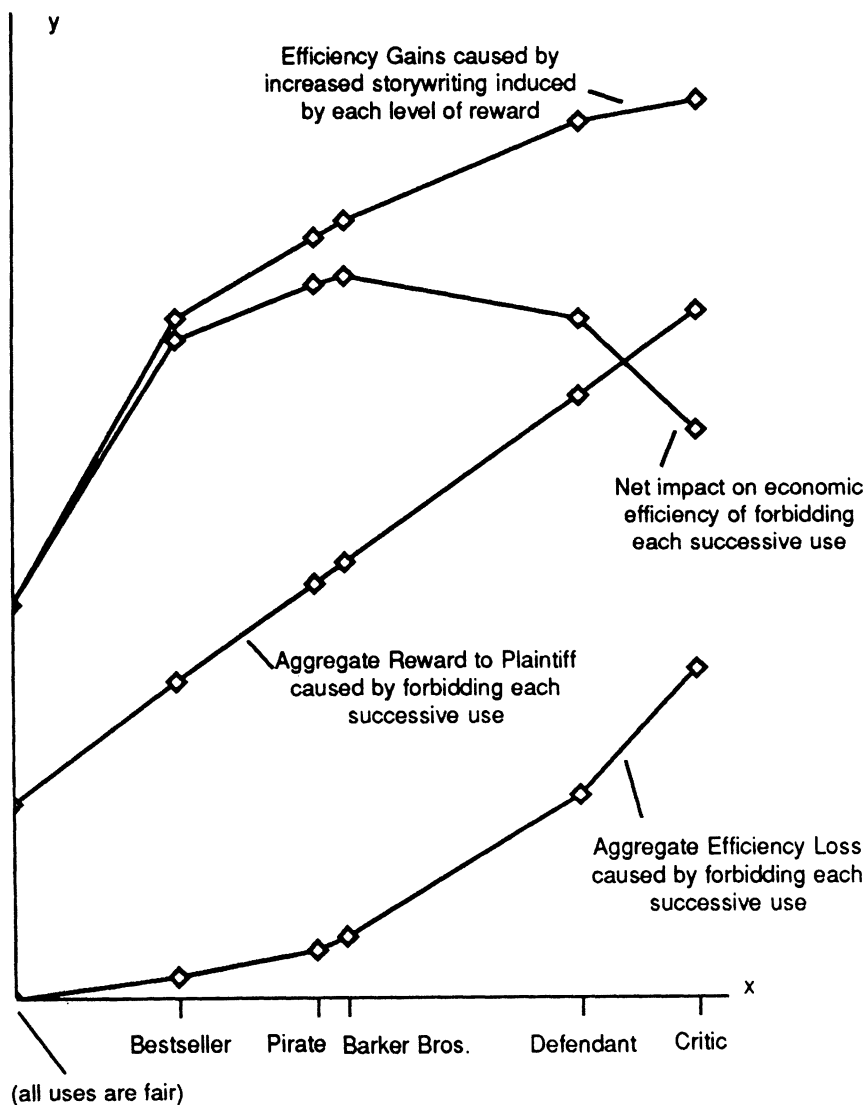


Figure 4

²⁵⁹ Strictly speaking, the judge ought also to determine (and subtract from those gains) the present value of the amounts of money consumers would have been willing to pay for products or services that the mystery writers would have produced had they not been enticed into writing detective stories. *See id.* at 425, 429, 430. If talent were to some degree fungible — for example, if a good mystery writer would be more likely than the average person to be a good physicist — those costs might be significant.

²⁶⁰ The scale of the X-axis was selected in order to make the Aggregate Reward function linear. Using a less arbitrary scale would not alter the location of the optimal point, but would

To ascertain the most efficient interpretation of the fair use doctrine in this context, the judge need only identify the point in the series of putatively infringing uses where the difference between aggregate efficiency gains and aggregate efficiency losses is greatest. On the facts as hypothesized in Figure 4 above, that spot is the activity of Barker Brothers. By holding Barker's behavior and all uses to its left (Best-seller's and Pirate's) unfair and all uses to its right (Defendant's and Critic's) fair, the judge will, to the limit of his ability, maximize allocative efficiency.²⁶¹

C. Taking Stock

Is all this really necessary? Must a judge, in order to evaluate the fairness of a defendant's activity, assess and rank all other conceivable uses of the plaintiff's work? In two extreme situations, the answer is no. First, with regard to some sorts of copyrighted works, it may be that to forbid even a single use would result in efficiency losses that would exceed gains. Note that, in the hypothetical case, Plaintiff was able, without any legal protection, to reap two months of monopoly profits from the sale of her hardback edition. That income might be sufficient to induce many prospective writers to try their hands at detective stories. Even the substantial increase in Plaintiff's income caused by preventing Bestseller from releasing a paperback edition

make it more difficult to see the relationships between the different components of the judge's calculations. The utility of depicting in this fashion the choices facing the judge was suggested by a graph in Liebowitz, cited above in note 185, at 187.

²⁶¹ Although sufficient as applied to the facts as depicted in Figure 4, this procedure would have to be modified in one respect to accommodate more complex cases. The judge's objective, as the text indicates, is to select the package of entitlements whose net efficiency gain (as compared to a situation of no legal protection for intellectual property) is greatest. The procedure outlined in this section — and, specifically, identification of the apogee of the net-economic-efficiency curve — is a reasonably reliable way of ascertaining that package. However, if the entitlements in question are not divisible, *but cf. infra* section IV.D.3 (suggesting one way in which they might be divided), the proposed approach will sometimes point toward a slightly less than optimal solution.

To illustrate, assume that works of a particular sort may be infringed in four ways, and that the incentive/loss ratios associated with them are as follows: A: 5/4; B: 10/1; C: 12/2; D: 1/1. The conscientious judge arranges them in order of their ratios (B, C, A, D), constructs a graph analogous to Figure 4, determines that the net-efficiency curve peaks at use C, and is therefore inclined to declare uses B and C unfair and uses A and D fair. The differences in the magnitude of the economic impacts associated with uses A and D, however, create a possibility that reversing their order and declaring uses B, C, and D unfair and use A fair would yield greater net efficiency gains. The general lesson: the procedure outlined in this section will provide a good approximation of the most efficient solution, but a judge will sometimes be able to do a little better by altering the order of the entitlements in the near vicinity of the line between fair and unfair uses.

might not provide enough additional incentive to offset the efficiency losses such a prohibition would produce.²⁶² With regard to copyrighted works of other sorts, it may be that to permit even a single putatively infringing use would incur economic costs that exceeded gains. For example, it might be that detective story writers are extraordinarily sensitive to fluctuations in their anticipated incomes, and that, as a result, the gain to consumers of forbidding book reviews altogether would exceed the efficiency losses that such a ban would cause.²⁶³ In situations of these two types, it clearly is unnecessary to rank uses. Every use of a copyrighted work of the first sort should be ruled fair; every use of a copyrighted work of the second sort should be ruled unfair.

Except in these special contexts, however, maximizing efficiency through interpretation of the fair use doctrine unfortunately requires the kind of comprehensive, comparative analysis sketched in Section B, for two reasons. First, the relationship between the aggregate rewards available to artists of a given kind and their production of works valued by consumers is almost certainly not linear; therefore, the efficiency gains associated with forbidding a given activity depend on what other uses are permitted and proscribed. Second, if the incentive/loss ratio of any activity held to be fair exceeds the ratio of any activity held to be unfair, the optimal solution has been missed.

If such a comparative analysis must be employed in most cases, is not economic analysis in this doctrinal context hopelessly impracticable? The discussion of the highly stylized case presented in section B was complex enough. If we removed the simplifying assumptions, limited the judge's investigatory power, and burdened him with other cases, it would be ludicrous, surely, to ask him to undertake an inquiry like the one outlined above. Perhaps. It is hard to imagine a judge making even rough guesses at some of the figures critical to the calculus. Especially implausible are the notions that he would be able, or willing,²⁶⁴ to ascertain the universe of ways in which copy-

²⁶² For an argument that this may well be the case for most popular "tradebooks" (of which *More Adventures* is an example), see Breyer, cited above in note 144, at 293-313. For criticism of Breyer's argument, see Tyerman, cited above in note 148, at 1108-25. It has been suggested that legal protection for *most* kinds of books may be inefficient for these and other reasons. See Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMICA* 167 (1934).

²⁶³ This seems to be the position of commentators who argue, on economic grounds, that no use of a copyrighted work should be considered fair if it results in any "significant" or "substantial" reduction in the rewards that the copyright owner could reap. See, e.g., Gordon, *supra* note 185, at 1618 (asserting that "[f]air use should be denied whenever a substantial injury appears that will impair incentives"); Smith, *supra* note 209, at 142.

²⁶⁴ Although breached with notorious regularity, the principle that a court should not consider issues inessential to the resolution of the matter before it remains deeply rooted in American law. See Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 *CLEV. ST. L. REV.* 385, 410-12 (1983-84). But

rights in the type of work before him are susceptible of being infringed and that he could estimate the effects of different levels of remuneration on the future production of works of that sort.

Even so, the analysis may have considerable value. The assumptions used in section B were not wildly unrealistic. Some of the conclusions reached by the hypothetical judge may survive transition to the real world. Moreover, a simplified version of the procedure might enable a court at least to *increase* allocative efficiency, if not to *maximize* it. Before we can derive those lessons, however, we must take into account some important considerations thus far excluded from the discussion.²⁶⁵

D. Complications

1. *Categories of Works and Uses.* — In the hypothetical case, the judge was concerned only with the production of “detective stories” and knew that there existed precisely five distinct ways of infringing the copyright in such stories. A real case would not be so nicely

cf. id. at 413–20 (advocating use of a more inclusive approach, denoted “wide-angle adjudication,” in special contexts). The kind of comparative analysis outlined in section B, while not inconsistent with the letter of that principle, would carry the court further from the facts of the case at bar than many federal judges would feel comfortable going.

²⁶⁵ One significant policy implication of the analysis conducted thus far will not be affected by the subsequent discussion and, because it does not bear directly on the content of the fair use doctrine, is perhaps worth mentioning at this point. Economists and legislators have long debated the optimal *duration* of intellectual property rights. This argument has been most heated with regard to patent life, *see* Kaplow, *supra* note 210, at 1822–29 & n.21, but has also arisen occasionally in the context of copyright law, *see, e.g.,* Breyer, *supra* note 144, at 323–29. The analysis presented in section B suggests a solution to the controversy. Assume that a legislator is confronted simultaneously with two questions: (i) Which of four possible entitlements should be allocated to creators of a certain kind of intellectual product? (ii) For how long should creators enjoy those rights? The legislator begins by arranging the four entitlements in a series in order of their incentive/loss ratios (A, B, C, D). He then determines how potential creators of works of the sort in question would respond to different levels of anticipated reward. Finally, he determines what the optimal duration would be for each possible package of entitlements. His conclusions are as follows. (i) If creators were given all four rights, the optimal life would be 1 year. (ii) If creators were given only rights A, B, and C, the optimal life would be 2 years. (iii) If creators were given only rights A and B, the optimal life would be 10 years. (iv) If creators were given only right A, the optimal life would be infinity. The legislator clearly should select option (iv), because the high incentive/loss ratio associated with right A means that the legislator can provide greater incentives to creators at a lower efficiency cost using the fourth option than using any of the other options. The general insight that emerges from this hypothetical case is that, unless the ratios associated with different entitlements are likely to change in different ways over time, it always will be more efficient to select a long patent or copyright life and then to use the procedure sketched in section B to determine which small set of entitlements would be optimal than to select a shorter life and then to use the procedure to identify a larger optimal set of entitlements. *But cf.* Kaplow, *supra* note 210, at 1839–41 (discussing in a somewhat different manner the “Simultaneous Determination of Patent-Antitrust Doctrine and the Patent Life”).

packaged. Instead, the judge would be obliged to classify (i) the plaintiff's work and (ii) the various arguably illegal uses of it.

The first of these tasks would be harder than one might expect. From an economic standpoint, it is important that authors be able to predict with some confidence what uses of their works will be considered fair and what uses will be considered unfair; otherwise, the expected income from creating those works will be uncertain, and they will not be optimally induced to develop and exercise their talents.²⁶⁶ Differentiating types of copyrighted works for the purpose of applying the fair use doctrine thus creates some inefficiency, because each division decreases artists' ability to predict how their creations will be classified and, therefore, what they will be worth. On the other hand, some differentiation seems essential. Copyright law currently covers a wide array of original works, ranging from books to films to computer software programs to advertisements. Both the responsiveness of creators of those various sorts of works to different levels and kinds of incentives and the economic impacts of different infringing uses of such works vary dramatically. Consequently, to lump all intellectual products together when attempting an analysis of the sort sketched in section B would be senseless. In short, categorizing copyrighted works for the purpose of determining what uses are fair would promote allocative efficiency, but creating too many subdivisions would reduce efficiency.

How should a judge determine how many lines to draw and where to draw them? Assume, for example, that he must decide a case involving a parody of a Broadway musical. Should the rule he prescribes cover all plays, all musicals, all Broadway musicals, or some other category?

To make an efficient choice, the judge should estimate three figures. First, he should determine how much of an efficiency gain, caused by differentiating the monetary incentives for creating different types of intellectual products, would result from moving from each level of specificity to the next. For any of a variety of reasons, the optimal combination of entitlements for musicals may be different from the optimal combination for other sorts of plays.²⁶⁷ Lumping them together would therefore result in a less-than-ideal system of incentives for playwrights of all sorts. The judge should ascertain how much less than ideal. Second, the judge should determine how

²⁶⁶ This argument assumes, realistically, that potential authors are risk averse. Thus, as their future earning power becomes less certain, fewer potential authors will write, even though the expected value of their earning power remains constant.

²⁶⁷ For example, writers of musicals might love their work less than writers of other plays and be more inclined to shift to other occupations if their incomes dropped a certain amount, or the profitability of musicals might be more vulnerable to impairment by an effective parody than the profitability of other plays.

much of an efficiency loss, caused by reducing playwrights' ability to predict their incomes, would result from each subdivision. Suppose, for example, that differentiating musicals from other plays resulted in sharply different combinations of entitlements and income levels for writers of the two sorts of works,²⁶⁸ but left a substantial number of potential playwrights uncertain as to whether the plays they contemplated writing would ultimately be classified as musicals or nonmusicals. The effect would be to sacrifice much of the efficiency gain described above by reducing the willingness of risk-averse playwrights to write works whose status was unclear. Third and finally, the judge should calculate how each additional differentiation would affect the number of cases in which the parties disputed the classification of the copyrighted work in question, and what the litigation costs generated by those controversies would be.

If he were able to get this far, the judge's task would be easy. He would subdivide a category of copyrighted works only if the first figure were greater than the sum of the second and third.

To determine how finely to slice the set of infringing uses, the judge would have to undertake a similar analysis. Assume that, in the case just described, the judge settles on "musicals" as the appropriate category and then conducts an analysis of the sort sketched in section B to determine whether parody is a fair use. He concludes that parodies fall to the right of the optimal point and, therefore, should be considered fair. It then occurs to him to differentiate parodies that use just enough material from a musical to "conjure up" the original in the minds of the audience from parodies that use more material than necessary to achieve that effect.²⁶⁹ He modifies his analysis to incorporate this distinction and concludes that the optimal point lies between the two types of parody. Should he distinguish between them in deciding this case and in announcing a rule to govern future cases?

The answer depends on the relationship between three figures: (i) the efficiency gains associated with improving the incentive system by distinguishing among parodies; (ii) the efficiency losses caused by deterring risk-averse parodists from making parodies the status of which would be uncertain; and (iii) the costs of litigating cases in which the

²⁶⁸ It is possible treating musicals and other plays differently for fair use purposes would reduce rather than increase the disparity of income that the two types of playwright could anticipate. The smaller the gap between the expected rewards associated with each category, the smaller the efficiency loss caused by writers' uncertainty as to how their creations would be classified.

²⁶⁹ Several courts have made precisely this distinction. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757-58 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D. Cal. 1955); cf. *Light*, *supra* note 185, at 628-29 (criticizing the "recall or conjure up test").

parties disputed whether more material was used than necessary. If (i) exceeded (ii) + (iii), he should make the distinction; if not, not.

2. *Stare Decisis*. — To this point, we have been talking as if the judge, in deciding a fair use case, were writing on a blank slate. Given the current state of the doctrine, it may make sense to approach the job of reconstruction in just that spirit. However, new decisions would soon begin to fill in the slate. From an economic standpoint, how should the accumulation of decisions affect the treatment of new cases?

Assume that, after a certain date, each judge confronted with a fair use defense conscientiously undertakes an analysis of the sort described in section B and writes an opinion indicating which uses of the type of copyrighted material before him should be considered fair and which uses should be considered unfair.²⁷⁰ So, in the case of Plaintiff v. Defendant, Judge #1 rules that issuing unauthorized paperback or hardcover editions of sets of detective stories and selling games based upon such stories are all unfair, whereas copying detective stories for educational purposes and quoting portions of them in critical reviews are fair. A year later, a case involving educational copying of detective stories comes before Judge #2. Judge #2 conducts another evaluation of the problem, relying in part on empirical data concerning the production of detective stories collected during the preceding year, and concludes that the optimal point lies between educational copying and criticism. Should he repudiate Judge #1's ruling?

If Judge #2 were certain of his findings, could costlessly inform all prospective detective-story writers of the new rule, and could persuade them that the rule would never change again, the answer would surely be yes. None of these assumptions, however, is likely to be true. The judge therefore should compare the present value of the efficiency gains that he anticipates would result from altering the incentive system (multiplied by the probability that he is right) with the costs of spreading the word to affected parties plus the efficiency losses associated with undermining the confidence of artists and incipient artists of *all* sorts that the legal system now in force will still be

²⁷⁰ From an economic standpoint, it is important that the judge reveal in his opinion more than whether the defendant's conduct should be considered fair or unfair. Assume that, after conducting a comprehensive analysis, a judge concludes that copyrights in works of the sort at issue in the case before him might be infringed in 5 ways — A, B, C, D, and E (in order of descending ratios); that the defendant has engaged in use D; and that the optimal combination of unfair uses is A + B + C. Consequently, the judge rules in favor of the defendant. At a minimum, it is imperative that the judge disclose in his opinion his conclusion that uses A, B, and C should be deemed unfair, because a decision in a subsequent case that any of those uses is fair might well render inefficient the rule that use D is fair.

in force when they are in a position to make some money from their creations.²⁷¹ Under these conditions, the new rule would have to be substantially better than the old to justify the change.²⁷²

3. *Property Rules or Liability Rules?*²⁷³ — We have assumed, to this point, that a judge called upon to assess a particular use of copyrighted material has only two choices: he can declare it unfair, thereby forcing the user to bargain with the copyright owner for permission to engage in it; or he can declare it fair, thereby empowering the user to engage in it without compensating the owner. In principle, there exists an intermediate option: the judge can declare the use fair if and only if the user pays the copyright owner a fee set by the judge.

From an economic standpoint, a judge's ability to employ a liability rule of the sort just described would have two advantages. First, in some cases it would enable him, by setting the price of engaging in a particular use at a level below the monopoly price that would be charged by the copyright owner, to increase dramatically the ratio of reward to monopoly loss associated with that entitlement.²⁷⁴ Such a maneuver would reduce the income the copyright

²⁷¹ Should a judge's respect for precedent vary depending on whether the rule he considers abandoning is a "holding" (as would be a ruling that educational copying is fair) or "dicta" (as would be a ruling that making a derivative game is unfair)? From an economic standpoint, there would seem to be no justification for such a distinction, insofar as the ranking of each use was essential to the ultimate holding that the use in question was either fair or unfair. The only conceivable reason for differentiating the two types of ruling is that the artists themselves would consider "dicta" less permanent and therefore would not assume that departure from "dicta" implies that the "holdings" are unstable.

²⁷² A practical implication of this insight is that, if a regime of the sort sketched in this Part of the Article were put into place, litigants would rarely attempt to challenge an established rule governing unauthorized uses of a particular kind of copyrighted work because their chances of success would be so small. Thus, the *typical* fair use case would not become "a complex economic battleground populated by expert witnesses expounding philosophies allegedly supporting or rejecting recovery," as some critics of economic analysis in this context have charged. See W. PATRY, *supra* note 6, at 456 n.520. To be sure, fair use cases in fields not yet governed by a rule would be enormously complex affairs. See *infra* p. 1739. Once a rule was adopted, however, most subsequent cases in the area would be comparatively simple.

²⁷³ This nomenclature is derived from the famous article by Calabresi and Melamed, cited above in note 194, where the phrases are defined as follows: "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. . . . Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule." *Id.* at 1092. For other discussions of the issues considered in this subsection, see 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[E][4][e], at 13-111 (1987); Gordon, cited above in note 185, at 1622-24; Timberg, *A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age*, 75 NW. U.L. REV. 193, 233-44 (1980).

²⁷⁴ To illustrate, the market for the right to make copies of a computer chess program that

owner reaped from the entitlement,²⁷⁵ so the judge would need to grant the owner more entitlements than would be required if he employed property rules exclusively. The net result of such a general reform of the doctrine would be an enhancement of economic efficiency.

Second, in situations in which transaction costs would prevent a user from purchasing the right to engage in an activity if it were held unfair, the availability of a liability rule might increase a judge's choices. Reconsider, for example, the case of copying detective stories for educational purposes considered in section B. Our hypothetical judge concluded that, if teachers were not permitted to photocopy stories, they would either assign their students anthologies or place books "on reserve," and that the economic costs generated by those

was sufficiently better than its competitors to accord its owner substantial market power might be represented graphically as follows:

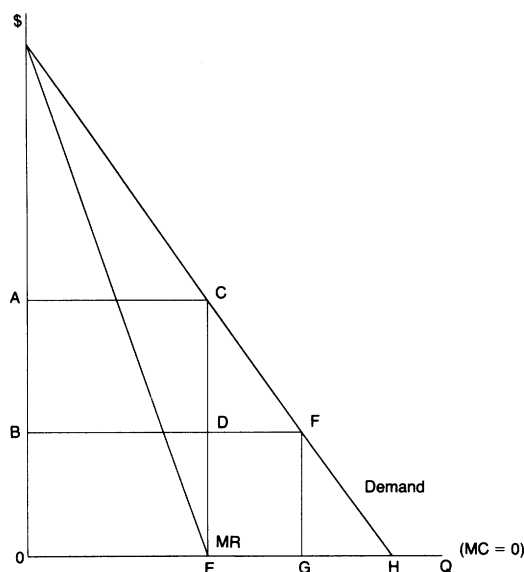


Figure 5 Sale of Permission to Copy Chess Program

Assuming (for the sake of simplicity) that no users will engage in unauthorized copying and that, therefore, the marginal cost to the copyright owner of authorizing copying is zero, the rational owner will grant permission only up to the point where he reaps no marginal revenue from an additional grant (quantity E, price A). The ratio of reward to monopoly loss associated with that pricing strategy is the ratio of the area of rectangle AOEC to the area of triangle CEH, which on the arbitrary assumptions embodied in the graph would be 2:1. If, by employing a liability rule, a judge forces the copyright owner to "sell" the right to make copies of the program for a price of B, the copyright owner will have no choice but to grant permission to G users, and the ratio of reward to monopoly loss will be the ratio of the area of rectangle BOGF to the area of triangle FGH — a much larger figure.

²⁷⁵ In the figure above, the area of rectangle BOGF is less than the area of rectangle AOEC.

responses would be substantial, rendering the incentive/loss ratio associated with forbidding the photocopying low. If the judge had the option of declaring such copying fair on the condition that the copyright owner receive from each student a royalty of, say, \$.50 per story, the situation could change considerably. Most teachers might respond by assigning the same materials in the same form they had assigned before the fee was imposed. Although the result would be to increase somewhat the price of the course materials, thereby deterring a few students from enrolling,²⁷⁶ the major source of economic loss — the diminution of the value of short-story courses to the students who do enroll — would be eliminated. The ratio of reward²⁷⁷ to efficiency loss²⁷⁸ associated with such a regime might well be quite high (especially if the size of the fee were selected shrewdly) — perhaps high enough to alter the sequence of entitlements.²⁷⁹

The foregoing analysis suggests that it is sensible for Congress, when modulating the entitlements of copyright owners in particular fields, to employ compulsory licensing systems, which permit specified uses of copyrighted works on the condition the users pay fees set by an administrative tribunal. In a few contexts, Congress has already

²⁷⁶ For discussion of the economic losses associated with this impact, see p. 1713 above.

²⁷⁷ It is important to keep in mind that the relevant figure is the *net* reward reaped by the copyright owner. Thus, determination of the numerator of the fraction would require subtracting from the owner's proceeds the cost to him of monitoring the activities of users, asserting his rights, and collecting payments.

²⁷⁸ The losses generated by such a rule would include the administrative and litigation costs associated with its enforcement, including those incurred by the author, *see supra* note 277. Those costs would probably be larger than the costs generated by a property rule, and thus would reduce the potential gains of a shift to a compulsory licensing system.

²⁷⁹ If the economic consequences of forcing Plaintiff to grant Defendant permission to copy her stories in return for a fee of fifty cents a copy are so superior to those associated with denying permission outright, why would the parties not reach an agreement to that effect without the court's aid? Put differently, what are the "transaction costs" preventing such a bargain, *see supra* note 248, that the court is able to overcome with the compulsory license? There are two possibilities. First, Plaintiff may be inclined to engage in strategic behavior — for example, to demand a high fee in order not only to maximize her revenues in this exchange, but also to set a "precedent" for her dealings with other teachers in the future. *See generally* Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982). Second, Plaintiff's net income under the compulsory licensing scheme may be smaller than the injuries she sustains as a result of permitting teachers to copy her stories. (For a summary of those injuries, see the text following note 247 above.) Thus, Plaintiff, if protected by a property rule, would not voluntarily agree to a regime under which she received only fifty cents per copy.

availed itself of this option.²⁸⁰ It ought to do so more often.²⁸¹

The circumstances in which a judge, construing the fair use doctrine, can and should employ such liability rules, however, are likely to be more limited. Although a court's remedial authority under the Copyright Act probably encompasses the power to forbid a particular use until the user pays a royalty,²⁸² that authority almost certainly does not include the power to order the creation (and funding) of an administrative agency capable of monitoring a compulsory licensing system. The court itself, therefore, would be obliged to determine an appropriate schedule of fees and to alter that schedule periodically in response to changing economic conditions. Leaving aside the question whether a court would be willing to undertake a project of that order, in many contexts the associated litigation costs would exceed the potential economic gains.²⁸³ Finally, the court's ruling would only

²⁸⁰ See, e.g., 17 U.S.C. §§ 111(d), 115, 116, 118 (1982 & Supp. IV 1986) (governing, respectively, cable television, phonorecords, jukeboxes, and noncommercial broadcasting). The royalty rates under these various provisions are periodically reviewed and adjusted by the Copyright Royalty Tribunal. See 17 U.S.C. § 801 (1982 & Supp. IV 1986). For an overview of these systems, see generally R. BROWN & R. DENICOLA, *CASES ON COPYRIGHT* 407-25 (4th ed. 1985); Greenman & Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 CARDOZO ARTS & ENT. L.J. 1 (1982).

²⁸¹ The economic advantages of a compulsory licensing system of this sort would be enhanced if Congress, when establishing an administrative tribunal responsible for regulating royalty rates, staffed it with persons capable of undertaking calculations of the sort discussed in the text and provided it with better guidance regarding how prices should be set. In the pertinent provisions of the 1976 Act, Congress gave the Copyright Royalty Tribunal (and the courts that review the decisions of the Tribunal) virtually no instruction on this score. See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 182, 190 (D.C. Cir. 1983) (cable television); *Recording Indus. Ass'n v. Copyright Royalty Tribunal*, 662 F.2d 1, 4-5, 8-9 (D.C. Cir. 1981) (phonorecords). The Tribunal consequently has felt free to set the license fees at levels it believes an "unregulated" market would produce. See 47 Fed. Reg. 52,146 (1982) (subsequently codified as amended at 37 C.F.R. § 308 (1987)) (announcing an intention to set on this basis the rates paid to copyright owners by cable television stations). For the reasons suggested above, see *supra* note 274 and accompanying text, the incentive/loss ratios associated with these activities could be dramatically improved if the rates were set *below* the levels that copyright owners, enjoying significant market power, and persons desiring access to their works would agree upon.

²⁸² The plaintiffs in the *Sony* case argued that the district court had such a power with regard to copying of copyrighted material broadcast over the airwaves. Although the Ninth Circuit insisted that the availability of such a remedy was not essential to its result, it appeared to agree with the plaintiffs. See *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 976 (9th Cir. 1981), *rev'd*, 469 U.S. 417 (1983). Although commentators continue to dispute the question, those who contend that a court has the power to deny an injunction and instead order the payment of a royalty, see Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1530-32 (1982), have the better of the argument. But cf. Note, *The Betamax Case*, *supra* note 13, at 261 (arguing that a court lacks statutory authority to set up a compulsory royalty scheme).

²⁸³ Cf. Gordon, *supra* note 185, at 1623-24 (arguing on the basis of institutional competence that such an approach is problematic).

bind the parties to the suit in which the order was announced. Similarly situated parties would have an incentive to try to secure more favorable arrangements from other courts. Such duplicative litigation would compound the costs of the remedy.²⁸⁴

In short, the efficient response to a suit implicating the fair use doctrine occasionally may be to employ a liability rule rather than the usual property rule. *Sony* may have been such a case.²⁸⁵ However, the majority of cases probably will not lend themselves to such a solution.

4. *Private Licensing Arrangements.* — The question whether, if a use were held unfair, the copyright owner and user might negotiate a licensing agreement arose in two phases of the “basic approach” presented in section B — the discussion of the deal Plaintiff and Barker Brothers might arrange²⁸⁶ and the discussion of the possibility of an efficiency-enhancing contract between Plaintiff and Defendant.²⁸⁷ This subsection refines those analyses.

(a) *Sophisticated Deals.* — Barker’s dominance in the board-game market puts it in a position to pay Plaintiff a substantial royalty for the use of *More Adventures*. Section B hypothesized that, if Barker’s unauthorized use of the book were held to be unfair, Plaintiff and Barker would negotiate a contract that would require Barker to pay Plaintiff a flat fee for each game manufactured and sold.²⁸⁸ Such a contract is not, however, the only possible outcome of their negotiation. Indeed, if Plaintiff and Barker are sophisticated bargainers (or if they are advised by sophisticated lawyers²⁸⁹), they are unlikely to reach such an agreement. Instead, they will devise some way of keeping the retail price of the game at \$10²⁹⁰ and dividing the monopoly profits generated by that pricing strategy.²⁹¹

²⁸⁴ Professor Nimmer, in discussing the desirability of such a court-ordered remedy in the context of audio home recording, asserts confidently: “Parties to subsequent actions of a similar nature could agree to be bound by the same consent decree.” Nimmer, *supra* note 282, at 1534. The author does not explain, however, why such parties would agree to abide by the terms of the original order.

²⁸⁵ See *id.* at 1529–30.

²⁸⁶ See *supra* pp. 1710–12.

²⁸⁷ See *supra* note 248.

²⁸⁸ See *supra* p. 1710.

²⁸⁹ Participation in the bargaining process by lawyers will also reduce the probability that the parties, each of whom is trying not only to capture the entire value of the licensing arrangement, but also to conceal from the other the terms to which he would consent, will fail to reach an agreement. See Cooter, *supra* note 279, at 22.

²⁹⁰ The reason that Plaintiff and Barker will seek to prevent the retail price from rising is that they both have an interest in maximizing the size of the pie to be divided. By hypothesis, \$10 is the price at which the total profits from the sale of “Detection” will be greatest. See *supra* note 238. Both parties therefore have an interest in keeping the price at that level.

²⁹¹ There are various ways the parties could achieve these results; the simplest is an agreement under which Barker promises to pay Plaintiff a fixed annual fee and not to raise the retail price.

A contract of the sort just described would fare very differently in the fair use calculus than would the arrangement discussed in section B. If the parties agreed not to alter the retail price of "Detection," a ruling that Barker's activity is unfair would not increase the efficiency losses already caused by its monopoly pricing scheme. The denominator of the fraction associated with Barker's use would therefore be only the cost of negotiating the licensing agreement — a relatively small figure. The size of the numerator would be difficult to predict,²⁹² but most likely it would be much larger than the denominator. The incentive/loss ratio, consequently, would be very large — probably large enough to require that Barker's activity be shifted to the left in the sequence of entitlements.²⁹³

In sum, when assessing the economic impact of declaring unfair a derivative use of copyrighted material by a party in a position to engage in monopoly pricing of the derivative product, it is critical to predict accurately the content of the licensing agreement that would be precipitated by such a declaration. Generally speaking, the more sophisticated the parties, the more likely they are to make a deal that benefits the copyright owner without materially harming the public, and therefore the more willing a court should be to classify the use as unfair.

(b) *Blanket Licenses*. — In situations in which many artists produce copyrighted works of a particular kind and many users are willing to pay for access to those works, the transaction costs that impede the negotiation of licensing agreements between individual artists and users might be overcome through the establishment of a blanket licensing organization. Such an organization might arise without governmental intervention in at least two ways. First, the artists might form an association to which they cede their rights to license their works. The association would then negotiate agreements with individual users and distribute the revenues to its members. Second, the users might form an association, which would negotiate agreements with individual artists.²⁹⁴

The advantage of such organizations is that, by enabling artists to augment their revenues without incurring the efficiency costs caused

²⁹² See *supra* note 239.

²⁹³ If the judge had previously concluded that Barker's activity should be declared unfair, see *supra* p. 1717, this change in the order of the uses would have no effect on the judge's decision. By contrast, had the apogee of the net-efficiency curve been to the left of Barker's activity, the change would probably lead to a different outcome.

²⁹⁴ Organizations of both types — known respectively as ASCAP and BMI — have arisen in the context of the use of copyrighted musical compositions by television and radio stations, nightclubs, and restaurants. For discussion of the histories and current structures of the two organizations, see R. BROWN & R. DENICOLA, cited above in note 280, at 380–91; S. SHELML & M. KRASILOVSKY, *THIS BUSINESS OF MUSIC* 135–52 (rev. ed. 1971).

either by banning the putatively infringing activity altogether²⁹⁵ or by administering a judicial compulsory licensing system,²⁹⁶ they would dramatically improve the incentive/loss ratio associated with the activity at issue.²⁹⁷ So, in the case of Plaintiff v. Defendant, discussed above, the judge, before locating Defendant's conduct in the sequence of arguably illegal activities, should assess the likelihood that holding educational copying of detective stories unfair would prompt authors or teachers to form such an organization,²⁹⁸ and should modify the ratio associated with Defendant's conduct accordingly.

5. *Synergy and Progress.* — The analysis thus far has implicitly treated creativity as an individualistic phenomenon. A good detective story, it has been assumed, is created out of whole cloth by a gifted individual writer. Thus, the way to improve the menu of detective stories available to consumers is simply to increase, through adjustments in the incentive system, the number of gifted writers who decide to exercise their talents rather than become lawyers. Creativity, however, is often — perhaps always — a more social phenomenon than this scenario suggests. Every writer, composer, and filmmaker draws on the work of his predecessors when creating something new,²⁹⁹ and most are stimulated by the ongoing work of their contemporaries.

Sensitivity to this characteristic of artistic creation should prompt a judge to watch for two possibilities when estimating the efficiency gains and losses associated with a particular combination of entitle-

²⁹⁵ See *supra* pp. 1713–14.

²⁹⁶ See *supra* pp. 1726–27.

²⁹⁷ Cf. R. POSNER, *supra* note 204, at 274 (discussing the cost savings such systems make possible); Note, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 COLUM. L. REV. 1245, 1259–62, 1271–75 (1983). Depending, *inter alia*, on the proportion of the market it controls and its effects on the “output” of copyright licenses, such an organization might be held to violate the antitrust laws. Cf. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (holding that a blanket licensing agreement does not constitute a *per se* violation of the Sherman Act, but may be subject to scrutiny under the rule of reason); *Columbia Broadcasting Sys. v. American Soc’y of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980) (holding that the particular blanket licensing scheme in question was reasonable and lawful), *cert. denied*, 450 U.S. 970 (1981); Note, *supra*, at 1262–71 (reviewing possible bases of liability). The pretext for judicial intervention created by such a violation would create another opportunity for enhancement of economic efficiency. If a court were able to limit the size of the licensing fees charged by the organization, it could use the principle discussed above, see *supra* p. 1723, to improve the incentive/loss ratio. Cf. R. BROWN & R. DENICOLA, *supra* note 280, at 382–86 (reviewing the consent decrees under which ASCAP operates, some aspects of which provide for judicial review of the “reasonableness” of the royalties it charges).

²⁹⁸ In making this point, I follow Professor Gordon, who argues persuasively that a court presented with a fair use defense should try to determine whether, if the defense were rejected, the parties would develop a “clearinghouse system to simplify the process of purchasing permission and thus allow a market to function.” Gordon, *supra* note 185, at 1620.

²⁹⁹ See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (Story, J.); R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* ch. 7 (forthcoming 1988).

ments. First, when an art form is in its infancy, adjusting the compensation system so as to increase the number of artists engaged in developing it might substantially increase the quality and variety of products available to consumers in the near future because each participant in the venture would build upon and stimulate the work of all the other participants to an unusual degree.³⁰⁰ As opportunities for synergy of this sort diminish, courts should reduce the copyright protection for such works by expanding the set of uses of them deemed fair.³⁰¹

Second, a judge should hesitate before declaring transformative or productive uses of copyrighted material unfair. In many contexts, an artist's ability to engage in creative work depends on his freedom to make use of other copyrighted works in ways that might be considered infringements. A parodist, to be successful, must mimic an original work at least enough to make the object of his ridicule recognizable to his audience. The designer of a computer operating system can generate a better system more rapidly if he is permitted to incorporate portions of other copyrighted systems.³⁰² Proscribing unauthorized activities of these kinds risks diminishing the stock of intellectual creations available for popular consumption.³⁰³

³⁰⁰ The development of photography in the late nineteenth and early twentieth centuries and the development of video games in the 1970's may be examples of such circumstances.

³⁰¹ It appears that the effectiveness of such an "infant industry" approach to the interpretation of the fair use doctrine would be maximized if courts were able to keep secret their plan to reduce the level of copyright protection after the initial surge of creativity had passed. However, leaving aside the problem of preventing premature "leaks" of the courts' intentions, the diminution of other artists' confidence in the stability (and decency) of the legal system that would result from implementation of such a strategy would more than offset the strategy's short-term benefits. For fuller exploration of the question of artists' confidence in "the system," see section IV.D.2 above.

³⁰² For a description and criticism of the state of the law pertaining to this problem, see Menell, cited above in note 198, at 1353-67.

³⁰³ If the benefits to consumers of transformative uses of copyrighted materials are so great, why cannot the persons who engage in such uses charge consumers enough to enable them to purchase licenses from the copyright owners? If T.S. Eliot wants to incorporate in *The Waste Land* passages from other authors' works, see R. POSNER, *supra* note 299, at 38-40, why not let him buy permission from those authors to use their language? The result would be to increase the price of *The Waste Land*, but not to diminish the stock of intellectual creations. For three reasons (operative to different degrees in different contexts), voluntary transactions of this sort cannot be relied upon to facilitate creative uses. First, various circumstances are likely to prevent the transformative user from charging consumers the full value to them of his work — for example, the infeasibility of engaging in perfect price discrimination and the impossibility of preventing some unauthorized copying of his work. Second, a transformative user (like Eliot) who wishes to incorporate passages from many prior works would incur enormous costs in negotiating licenses with all of the copyright owners in question. Third, many copyright owners would refuse to sell permission to make use of their works for any price. The third problem is especially serious in the context of parody. See Note, *The Parody Defense*, *supra* note 13, at 1397 n.12 (arguing that, "because of parody's caustic nature, a parodist often would not be able to secure an original author's permission through normal licensing procedures"). *But cf.* Net-

This insight can be made more concrete by returning once again to the case of Barker's use of Plaintiff's book.³⁰⁴ To simplify the discussion of that case in section B it was assumed that neither the number nor the quality of board games based upon copyrighted stories would be impaired by a rule requiring developers of such games to purchase the right to use the stories.³⁰⁵ That assumption may be unrealistic. The ability to invent interesting board games is a rare talent, and the willingness of persons possessing that talent to develop and exercise it is likely to be affected by their expectations of monetary rewards. Thus, if Barker were required to pay Plaintiff a fee and consequently to forgo a portion of the monopoly profits it otherwise would make on the sale of "Detection," the compensation it paid creators of such games would probably decline, and fewer or inferior games would be produced. The result would be an efficiency loss analogous to the efficiency loss caused by undercompensating detective-story writers like Plaintiff. That figure would have to be added to the denominator of the ratio associated with Barker's unauthorized use of Plaintiff's book, thereby reducing the size of the fraction and perhaps altering the ranking of the five activities enough to compel redetermination of the optimal package of entitlements.³⁰⁶

The general point is that, when calculating the incentive/loss ratio associated with a creative use of copyrighted material, a judge must be sure to include in the denominator the present value of the consumer surplus that would be sacrificed if persons who engaged in the use were obliged to compensate the copyright owner and, as a result, produced fewer or poorer derivative intellectual products.³⁰⁷

terville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225, 233 (1962) (describing one situation in which a copyright owner was willing to license a parody of his work for a rumored fee of \$100,000).

³⁰⁴ See *supra* pp. 1710-12. For the purpose of this reexamination of the case, assume that, if the activity were declared unfair, the parties would negotiate a licensing arrangement of the sort described in section B, not a more sophisticated agreement of the sort described in the preceding subsection.

³⁰⁵ See *supra* note 244.

³⁰⁶ The foregoing modification of the analysis presented in section B might not be the end of the tale. If board games or their components were themselves copyrightable, see *supra* note 224, perhaps the diminution in the compensation paid to their inventors by a rule holding unauthorized uses of detective stories unfair could be offset in whole or in part by an adjustment in the rules governing unauthorized uses of *board games*. If so, the judge might be able to improve the newly revised ratio associated with Barker's behavior by making a change in the fair use doctrine as applied to games. The procedure the judge would have to employ to ascertain the most efficient combination of rules is sufficiently complex — and sufficiently dependent upon information likely to be unobtainable — as not to merit presentation here.

³⁰⁷ In a paper that came to hand as this Article was going to press, Judge Posner and Professor Landes develop a formal economic model that emphasizes the costs associated with preventing authors from making creative use of copyrighted materials. See W. Landes & R. Posner, *An Economic Analysis of Copyright Law* (draft of April 13, 1988). The authors'

6. *Frustrating Popular Expectations.* — The large majority of fair use cases involve issues about which most Americans are either ignorant or indifferent.³⁰⁸ In unusual circumstances, however, there may exist something approaching a popular consensus regarding the fairness of a particular activity. The best example is the *Sony* case. By the time the Supreme Court rendered its decision, much of the population seems to have concluded that it was perfectly appropriate behavior to record copyrighted programs broadcast over the public airwaves.³⁰⁹

Judges who desire to maximize allocative efficiency should be watchful for such situations and, when they occur, should be loath to issue decisions inconsistent with the popular view. The reason is that otherwise they risk undermining people's confidence that they can predict the content of the laws that affect their lives. Most Americans regularly make major decisions (for example, to lease an apartment, to buy or sell a car), the rationality of which depends heavily on the content of legal rules, with only the vaguest idea what those rules are. We act this way partly because we believe that, by and large, the law is just, and that, by consulting our sense of justice, we can guess with reasonable accuracy what the rules are and will be. Each time we are informed of a significant legal rule inconsistent with our sense of justice, that confidence is shaken. A person's loss of confidence of this sort will prompt him to respond in one of two ways, each of which will entail economic costs. He will either spend time he would not otherwise have spent learning what the relevant legal rules are before commencing a project,³¹⁰ or he will decide not to undertake the project at all.³¹¹ The more widespread the upset expectation, the more common these responses will be and the larger the associated economic losses will be. To be sure, even a notorious violation of a popular assumption regarding the content of a legal rule may impair only marginally the willingness of Americans to engage in economic and social activity without investigating their legal rights, but the enormous aggregate economic losses that would result from

recommendations regarding the shape of copyright law in general and the fair use doctrine in particular are consistent with the argument advanced here.

³⁰⁸ Cf. *supra* section II.B.5 (discussing the rarity of consensus regarding the "propriety" of a given unauthorized use of copyrighted materials).

³⁰⁹ For typical statements of that opinion, see Editorial, *But Is It Piracy?*, Wash. Post, Jan. 23, 1983, at C6, col. 1 (arguing that the Court should reject the studios' pleas); Shales, *I'll Tape Tomorrow; And So Will You, Thanks to the Court*, Wash. Post, Jan. 18, 1984, at B1, col. 1 (approving the outcome of the case).

³¹⁰ If the rules proved to be exactly as the actor suspected, the time and effort spent ascertaining them would constitute a deadweight loss.

³¹¹ Assuming the project (purchasing a new car, for example) would have made the actor better off, the decision not to undertake it also results in an efficiency loss.

even a modest reduction of that willingness should be a cause for concern.

7. *Shaping Preferences.* — In the discussion to this point, popular tastes for different sorts of intellectual products have been taken as given. More specifically, it has been assumed that a consumer's desires for books, movies, software programs, etc., depend neither upon his access to such goods nor upon behavior in which he or other members of the society might engage.³¹² However, as "choice theorists" recently have begun to point out,³¹³ those assumptions are unrealistic; our tastes are affected in countless ways by our actions.³¹⁴ Our desires for some activities are intensified by engaging in them — either because they are physically or psychologically addictive, like using heroin or jogging,³¹⁵ or simply because they provide pleasures that increase with familiarity, like playing chess.³¹⁶ Desires to own certain objects or enjoy certain rights are enhanced rather than diminished by indulgence; I am likely for a variety of reasons³¹⁷ to place a higher value on a bottle of wine or on the right to an odor-free environment if I am already entitled to it than if I am offered the chance to purchase

³¹² In section B, for example, it was assumed that Americans' tastes for detective novels equivalent in quality to *More Adventures* would not be affected significantly by the frequency with which they purchased and read such novels.

³¹³ The relevant literature is reviewed in March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, in RATIONAL CHOICE 142–70 (J. Elster ed. 1986).

³¹⁴ The scholarship pertaining to phenomena of the sorts described in this paragraph is insightfully canvassed in Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1145–66 (1986).

³¹⁵ On the possibly addictive character of jogging, see Taylor, Sallis & Needle, *The Relation of Physical Activity and Exercise to Mental Health*, 100 U.S. DEPT. OF HEALTH AND HUMAN SERVS., PUB. HEALTH REP. 195, 199 (March/April 1985).

³¹⁶ Economists refer to attitudinal shifts of this sort as "endogenous changes in tastes." See e.g., Yaari, *Endogenous Changes in Tastes: A Philosophical Discussion*, in DECISION THEORY AND SOCIAL ETHICS: ISSUES IN SOCIAL CHOICE 59 (H. Gottinger & W. Leinfellner eds. 1976). Tastes susceptible to modification in this way are sometimes contrasted with "exogenous" preferences. See, e.g., March, *supra* note 313, at 153 (defining "exogenous tastes" as tastes that, "by whatever process they may be created, are not themselves affected by the choices they control"). As the example of chess suggests, it is difficult in many circumstances to discern whether an actor's tastes have been changed by engaging in an activity or whether he has merely learned that he has certain tastes and that they can be satisfied by continuing to engage in the activity. Because the two effects require similar modifications of the economic analysis of the fair use doctrine, the distinction is not pursued here.

³¹⁷ The more important reasons are: (i) my total wealth is greater if I am entitled to the wine or clean air and am considering selling it than if I am being asked to purchase it, and the greater my wealth, the less value I place on a dollar and therefore the more dollars I am willing to spend for a given entitlement, see, e.g., R. POSNER, *supra* note 204, at 15; (ii) possession of the wine or clean air will sensitize me to the pleasures it can provide; and (iii) my psychological makeup prompts me to prefer received income to opportunity income, see Kelman, *supra* note 196, at 678–81; but cf. Spitzer & Hoffman, *supra* note 196, at 1189 (arguing that Kelman fails to substantiate his thesis).

it.³¹⁸ We also frequently immerse ourselves in communities — such as the Armed Forces, law school, and country clubs — that we know will alter our personalities and tastes.

As the last example suggests, not only do our actions shape our preferences, but we often choose between alternative courses of action *in order* to shape our preferences.³¹⁹ In circumstances in which we worry about our capacities to control the evolution of our tastes individually, we frequently use systems of collective control — most notably the legal system — to manage our preferences.³²⁰

In debates over the extent to which government should support the arts, the malleability of popular tastes has long been recognized. Much of the continuing controversy in that area concerns whether government officials may legitimately influence people's desires and, if so, how they should exercise that power.³²¹ Such questions have not hitherto been raised in arguments concerning the appropriate content of the fair use doctrine, but brief reflection makes plain both their relevance and the challenge they present to an economic analysis of the field.

Consider the following case. After conscientiously examining the various ways in which the copyright in a play³²² might be infringed, a judge concludes that the incentive/loss ratio associated with classifying a parody of a play as infringement would be slightly lower than the ratio associated with classifying a board game based upon the

³¹⁸ For discussion of this general phenomenon, see Sunstein, cited above in note 314, at 1150–52 (referring to it as an “endowment effect”); Thaler, *Illusions and Mirages in Public Policy*, 73 PUB. INT. 60, 64–66 (1983); and Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 43–47 (1980). A related aspect of the dependence of tastes on behavior is the phenomenon of so-called “posterior preferences.” We often “find meaning and merit in our actions after they are taken and the consequences are observed and interpreted.” March, *supra* note 313, at 160. In other words, through rationalization, we make our preferences conform to our conduct rather than vice versa.

³¹⁹ To illustrate: *X* decides not to take up chess because she suspects that she would come to love it and consequently would devote an inordinate amount of time to the game. *Y* enters law school rather than business school because, although he predicts that he would be happier ten years hence as a businessman than as a lawyer, he currently believes that law is a more socially responsible profession and he does not wish his sense of civic duty to atrophy. For insightful discussions of decisions like these, see J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 76–85 (rev. ed. 1984), and Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985).

³²⁰ For examples and thoughtful discussion of the practice, see J. ELSTER, cited above in note 319, at 84–85; Andenses, *The Moral or Educative Influence of Criminal Law*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 50 (J. Tapp & F. Levine eds. 1977); and Sunstein, cited above in note 314, at 1137–38, 1140–42, 1153–54.

³²¹ See generally *Panel Discussion: Art as a Public Good*, 9 COLUM. J. ART & L. 143 (1985) (debate among Professors Ronald Dworkin, Frank Michelman, Robert Nozick, and Thomas Scanlon, moderated by Professor Judith Thomson).

³²² Assume the judge has undertaken an inquiry of the sort sketched in section IV.D.1 above and concluded that “play” is the appropriate category.

play as infringement and that the optimal point lies between those two activities. He is therefore inclined to rule that making a parody is a fair use whereas making a board game is not. It then occurs to him that, if other courts follow his lead, his ruling may affect not just the availability and price of parodies and board games, but also popular tastes for them. Further empirical investigation convinces him that, if he reverses the order of the two entitlements and declares parody unfair and derivative board games fair, people will soon begin to lose interest in parody for several reasons. Few playwrights will grant parodists permission (even for a fee) to make light of their plays.³²³ As a result, the supply of parodies will drop substantially, the price³²⁴ of parodies will rise, and fewer people will see them. Parody is a subtle art form, appreciation of which depends in part on frequent exposure to it. Depleting the stock of parodies will therefore diminish popular desire for and enjoyment of parody. In addition, a psychological phenomenon that has come to be known as the "sour grapes effect"³²⁵ will prompt parody aficionados to persuade themselves that they did not really want to see the parodies that they are unable to view.³²⁶ Finally, that the law frowns on parody will diminish popular taste for it.³²⁷ The diminution in demand that results from this combination of responses will, in turn, sharply reduce the monopoly losses associated with declaring parody unfair,³²⁸ and will therefore increase the incentive/loss ratio associated with parody,³²⁹

³²³ See *supra* note 303.

³²⁴ The "price" would be the price of admission if a parody were produced as a play, or the fee demanded by the studio producing a parody if it were presented on commercial television. The price would rise not only because of the constriction of the supply, but also because the cost of each parody would now include the fee demanded by the owner of the copyright in the work parodied.

³²⁵ See J. ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); Sunstein, *supra* note 314, at 1135, 1138-39, 1146-50.

³²⁶ It is not obvious that the aficionados will respond this way. Although preventing a person from satisfying his desire for a good may make him value it less (apparently in order to avoid the "cognitive dissonance" associated with frustration), it may prompt him to value it more — a phenomenon sometimes referred to as the "the grass is always greener" effect, see Sunstein, *supra* note 314, at 1148, as a "counteradaptive preference," see J. ELSTER, *SOUR GRAPES*, *supra* note 325, at 111-12, or as the "forbidden fruit is sweet" effect, see *id.* at 111.

³²⁷ See Spitzer & Hoffman, *supra* note 196, at 1211 (discussing the impact of a declaration that a certain activity is illegal upon people's desire to pursue that activity). Again, this effect is far from inevitable. To some people in some cultures, a good or activity is more attractive if the government opposes it. See *id.* (discussing the possibility that young people may demand more marijuana because it is illegal). In the hypothetical case, the judge concludes that delegitimation of parody will reduce rather than enhance demand for it.

³²⁸ The reason for the reduction in monopoly losses is that the diminution in demand for parody would reduce the consumer surplus foregone by depriving consumers access to parody. See Figure 1, *supra* note 201.

³²⁹ It might seem that the diminution in demand for parody would reduce the reward copyright owners could reap (in the form of fees granting parodists permission to ply their trade)

making it higher than the ratio associated with board games.³³⁰ Consequently, although holding parody unfair and board games fair would be less efficient, given *current* tastes, than the opposite decision, the change in popular preferences caused by the ruling would soon make adhering to it more efficient than reversing it. Moreover, the judge concludes that, when the ruling's short-term efficiency losses and long-term efficiency gains (as compared to the decision he was initially inclined to make) are reduced to present values, the latter substantially exceed the former. What should the judge do?

The foregoing example may seem fanciful, but analogous (albeit less clear-cut) problems arise frequently in fair use cases. Virtually any decision that may significantly affect the availability or price of an art form can affect popular tastes for it. A judge called upon to decide such a case must first make an effort to predict the impact on popular preferences of alternative rulings,³³¹ and then devise a system for choosing between those trajectories.³³²

Assume, for the moment, that the judge succeeds in the first enterprise and has at least a rough idea of how the rules he is considering would affect tastes. On what basis should he make his decision? The literature on "law and economics" is surprisingly barren of reflection on that question.³³³ What follows are some preliminary speculations on the issue.

in direct proportion to the diminution of monopoly losses, thereby leaving the ratio unchanged. The reason this will not occur is that most of the "reward" to copyright owners caused by classifying parody as an unfair use derives from avoiding the injury to the reputation of their works caused by parodies, not from the fees they can charge parodists. That reward will not be altered by the reduction in demand for parody.

³³⁰ The judge of course could not take for granted that the ratio associated with board games will remain unchanged. In this case, he concludes that the percentage of the market for board games composed of games derived from plays is so small that neither of the decisions he is considering will have a significant impact on the supply, price, or apparent legitimacy of board games.

³³¹ Two kinds of impact on popular tastes affect most clearly the design of an optimal fair use doctrine: (i) preference changes that alter the incentive/loss ratios associated with putatively infringing activities; and (ii) preference changes that increase or decrease the aggregate rewards available to creators of a particular art form and therefore require an expansion or contraction of the total package of legal entitlements accorded those creators. The parody/board game case recounted above, *see supra* pp. 1735-36, illustrates the first sort of impact. Changes of that type are likely to occur whenever the copyright owner's response to a declaration that a use is unfair is to deny permission to engage in it (rather than license it for a fee) and whenever a substantial portion of the monopoly losses associated with forbidding an activity consist of the relatively stable costs of running an organization like ASCAP or BMI, *see supra* pp. 1728-29. *Sony* involved many impacts of the second sort.

³³² Cf. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 71 & n.31 (1984) (arguing that the "Coasean analysis" must be expanded to take into account "how the law shapes social perception and evaluation through a complex process of education and indoctrination").

³³³ Cf. J. ELSTER, SOUR GRAPES, *supra* note 325, at 110 n.3 (the author does "not know of any discussions in the economic literature of adaptive preferences" in the sense in which he uses

The style of economic analysis employed in these pages takes consumers' desires as given.³³⁴ On that premise, it might seem that whichever decision in a fair use case promises to make people happier — judged by the value they *will* place upon the menu of intellectual products available to them in the future — ought to be adopted.³³⁵ So, in the case described above, the judge should declare parody unfair and board games fair.

What that approach ignores, however, is that consumers are likely to have opinions regarding whether and how they want their tastes reshaped — so-called “preferences about preferences” — and that those opinions deserve at least as important a role in the economic calculus as first-order preferences.³³⁶ Just as we respect an individual's decision to go to law school rather than business school — even (indeed especially) if it is motivated by a desire to have his character modified in a particular way — so ought we to defer to the desires of members of the public regarding whether they want to be sensitized to the advantages of opera, desensitized to the pleasures of parody, etc. If this analogy holds, a judge confronted with a fair use case would have to ascertain and take into account the attitudes of the persons who will be affected by his decision toward alternative ways of re-fashioning their tastes and the amounts they would pay to have those attitudes respected.

Much of the appeal of the foregoing solution derives from its apparent conformity with the central principle of modern liberalism

the phrase). Professor Yaari's article contains a brief discussion of the legitimacy of “regulatory intervention” to control exchange processes contaminated by the phenomenon of endogenous changes in tastes. See Yaari, *supra* note 316, at 88–93. Unfortunately, that discussion bears at most a tangential relationship to the question presented in the text.

³³⁴ See *supra* p. 1699.

³³⁵ The hypothetical case often used to illustrate this point is as follows. Assume that *X*, who now lives in the country, is well aware of the pleasures the city has to offer but still likes country living better than city living and does not wish to move. Assume further that, if forced to move to the city, *X*'s tastes would change and she not only would come to prefer city living but also would be happier than she had been in the country. Should a policymaker devise some way to compel *X* to move to the city? Professor Sen at one time seemed to suggest that the answer is yes, see A. SEN, EMPLOYMENT, TECHNOLOGY, AND DEVELOPMENT 53–54 (1975), but has since disavowed that view, see Sen, *Plural Utility*, 81 PROC. ARISTOTELIAN SOC'Y 193, 213–14 n.41 (1980). Professor Roemer, in an unpublished paper, argues that forcing *X* to move would entail a degree of “paternalism” or “authoritarianism” that “will appeal to only a limited number of people.” J. Roemer, Optimal Endogenous Preferences 9, 12 (1985) (unpublished draft on file with the Harvard Law School library). He argues, however, that if the policymaker can devise a procedure for inducing *X* gradually and “voluntarily” to change her mind (e.g., by offering her a few amenities of city life (which she likes and selects even on the basis of her country tastes), the consumption of which alters her tastes, then offering her a few more amenities, etc.), he ought to do so. See *id.* at 10. Professor Elster disagrees. See J. ELSTER, ULYSSES AND THE SIRENS, *supra* note 319, at 81–83.

³³⁶ For a general discussion of the distinction between first- and second-order desires, see Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

— “that the government [should] treat all those in its charge *as equals*, that is, as entitled to its equal concern and respect.”³³⁷ A corollary of that principle, it is commonly thought, is that “government must be neutral on . . . the question of the good life” — must not give preference in its decisions to any particular vision of what gives value to life.³³⁸ Fidelity to that notion might seem to require that government, represented by the judge in a fair use case, defer to consumers’ current attitudes regarding the sorts of persons they wish to become.

Further analysis, however, reveals two defects in the proposed procedure. First, its conformity with liberalism proves illusory. If the judge’s decision could be expected to affect the tastes of only one person, deference to that person’s second-order preferences might well be the course most respectful of his autonomy. Most decisions, however, will affect the tastes of large numbers of persons, whose second-order preferences differ. Under those circumstances, deference to the convictions of the majority (or worse yet, the minority) will give rise to the liberal nightmare — the imposition on some persons of others’ conception of the good.³³⁹

Second, consumers’ second-order preferences may prove as malleable as their primary tastes. If so, the judge would have to consult their third-order preferences to choose between alternative ways of shaping their second-order preferences. The danger of an infinite regress, at each stage of which the judge’s capacity to ascertain persons’ desires diminished, should be apparent.

The latter point has additional, more fundamental ramifications. If it turns out that not only our primary desires but also our views of the sorts of persons we wish to become are influenced by law, and if the legitimacy of the laws by which our outlooks have already been molded cannot be taken for granted,³⁴⁰ then the reasons why the fair use doctrine (or any other doctrine) should be modified to increase the satisfaction of our extant tastes become obscure.³⁴¹ Put differently,

³³⁷ Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 125 (S. Hampshire, ed. 1978) (emphasis in original). For an argument that taking into account “preferences about preferences” also has the advantage of allowing us to screen out people’s nastiest desires and therefore makes welfare economics a less easy target for its critics, see Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (J. Elster & A. Hylland eds. 1986).

³³⁸ See Dworkin, *supra* note 337, at 127; see also R. DWORKIN, *supra* note 169, at 441 n.19.

³³⁹ To the extent that persons’ second-order preferences incorporate not just desires regarding the kinds of tastes they themselves wish to have, but also convictions regarding the sorts of tastes everyone ought (or ought not) to have, the proposed procedure would also run afoul of the liberal principle that “external preferences” should not be taken into account when making collective decisions. See, e.g., R. DWORKIN, *supra* note 139, at 235–36.

³⁴⁰ See Sunstein, *supra* note 314, at 1145–46.

³⁴¹ See Dworkin, *supra* note 337, at 143 (“[S]ince the preferences people have are formed by the system of distribution already in place, these preferences will tend to support that system,

recognition of the ubiquity of preference-shaping casts doubt on the principle of consumer sovereignty upon which the currently dominant form of economic analysis of law rests. If the argument developed in the preceding forty pages is not to be rendered irrelevant, it is imperative that we identify some standard of value independent of consumers' current desires that can temper or set into context the wealth-maximizing principle to which we have thus far paid obeisance.³⁴² The job of developing such a standard is begun in Part V. Before taking up the task, however, we should pause to consider the lessons of the investigation we have just completed.

E. The Value of the Method

Few judges would be willing, when confronted with a copyright infringement case in which the defendant invoked the fair use defense, to attempt an analysis of the sort sketched in sections B and D. Of those inclined to commence such a project, few would succeed. To ascertain the economically optimal package of entitlements for a given type of copyrighted work using this mode of analysis, the judge would need an extraordinary amount of information, much of it very hard to obtain. Even determining popular tastes for different sorts of intellectual products and their uses would be difficult. Gathering reliable data with regard to such crucial variables as the sensitivity of different types of artists to fluctuations in their anticipated incomes³⁴³ and the mutability of each of the relevant sets of preferences would probably be impossible.³⁴⁴

which is both circular and unfair."); Roemer, *Rational Choice Marxism: Some Issues of Method and Substance*, in *ANALYTICAL MARXISM* 193 (J. Roemer ed. 1986).

³⁴² Professor Sunstein, whose writings have stimulated much of my thought in this area, responds somewhat differently to the perception that, in many contexts, the arguments in favor of deferring to popular preferences are weak. His proposal is that we should ignore or override those preferences and use the law to inculcate different tastes when and only when the "autonomy" of the affected persons would be enhanced. See Sunstein, *supra* note 314, at 1136. Cf. J. ELSTER, *SOUR GRAPES*, *supra* note 325, at 135-40 (also attempting to develop and rely upon the notion of "autonomous" desires).

Sunstein's reluctance to define "autonomy" makes it difficult to assess his proposal. My tentative judgment is that the enterprise, to the extent it attempts (by referring to an ostensibly neutral notion of freedom) to avoid the highly controversial task of articulating a theory of better and worse tastes (i.e., a vision of the good life), cannot succeed. Final judgment on that question must await Sunstein's elaboration of his argument. See Sunstein, *Disrupting Voluntary Transactions*, 29 *NOMOS* (forthcoming 1988).

³⁴³ For an explanation of the need for such information, see p. 1715 above.

³⁴⁴ Cf. Kaplow, *supra* note 210, at 1842-43 (expressing pessimism regarding the capacity of courts to develop an efficient resolution of the tension between patent and antitrust law); Perlman & Rhinelander, *Williams & Wilkins Co. v. United States: Photocopying, Copyright, and the Judicial Process*, 1975 *SUP. CT. REV.* 355, 373-79 (arguing that the "hard evidence" necessary to evaluate a particular invocation of the fair use doctrine on economic grounds is not available); Priest, *What Economists Can Tell Lawyers About Intellectual Property*, in *THE ECONOMICS OF*

The fact that it would be infeasible to use the method outlined above to generate a fair use doctrine that would *maximize* allocative efficiency, however, does not imply that the approach is useless. On the contrary, the method points to several ways in which the doctrine could be amended that would substantially reduce the waste in resources it currently produces. The most important of those guidelines are reviewed below.

1. *Arranging Entitlements in the Right Order.* — If two putatively infringing activities pose comparable dangers to the incomes of the owners of copyrights in a particular type of work, and if the incentive/loss ratio associated with the first exceeds the ratio associated with the second, a rule that the first is fair and the second unfair is less efficient than a rule that the first is unfair and the second fair. Courts and commentators often violate this relatively simple guideline because they fail to take into account all of the potential gains or efficiency losses caused by proscribing a given activity. The three most common and serious of those errors (recognition of which is facilitated by the foregoing analysis) are as follows.

(a) *Narrow Conceptions of "Harm" to Copyright Owners.* — The numerator of the ratio associated with a putatively infringing use is the gain to creators of a particular type of work that would result from forbidding the use.³⁴⁵ The reason we are interested in such "gains" is that, in combination, they constitute the monetary incentive for creating such works.³⁴⁶ It follows that any predictable improvement in the welfare of creators caused by forbidding a use should count as a "gain."³⁴⁷ Several of the hypothetical examples discussed in the preceding pages have illustrated that principle.

When defining the "injury" to copyright owners caused by declaring particular uses fair, courts often ignore this point. For example, in *Consumers Union v. General Signal Corp.*,³⁴⁸ the publisher of *Consumer Reports* sought an injunction against the broadcast of a vacuum-cleaner advertisement that quoted some passages from the magazine's favorable review of the product. The plaintiff argued that consumers seeing the advertisement would suspect that the manufacturer of the vacuum cleaner had paid *Consumer Reports* to endorse the product and would lose faith in the objectivity of the magazine's reviews of other products. The Second Circuit vacated the district

PATENTS AND COPYRIGHTS, *supra* note 185, at 19–24 (arguing that the answer to the question is "very little," primarily because the empirical data necessary to make intelligent recommendations is altogether lacking).

³⁴⁵ See *supra* p. 1707.

³⁴⁶ See *supra* pp. 1700, 1715.

³⁴⁷ Or, conversely, any predictable reduction in creators' welfare caused by permitting the use should be counted as a "harm."

³⁴⁸ 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984).

court's grant of a preliminary injunction largely on the grounds that "[t]he copyright laws . . . are not aimed at recompensing damages which may flow *indirectly* from copying"³⁴⁹ and that the plaintiff had alleged, at most, a likelihood that "the value of possible *future* issues of *Consumer Reports*" would be impaired by the advertisement, whereas the law was concerned only with "the effect of the use upon the potential market for or value of *the copyrighted work*."³⁵⁰ If the plaintiff's fears were justified, the loss of revenue to publishers of consumer magazines caused by legalizing the defendant's behavior could well be enormous, and the incentive/loss ratio associated with forbidding the practice could be high.³⁵¹ By refusing to recognize as "harms" the injuries predicted by the plaintiff, the court implicitly treated the ratio associated with the activity as zero, and may well have wrought considerable inefficiency by its decision.³⁵²

Commentators are equally prone to error on this issue. Most articles that attempt to determine whether a particular activity should be deemed a fair use concentrate on the threat the activity poses to copyright owners' ability to exploit the "primary" or "ordinary" markets for their works, and deliberately or unconsciously exclude from their analysis other ways in which the activity in question could affect the welfare of the copyright owners.³⁵³

³⁴⁹ *Id.* at 1050 (emphasis added).

³⁵⁰ *Id.* at 1051 (emphasis in original).

³⁵¹ The denominator of the fraction would be the efficiency losses that resulted when consumers, denied immediate access to the language used by *Consumer Reports* in its review, made purchases they would not have made had they been given easier access to that language.

³⁵² Another recent illustration of this common error is the decision of the the Ninth Circuit in *Hustler Magazine v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986). The Moral Majority, as part of a fundraising campaign, sent to some of its members letters which included photocopies of a copyrighted obscene parody (featuring Rev. Jerry Falwell) which had been published by Hustler Magazine. Hustler brought a copyright infringement action against the Moral Majority, which in turn invoked the fair use doctrine. A bemused panel of the court of appeals found in favor of Moral Majority, largely on the ground that "Hustler's creative incentives are not decreased [by the mailing] because the Defendants are profiting from an activity that Hustler could not have taken advantage of." *Id.* at 1156. One judge dissented, criticizing his colleagues for their apparent willingness to take judicial notice of the fact that "Moral Majority . . . members would probably not be counted among Hustler's readers." *Id.* at 1158 n.1. (Poole, J., dissenting). The dissent did not, however, take issue with the manner in which the majority calculated the potential "harm" to Hustler. All three judges thus deemed irrelevant the fact that the purpose of Moral Majority's campaign (from which it gained over \$700,000) was to help finance a suit by Falwell against Hustler for libel, invasion of privacy, and infliction of emotional distress. If, as seems certain, Moral Majority's unauthorized use of the parody increased its litigation fund and thereby enabled it to mount a more effective suit, *cf.* *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (describing the outcome of the litigation), the net impact may well be to reduce the eagerness of Hustler and other magazines to publish parodies of public figures in the future. Whether that result would be unfortunate is debatable, but the argument that this sort of unauthorized use of copyrighted material would have no effect on "creative incentives" is plainly incorrect.

³⁵³ Typical of articles of this sort is Professor Light's discussion of parody, the thesis of

(b) *Insensitivity to Price Discrimination and Infringers' Market Power.* — In two circumstances discussed above, the behavior of a copyright owner or putative infringer affects the economic impact of declaring an activity unlawful. The first of these is the practice of price discrimination. The ability of a copyright owner to demand more for access to his work from persons who are able and willing to pay more is desirable from an economic standpoint because it enables the copyright owner to reap greater rewards per unit of efficiency loss than he would if he charged a flat fee.³⁵⁴ Accordingly, judges should watch for situations in which unauthorized use of copyrighted material undermines price discrimination schemes and should be chary of holding such uses fair.

The other circumstance is illustrated by the first and second rounds of discussion of the Barker Brothers case.³⁵⁵ The upshot of those analyses was that, in situations in which a putative infringer is reaping monopoly profits in the sale of a product derived in some way from a copyrighted work, the economic impact of holding his activity unfair will depend heavily not only on whether the copyright owner and infringer would negotiate a licensing arrangement, but also on the terms of that arrangement. Generally speaking, the more sophisticated the parties, the higher the incentive/loss ratio will be.³⁵⁶ Courts should thus be watchful for categories of cases in which copyright

which is: "The central consideration in deciding whether a parody infringes a copyright will be whether it impinges upon the copyright holder's legitimate interests by competing with his work in a market in which that work would ordinarily be salable." Light, *supra* note 185, at 634. Articles taking similar tacks include Comment, *Photocopying and Fair Use: An Examination of the Economic Factor in Fair Use*, 26 EMORY L.J. 849, 865-71 (1977), which argues that "[t]he principal question in fair use cases is whether the demand for plaintiff's copyrighted work is partially satisfied by defendant's use" and therefore that photocopying should be permitted whenever it does not impair the demand for the "originals"; Keon, *Audio Home Recording: Canadian Copyright Implications*, in *THE ECONOMICS OF PATENTS AND COPYRIGHTS*, cited above in note 185, at 157, 171, which takes for granted that the law should be concerned with home recording only if the practice reduces rather than increases record sales; and Liebowitz, cited above in note 185, at 191, which makes a similar assumption about the practice of photocopying professional journals. Professor Nimmer criticizes such narrow definitions of injury, but nevertheless contends that the courts' inquiries should be bounded by a "functional test." See 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 13.05[B], at 13-84 (1987) ("If the defendant's work adversely affects the value of any of the rights in the copyrighted work, . . . the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff. But if regardless of medium, the defendant's work . . . performs a different function than that of the plaintiff's, the defense of fair use may be invoked." (footnotes omitted)) The rationale for thus constricting the category of legally cognizable harm is not apparent.

³⁵⁴ See *supra* pp. 1709-10.

³⁵⁵ See *supra* pp. 1710-12, 1726-28. Excluded from those discussions was the possibility that Barker's market power derived from the originality of the board games it developed. The significance of "creativity" of that sort is considered in section IV.D.5 and the subsection immediately following this one.

³⁵⁶ See *supra* p. 1728.

owners have an interest in permitting infringers who enjoy significant market power in the sale of a derivative product to continue to manufacture those goods and in which all relevant parties are shrewd economic actors. In such contexts, the courts should be extremely reluctant to hold the use in question fair.

(c) *Refusal to Consider the Creative Character of the Use.* — Section II.C.6 showed that, prior to 1984, many courts and commentators maintained that “productive” or “intellectually transformative” uses of copyrighted material should be deemed “fair” more readily than “nonproductive” uses. One of the effects of Justice Stevens’ majority opinion in *Sony* has been to undermine that view. The economic analysis conducted in this Part suggests that a version of the “productivity” factor should be resurrected. As was observed in section IV.D.5, transformative uses of copyrighted material are as likely to be “public goods” as works created out of whole cloth. Holding such uses unfair reduces the rewards available to persons who engage in them, and thus in the long run may prevent the creation of intellectual products worth more to consumers than the costs of producing them. In at least a rough way, courts could and should take that consideration into account when assessing fair use claims: other things being equal,³⁵⁷ an activity that improves upon or makes some creative use of copyrighted material should be permitted more readily than an activity that does not.³⁵⁸

2. *Rules, Categories, and Precedents.* — One of the lessons of Part II was that the Supreme Court’s ratification, in *Sony* and *Harper & Row*, of the traditional “case-by-case” approach to the application of the fair use doctrine has had unfortunate effects in practice.³⁵⁹ The economic analysis conducted in this Part reinforces that conclusion. Not only does ad hoc decisionmaking in this context entail substantial administrative costs, but it also prevents artists and potential artists from knowing in advance the rewards they stand to reap by devoting

³⁵⁷ In circumstances in which the infringer enjoys significant market power because of the originality of his derivative work and in which both copyright owner and infringer are sophisticated bargainers, efficiency losses of the sort discussed in this section would form the bulk of the denominator of the ratio. In other words, the lesson stated in the last paragraph of the immediately preceding subsection and the lesson stated in this subsection will sometimes pull in opposite directions.

³⁵⁸ Professor Gordon acknowledges the relevance of the “productivity” of the putatively infringing activity only insofar as it may affect either the likelihood of adverse impact on the income of the copyright owner or the likelihood that transaction costs will prevent the copyright owner and infringer from reaching an efficiency enhancing agreement. See Gordon, *supra* note 185, at 1653–54. Contending that those effects will be modest, Gordon takes the position that “the productive status of a user is at best a secondary indicator” of the economic considerations upon which the availability of the fair use defense ought to depend. See *id.* at 1601. The analysis offered here suggests that creativity should play a more substantial role in the doctrine.

³⁵⁹ See *supra* section II.D.

their energies to creating particular kinds of products. It thus impedes the ability of the copyright system to foster the production of works of the intellect from which we all benefit.

The discussion in this Part also suggests why the Court was reluctant to depart from the traditional approach. An extraordinary variety of intellectual products are governed by the copyright system. The creators of different types of works are responsive to economic and noneconomic incentives in widely varying degrees, and the threats to their livelihoods posed by different kinds of unauthorized uses of their products vary dramatically by context. The best way to tune the copyright system, it might appear, would be to resolve controversies on an individual basis.

Last but not least, the analysis has offered some ways of resolving the tension between the points made in the preceding two paragraphs. Specifically, section IV.D.1, after identifying the economic advantages of prescribing rules that indicate which uses of copyrighted material are permissible and which are not, set forth a method for determining when to subdivide categories of copyrighted works and their uses. Section IV.D.2 then demonstrated that, once rules governing particular types of works and uses are established, they should rarely be changed.

3. *Collateral Benefits*. — In addition to suggesting the foregoing ways in which fair use cases could be resolved more efficiently, the economic analysis just completed contributes in two respects to the project of this Article. First, it provides a methodology and several specific suggestions³⁶⁰ that could be put to good use by Congress when it next overhauls the copyright statute. Second, it provides an analytical framework — an understanding of the structure and function of copyright law in general and the fair use doctrine in particular — that will stand us in good stead when considering how the law might advance a more inclusive set of values. To that project we now turn.

V. UTOPIAN ANALYSIS

This Part considers how the fair use doctrine might be rebuilt if one's ambition were not merely to reduce inefficiency in the use of resources, but to advance a substantive conception of a just and attractive intellectual culture. Section A sets the premises of the analysis by adumbrating a vision of the good life and the sort of society that would facilitate its widespread realization. Section B confronts and rejects the argument that using legal doctrine to nudge the United States in the direction of that vision would be unacceptably

³⁶⁰ See, e.g., *supra* pp. 1725–26 (discussing the advantages of compulsory licensing systems).

"paternalistic." Section C considers how a well-informed court or legislature might advance the utopian agenda by differentiating between fair and unfair uses of copyrighted materials. Section D distills from that analysis a set of considerations that could be incorporated reasonably easily into the current fair use doctrine. Section E considers how the proposed reforms might have been applied to the facts of the *Sony* and *Harper & Row* cases.

A. Premises

What sort of social order should we strive to achieve? Most of the writers who in recent years have addressed this age-old question fall into one of two camps. Utilitarian theorists argue that our goal should be to identify and institute the system that would maximize "general happiness," measured by the sum of the pleasures minus the sum of the pains experienced by the members of the society, taking due account of the intensity — but no account of the character — of the desires whose satisfaction or frustration gives rise to those pleasures and pains.³⁶¹ The members of the other group — perhaps best described as "Kantian liberals"³⁶² — reject the utilitarians' aggregative criterion for resolving conflicts between individuals' preferences on the ground that it often counsels subordinating the interests of some persons to the interests of others, a result offensive to our conceptions of justice.³⁶³ The ambition of the Kantian philosophers is to formulate guidelines for the design of the social and political system that do not entail judgments regarding alternative aspirations or ways of living

³⁶¹ See generally J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 160; J. BENTHAM, FRAGMENT ON GOVERNMENT, *supra* note 160; H. SIDGWICK, *supra* note 160. Utilitarians' disagreement regarding the most appropriate ways of defining and measuring "pleasure" and "pain" need not detain us. For two contemporary efforts to determine what a society organized on the basis of the "general happiness" principle would look like, see R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 306–26 (1979), and R. HARE, MORAL THINKING 164–67 (1981).

³⁶² The label and some of the argument in this paragraph are derived from M. SANDEL, LIBERALISM AND ITS CRITICS 1–7 (1984). The marked differences in the views of the members of this group preclude referring to them as a "school," but their common commitment to the propositions set forth in the text warrants lumping them together for present purposes. Their major works include B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); R. DWORKIN, *supra* note 139; Dworkin, *What Is Equality?*, 10 PHIL. & PUB. AFF. 185, 283 (1981); C. FRIED, RIGHT AND WRONG (1978); J. RAWLS, *supra* note 192; D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); and E. Rakowski, Equal Justice (forthcoming 1989) (draft of August 7, 1987 on file with Harvard Law School library). For helpful discussions and criticisms of the themes common to their arguments, see Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979); and Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1119–74 (1983).

³⁶³ See, e.g., R. DWORKIN, *supra* note 139, at vii; D. RICHARDS, A THEORY OF REASONS 87 (1971).

but instead accord all persons the respect they are due as autonomous moral agents.³⁶⁴

The theory summarized below, though it incorporates many arguments developed by the utilitarians or their opponents, takes a different tack. It proceeds from the propositions, sometimes associated with the Aristotelian tradition of moral philosophy, that there exists such a thing as human nature, which is mysterious and complex but nevertheless stable and discoverable, that people's nature causes them to flourish more under some conditions than others,³⁶⁵ and that social and political institutions should be organized to facilitate that flourishing.³⁶⁶

Adequate development of such an argument is clearly beyond the scope of an article on copyright law. This section does no more than set forth, in the form of postulates, those aspects of the vision that bear on the shape of intellectual property law and direct readers to more thorough defenses and criticisms of each tenet. Readers who find either the methodology or the proffered theory uncongenial may nevertheless find the ensuing analysis helpful in suggesting how some other substantive conception of the public interest might be used to restructure the fair use doctrine.

1. *The Good Life*. — The good life is a life of self-determination, commitment, moderate risk, and meaningful work.³⁶⁷ The activities,

³⁶⁴ See, e.g., B. ACKERMAN, *supra* note 362, at 11, 57–58, 327–78; C. FRIED, *supra* note 362, at 9, 20, 24, 28–29; J. RAWLS, *supra* note 192, at 395–452 (insisting that persons in the original position be ignorant of their own conceptions of the good); *id.* at 325–32, 442 (arguing that government, once established, should remain neutral as to alternative ways of life).

³⁶⁵ The question naturally arises: Exactly how does one pierce the veil of cultural conventions and induced tastes, discover people's true nature, and determine what allows it to flower? There is no infallible method, but three sorts of inquiries, in combination, seem to yield the greatest insight: (i) the study of history and anthropology, to see how different people have behaved under different circumstances in different cultures; (ii) introspection, to determine which of those ways of living seem most attractive, most rewarding and decent, most “congruen[t] with our deeper understanding of ourselves and our aspirations,” *cf.* Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980) (using the phrase to describe one of the appropriate sources of a theory of justice, rather than a conception of the good life); and (iii) critical reading of the work of those philosophers and social critics who have thought seriously about such matters. In any event, a mixture of these three approaches has shaped the vision summarized in this section.

³⁶⁶ For discussion of the degree to which Marx relied on similar propositions, see J. ELSTER, *MAKING SENSE OF MARX* 53–55, 61–92 (1985). For four quite different contemporary arguments employing similar approaches, see J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); W. GALSTON, *JUSTICE AND THE HUMAN GOOD* (1980); A. MACINTYRE, cited above in note 175; and R. UNGER, *PASSION* (1984). For a criticism of the method in general and Finnis' use of it in particular, see L. WEINREB, *NATURAL LAW AND JUSTICE* 108–15 (1987). For a criticism from a different perspective of the arguments of MacIntyre and Unger, see Cornell, cited above in note 176, at 314–59.

³⁶⁷ *Cf.* *Port Huron Statement* (an early iteration of the platform of the Students for a Democratic Society), *reprinted in* THE NEW LEFT: A DOCUMENTARY HISTORY 166–67 (M.

bonds, and communities through which a person defines himself are freely chosen; the person is engaged in projects and relationships that carry with them a chance of failure; work is important and, for the most part, creative. Brief explications of the components of this conception and an explanation why they do not conflict with one another follow.

(a) *Work*. — Marx's most durable insight is that productive activity is "the life of the species" — that work is natural, not something to be endured or escaped, and that the quality of a person's existence is closely related to the quality of his work. What is good work? The adjective that best captures Marx's answer is "meaningful." Meaningful work requires skill and concentration, presents the laborer with challenges and problems he can overcome only through the exercise of initiative and creativity, and is part of a larger project he considers socially valuable and must take into account in making his decisions.³⁶⁸

Persons whose labor consists primarily of thinking and writing have long known the rewards of work of this sort. Prior to the onset of industrialization, many artisans also cherished a version of this ideal and to some degree realized it. The spread of industrial capitalism during the nineteenth century deprived an ever larger proportion of the population access to meaningful work.³⁶⁹ The resulting changes in the consciousness and life-style of the typical laborer — the sense of being separated from the goods and institutions one has created, from other people, and from one's own ego; the passivity; the search for solace in the ephemeral pleasures of consumption — are what most horrified Marx.³⁷⁰ Movement in the direction of utopia would require, to the extent practicable, reversal of those trends.

Teodori ed. 1969) ("Men have unrealized potential for self-cultivation, self-direction, self-understanding, and creativity.").

³⁶⁸ Though most evident in his early writings, *see, e.g.*, K. MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844*, at 110–11, 137 (D. Struik ed. 1964) [hereinafter 1844 MANUSCRIPTS]; K. MARX, *GRUNDRISSE* 124 (D. McLellan ed. 1971), these themes run throughout his works. *See* J. ELSTER, *supra* note 366, at 521; S. MOORE, *MARX ON THE CHOICE BETWEEN SOCIALISM AND COMMUNISM* 42 (1980); B. OLLMAN, *ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY* 98–100 (1971). A definition reasonably true to Marx's vision may be found in R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 247 (1974). A version of the ideal less schematic and more evocative than Nozick's may be found in the *Port Huron Statement*, cited above in note 367, at 168.

³⁶⁹ For detailed studies of this development in the United States, *see, for example*, A. DAWLEY, *CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN* (1976); S. ROSS, *WORKERS ON THE EDGE: WORK, LEISURE, AND POLITICS IN INDUSTRIALIZING CINCINNATI, 1788–1890* (1985); S. WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850* (1984); and Montgomery, *The Working Classes of the Pre-Industrial American City, 1780–1830*, 9 *LAB. HIST.* 3 (1968).

³⁷⁰ *See* 1844 MANUSCRIPTS, *supra* note 368, at 133–41, 150. For insightful secondary studies of this aspect of Marx's thought, *see* J. ELSTER, cited above in note 366, at 74–82, 521; B.

(b) *Risk and Vulnerability*. — Excessive security makes for a flat life. Excessive desire for security — for certainty that one's projects will succeed, that one's relationships will not deteriorate, and that one will not be hurt physically or emotionally — leads to unambitious and unrewarding projects, shallow relationships, and dull play. The good life is an intense life, and intensity depends in part on adventurousness.³⁷¹ To be vulnerable, to be not fully in control of one's life, is a good thing, a condition to be sought, not shunned. To avoid friendship and love, to eschew all attachment to possessions, to refuse to nourish or gratify one's passions because all of those things expose one to the risk of loss, to the vagaries of fortune, and to the wills of others, is to be not fully human.³⁷²

The notion that some degree of risk and vulnerability is desirable coheres in two ways with the value of meaningful work. First, engagement in meaningful work fosters confidence, innovativeness, and sense of worth, which in turn support a willingness to take chances. Second, the possibility that a project on which one is working will not realize one's hopes helps prevent creative work from "degenerat[ing] into narcissism or self-indulgence"; the worker's desire to succeed, and knowledge that he may not, keeps his mind off "self-realization" and increases the likelihood that he will attain it.³⁷³

(c) *Self-Determination*. — To live well means, among other things, to take responsibility for one's self. "One's dignity resides in being, to some important degree, a person of one's own creating, making, choosing, rather than being merely a creature or a socially manufactured, conditioned, manipulated, thing: half-animal and half mechanical and therefore wholly socialized."³⁷⁴

To emphasize self-determination is not to deny that our identities are substantially socially determined — that both our initial senses of

OLLMAN, cited above in note 368, at 131-233; and A. SCHAFF, *ALIENATION AS A SOCIAL PHENOMENON* 57-62 (1980). Marx's prediction that consumerism would replace creative labor was fulfilled in the United States to a degree even he might have found surprising. See D. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA*, 1850-1920, at 94-124 (1978); Goldman, "We Make Weekends": *Leisure and the Commodity Form*, 8 SOC. TEXT 84 (1983-84).

³⁷¹ See Kateb, *Democratic Individuality and the Claims of Politics*, 12 POL. THEORY 331, 334, 337, 343 (1984) (examining the common themes in Emerson's, Thoreau's, and Whitman's conceptions of the good life and arguing that they could provide the basis for a conception of individuality that might facilitate the "renovation of liberalism").

³⁷² For an insightful study of the interplay in the writings of selected Greek philosophers, poets, and historians between the propositions set forth in the text and the opposed "Platonic conception of a self-sufficient and purely rational being," see M. NUSSBAUM, *THE FRAGILITY OF GOODNESS* (1986). For exploration of the benefits (as well as the dangers) of a moderate degree of attachment to possessions, see M. WALZER, *SPHERES OF JUSTICE* 7-10 (1983); Radin, *Market-Inalienability*, cited above in note 182, at 1871-72, 1903-09; and Radin, *Property and Personhood*, cited above in note 162. For reflections on the merits of vulnerability in general, see R. UNGER, cited above in note 366, at 107-15.

³⁷³ J. ELSTER, *supra* note 366, at 523.

³⁷⁴ Kateb, *supra* note 371, at 343 (emphasis removed). Some of the characteristics and virtues of self-determination in the sense used here are explored in J. FEINBERG, *HARM TO SELF* 31-47 (1986).

self and our capacity to reflect upon the selves we wish to become derive to a large extent from the communities in which we are reared, and that those communities inevitably exert powerful influences over our subsequent lives.³⁷⁵ But the person who depends too much for his identity and life-plan on inherited outlooks and habits — who does not achieve sufficient distance from his original community either deliberately to make the tradition his own or to transcend it — is not fully alive.³⁷⁶ Mill put the point powerfully:

The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are improved only by being used.³⁷⁷

Nor is it to deny the importance of attachment to groups. Participation in families,³⁷⁸ friendships,³⁷⁹ teams of workers, local political bodies,³⁸⁰ communities of faith,³⁸¹ and other cooperative ventures³⁸² is more than a strategy for achieving our individual ambitions and

³⁷⁵ See A. MACINTYRE, *supra* note 175, at 220–21; M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 152–53 (1982); Dworkin, *Moral Autonomy*, in MORALS, SCIENCE, AND SOCIALITY 156–61 (H. Engelhardt, Jr. & D. Callahan eds. 1978); cf. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART 152–54 (1985) [hereinafter R. BELLAH] (describing the rich sense of self that results from growing up in a “community of memory” — a community whose awareness of its past is sustained by “stories of collective history and exemplary individuals” — and the shallower sense that results from growing up in a community lacking such memories and bonds).

³⁷⁶ See A. MACINTYRE, *supra* note 175, at 211.

³⁷⁷ J. MILL, ON LIBERTY, reprinted in THE PHILOSOPHY OF JOHN STUART MILL 252 (M. Cohen ed. 1961). For other depictions of the connection between self-determination and the development of human faculties, see I. KANT, CRITIQUE OF PRACTICAL REASON 51–84 (T. Abbott trans. 1873) (6th ed. 1909), and the *Port Huron Statement*, cited above in note 367, at 167. For a contemporary defense of the “goodness” of the full development of human faculties, see W. GALSTON, cited above in note 366, at 61–66.

³⁷⁸ See R. BELLAH, *supra* note 375, at 85–112.

³⁷⁹ See M. SANDEL, *supra* note 375, at 179–83 (offering an admittedly only suggestive view of the proper relationship between “character, self-knowledge, and friendship”).

³⁸⁰ The linked propositions that participation in politics is not only good for the community but good for the soul and that a polity should be small enough to make widespread participation practicable and meaningful have a long pedigree. See, e.g., ARISTOTLE, POLITICS, in THE BASIC WORKS OF ARISTOTLE 1127–316 (R. McKeon ed. 1941) [hereinafter BASIC WORKS]; MONTESQUIEU, L'ESPRIT DES LOIS Bk. VIII, ch. 16 (1748); A. TOCQUEVILLE, DEMOCRACY IN AMERICA (P. Bradley ed. 1945); H. ARENDT, ON REVOLUTION (1963). In recent years, these ideas, as components of the ideology of classical republicanism, have captured the attention of a growing number of legal scholars. See, e.g., Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

³⁸¹ See R. BELLAH, *supra* note 375, at 219–49.

³⁸² See *id.* at 167–95 (describing modern voluntary associations); Benn, *Individuality, Autonomy and Community*, in COMMUNITY AS A SOCIAL IDEAL 43, 47–51 (E. Kamenka ed. 1982) (exploring the “transcendent collective enterprise, which arises from a common concern for some valued endeavor or a worthwhile activity, which must be pursued collectively”).

desires; it is a crucial way in which we define ourselves.³⁸³ To be most meaningful, however, such engagements should derive from choice and commitment, not drift or ascription.³⁸⁴

(d) *The Coherence of the Ideal.* — Why does the value of self-determination not conflict with the values of meaningful work and moderate risk? Left to their own devices, would not many people opt for risk-free, monotonous jobs that provide them sufficient income to enjoy the bounty of consumer goods in their leisure time?³⁸⁵ A premise³⁸⁶ of the argument advanced here is that the vast majority of persons would not react in that way. The theory supposes that the reasons relatively few Americans are now clamoring for more creative work³⁸⁷ are that they have not experienced the rewards of the life described above, that they are enmeshed in a culture that places a premium on “disposable income,” and that their preferences have adapted to afford them a modicum of pleasure and satisfaction in the

³⁸³ See M. SANDEL, *supra* note 375, at 147–50 (contrasting three conceptions of community: an “instrumental conception,” in which the group is merely a vehicle for the satisfaction of its members’ “egoistic ends”; a “sentimental conception” (associated with Rawls), in which the advantages of cooperation include “the quality of motivations and ties of sentiment that may attend” it; and a “constitutive conception,” in which “community would describe not just a *feeling* but a mode of self-understanding partly constitutive of the agent’s identity”).

³⁸⁴ Two conclusions follow from the emphasis on choice in this context. First, many different sorts of groups afford opportunities for self-fulfillment; the good life does not entail engagement in all kinds or in any one kind of community. Thus, the premium placed in recent years by writers mining the vein of republicanism, see *supra* note 380, on participation in political bodies is excessive — at least insofar as their arguments turn on the good of the participants rather than the quality of the outcomes of the political process. Cf. M. WALZER, *RADICAL PRINCIPLES* 128–38 (1980) (criticizing the conception of the socialist citizen proffered by Marx and Engels in *The German Ideology*). Second, the good life would afford opportunities for engagement in several nonoverlapping (or only partially overlapping) communities. Thus, the quest by a smaller group of theorists for “organic” communities, see, e.g., R. UNGER, *supra* note 105, at 262–63 (1975), is also misguided. Both topics are crucial to a full utopian vision, but neither bears sufficiently on the production of works of the intellect to merit further exploration here.

³⁸⁵ Cf. J. ELSTER, *supra* note 366, at 522 (worrying that many people would indeed react this way).

³⁸⁶ This proposition is described as a premise because, at present, it is grounded primarily in unverified intuition. However, an accumulating body of empirical research does lend support to the prediction. See, e.g., H. JAIN, *WORKER PARTICIPATION: SUCCESS AND PROBLEMS* (1980); R. KATZELL & D. YANKLOVICH, *WORK, PRODUCTIVITY AND JOB SATISFACTION: AN EVALUATION OF POLICY-RELATED RESEARCH* (1975); H. THOMAS & C. LOGAN, *MONDRAGON: AN ECONOMIC ANALYSIS* 191 (1982); M. WALZER, *supra* note 372, at 177–80 (discussing the cooperative Sunset Scavenger Company of San Francisco as an example of an enterprise in which self-management enhances self-respect, job satisfaction, and productivity); Conte, *Participation and Performance in U.S. Labor-Managed Firms*, in *PARTICIPATORY AND SELF-MANAGED FIRMS* 213 (D. Jones & J. Svejnar eds. 1982); Markovic, *Alienated Labour and Self-Determination*, in *ALIENATION: PROBLEMS OF MEANING, THEORY AND METHOD* 130 (R. Geyer & D. Schweitzer eds. 1981).

³⁸⁷ See I. J. GOLDTHORPE, D. LOCKWOOD, F. BECHHOFFER & J. PLATT, *THE AFFLUENT WORKER* (1968); Jensen & Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 5 J. BUS. FIN. & ACCT. 469, 472–75 (1978).

world as it stands.³⁸⁸ If released from the spell of consumerism and allowed to taste the kind of self-realization achievable through meaningful labor, they would with few exceptions opt to continue to live adventurous, creative lives.³⁸⁹

2. *The Good Society*. — In the utopian society, resources would be deployed and divided in the fashion that enabled and encouraged its members³⁹⁰ to realize as fully as possible lives of the sort sketched above. Does that entail affording all persons *equal* access to the good life? The present subsection assumes the answer is yes and outlines the allocation of resources that would advance that end. The following subsection considers possible reasons for departing from the goal of strict equality of access.³⁹¹

(a) Engagement in most of the activities central to the good life is impossible unless one is fed, housed, clothed, and tolerably healthy. People vary in their metabolisms, the climates in which they live, and their susceptibility to disease. Thus, affording all persons equal access to the good life would require that, up to a certain level, food, housing, clothing, and medical care be provided on the basis of need.³⁹²

(b) Both self-determination and creativity are facilitated by conditions that increase and make more apparent people's opportunities for self-expression and communication. Perhaps the most important such condition is cultural diversity. The enduring power of Mill's essay, *On Liberty*, despite gaps in the utilitarian rationale upon which

³⁸⁸ For discussion of the phenomenon of adaptive preferences, see section IV.D.7 above.

³⁸⁹ In other words, the good life described in this section is asserted to be "stable" in the same sense that Rawls contends his just society is stable: people living it will not wish to opt out of it. See J. RAWLS, *supra* note 192, at 453–504. It is not essential to the argument (nor is it likely) that the good life sketched here be the *sole* stable life-style — only that it be among the set of stable ways of life.

³⁹⁰ The vexing question of how much of the resources of one "society," however defined, should be distributed to the members of others will not be considered here. Cf. *supra* note 195 (acknowledging that the economic analysis of Part IV likewise is confined to American society).

³⁹¹ This way of proceeding treats equality (of a particular sort) as the default position, departures from which must be justified. It is grounded in the notion that individual human beings are sufficiently deserving of respect or share sufficiently important capacities and needs that they should be treated equally unless a persuasive reason can be advanced for not doing so. For different versions of that proposition, see, for example, R. DWORKIN, *supra* note 139, at 182; K. NIELSEN, EQUALITY AND LIBERTY 283 (1985); and Lukes, *Socialism and Equality*, in THE SOCIALIST IDEA 74, 76–77 (L. Kolakowski & S. Hampshire eds. 1974). But see F. HAYEK, THE CONSTITUTION OF LIBERTY 85–88 (1960) (criticizing the approach); Letwin, *The Case Against Equality*, in AGAINST EQUALITY 1–70 (W. Letwin ed. 1983) (rejecting the arguments usually advanced to make the *prima facie* case for equality).

³⁹² See D. MILLER, SOCIAL JUSTICE 149 (1976); Lukes, *supra* note 391, at 77. For more conceptual arguments that medical care in particular should be distributed on the basis of need, see M. WALZER, cited above in note 372, at 86–90, and Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY (2d ser.) 110 (P. Laslett & W. Runciman eds. 1962).

it ostensibly rests,³⁹³ is attributable in large part to its evocative depiction of the cumulative benefits of variety in social and intellectual life: the more multifarious the life-styles and ideas on public display in a society, the more each of its members must decide for herself what to think and how to act, thereby developing her own "mental and moral faculties" and rendering the culture as a whole even more "rich, diversified, and animating."³⁹⁴ Mill is usually remembered and invoked for his contention that the "expressive" activity crucial to the preservation of diversity ought not be penalized by the state.³⁹⁵ But Mill understood that "individuality" and diversity are endangered as much by hostile public opinion and informal social sanctions as by "blue laws."³⁹⁶ The more trenchant critics of American culture have confirmed the point.³⁹⁷ In the utopian society, therefore, intellectual and cultural innovativeness — the key to diversity — would be not merely tolerated by government but nourished and rewarded.

(c) A second, related condition conducive to self-expression and self-realization is a rich artistic tradition. This point has been made most ably by Ronald Dworkin in his recent defense of public subsidies for the arts.³⁹⁸ Dworkin persuasively argues that the more complex and "resonant" the "shared language" of a culture — the richer it is in the raw materials of representation, metaphor, and allusion — the more opportunities for creativity and subtlety in communication and

³⁹³ See R. WOLFF, *THE POVERTY OF LIBERALISM* 3–50 (1968).

³⁹⁴ See J. MILL, *supra* note 377, at 252–57. Mill's argument on this score was criticized by Stephen on the ground that it "confound[ed] the proposition that variety is good with the proposition that goodness is various." J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 83 (R. White ed. 1967) (1st ed. 1873). "Originality," insisted Stephen, "consists in thinking for yourself, not in thinking differently from other people." *Id.* at 84. What Stephen failed to appreciate are the fragility of the inclination to think for oneself and the importance of fostering that inclination by exposing persons to a wide variety of cultural forms. For analyses and defenses of diversity consistent with Mill's, see W. VON HUMBOLDT, *THE SPHERE AND DUTIES OF GOVERNMENT* 11–13 (J. Coulthard trans. 1854), and A.O. LOVEJOY, *THE GREAT CHAIN OF BEING* 293–314 (1936).

³⁹⁵ See, e.g., M. SANDEL, *supra* note 362, at 2.

³⁹⁶ See J. MILL, *supra* note 377, at 191.

³⁹⁷ The seminal work is *Democracy in America*. See A. TOCQUEVILLE, *supra* note 380, at 273–74. For exaggerated but nevertheless powerful accounts of the nature and effects of pressures in American culture to "[c]onform, conform, in your heart of hearts and obey," see Editorial, *Berkeley Barb*, Oct. 26, 1967, reprinted in *THE NEW LEFT: A DOCUMENTARY HISTORY*, *supra* note 367, at 362–63, and *Port Huron Statement*, *supra* note 367, at 164–65.

³⁹⁸ See Dworkin, *Art as a Public Good*, *supra* note 321, at 143–57. Dworkin appears to have arrived at this position only after considerable reflection. For the development of his thought, see Dworkin, *Liberalism*, cited above in note 337, at 131–32; Dworkin, *Philosophy and Politics*, in *MEN OF IDEAS* 260 (B. Magee ed. 1978); Dworkin, *Why Liberals Should Believe in Equality*, cited above in note 187, at 32–33; Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEGAL STUD. 177, 194–96 (1981). For insightful speculations regarding the reasons for his gradual change of heart, see Shiffrin, cited above in note 362, at 1131 n.105.

thought it affords the members of the culture.³⁹⁹ The complexity and resonance of the culture's language in large part depends, he contends, upon the quality of its "vocabulary of art."⁴⁰⁰ One might extend Dworkin's argument by observing that a resonant "shared language" also invites and helps persons to take a hand in shaping their culture, thereby facilitating their achievement of a rewarding collective life.⁴⁰¹ For several reasons, therefore, a legitimate and important objective of a government that wishes to increase the "complexity and depth [of] the forms of life open to" its subjects is to protect the culture's language as a whole and its artistic vocabulary in particular "from structural debasement or decay" — both by preserving and making accessible to the public "a rich stock of illustrative and comparative collections" of art and by fostering "a tradition of [artistic] innovation."⁴⁰²

(d) Simply multiplying the "choices" and the opportunities for communication available to individuals, however, does not sufficiently foster self-determination and self-realization. To be willing and able to avail oneself of such options, one must have a secure sense of self and a capacity for reflection — attributes most likely to be found in persons with a grounding in a "community of memory."⁴⁰³ And persons' capacities to construct rewarding lives will be improved if a variety of potentially "constitutive" group affiliations are accessible to them.⁴⁰⁴ In the good society, therefore, communities of both sorts would be encouraged and protected.⁴⁰⁵

³⁹⁹ See Dworkin, *Art as a Public Good*, *supra* note 321, at 153–57.

⁴⁰⁰ Cf. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 305–06 (1982) ("[T]he study and appreciation of art elevates and civilizes," helps "make possible a life that is morally serious and aesthetically delightful," and "is a necessary constituent of a rich and intense intellectual life.").

⁴⁰¹ Cf. R. BELLAH, *supra* note 375, at vii–viii (discussing how the reappropriation of a common heritage might assist Americans to cure the "cancer" of individualism and to reconstruct a "morally coherent" common life).

⁴⁰² See Dworkin, *Art as a Public Good*, *supra* note 321, at 153–56 (emphasis omitted). Dworkin strives valiantly but, in my view, unsuccessfully to demonstrate that the pursuit of such policies does not entail lending governmental support to a particular conception of the good life. Unhampered by Dworkin's compunctions on that score, I do not hesitate to appropriate his insightful depiction of the relationship between the character of a culture's artistic tradition and opportunities for self-realization available to its members. A very different route to the proposition that society should be organized to advance the pursuit of knowledge and the cultivation of art is described and criticized by Rawls in *A THEORY OF JUSTICE*, cited above in note 192, at 325–32.

⁴⁰³ See *supra* note 375 and accompanying text.

⁴⁰⁴ See *supra* pp. 1749–50; cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 618–20 (1984) (describing the importance to persons' "emotional enrichment" of certain kinds of voluntary associations and explaining the need to protect such groups from governmental interference).

⁴⁰⁵ For some suggestions regarding how legal doctrine should be employed to protect these communities, see Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV.

(e) Expansion and levelling of access to the good life would necessitate reform of the economic system designed to increase and equalize the proportions of persons' labor that consisted of meaningful work.⁴⁰⁶ At least three complementary initiatives would be essential to the program: decentralization of responsibility for deciding how tasks are performed and goods are produced, enabling workers to reap more of the rewards of problem-solving; equalization of the shares of irremediably dull labor performed by the members of the society;⁴⁰⁷ and equalization of access to each of the resultant packages of good and bad work.

(f) A rich linguistic and artistic tradition is of little value if the public is not in a position to appreciate it. Nor will ready access to a potpourri of creative work facilitate widespread achievement of the good life if few people are capable of doing those jobs. An essential feature of the good society would therefore be extensive, public,⁴⁰⁸ and (up to a point) compulsory education. The sort of education that would maximize access to the good life would encompass more than that received by most Americans today. It would expose a young person to a wide variety of (creative) occupations, assist her in choosing one, and prepare her to perform it. It would explore and celebrate, rather than ignore or denigrate, the distinctive traditions of established communities. And, to widen people's horizons, it would incorporate more than schooling — extending to such things as publicly financed concerts, art exhibitions, and dramatic performances.⁴⁰⁹

(g) The public projects described in the preceding six paragraphs would absorb a good deal of the society's resources, but, at least if

1097 (1981), and Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

⁴⁰⁶ Cf. K. NIELSEN, *supra* note 391, at 48 (arguing, from somewhat different premises, for expansion and equalization of "opportunities for meaningful work").

⁴⁰⁷ A provocative analysis of the desirability and feasibility of redistributing "hard work" may be found in M. WALZER, cited above in note 372, at 165–83. Not all of the activities Walzer considers "hard" are irremediably nonmeaningful; indeed, some of the jobs he includes in the subcategory of "dangerous work" (e.g., labor on oil rigs) are already organized in ways that afford workers more decisionmaking responsibility than, for example, factory or sales work. Cf. A. CLAYRE, *WORK AND PLAY* 84–86 (1974) (rejecting the notion that manual labor is necessarily degrading).

⁴⁰⁸ The reason schooling would have to be public is to minimize the capacity of parents who have legitimately acquired larger than average shares of wealth (see section V.A.3 below for a discussion of the sources of such legitimate inequality) to provide their children better than average educations. Cf. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 71, 111–30 (1973) (Marshall, J., dissenting); M. WALZER, *supra* note 372, at 206 (making similar arguments).

⁴⁰⁹ Cf. M. WALZER, *supra* note 372, at 70 (describing a system of publicly funded drama festivals in Athens in the fifth and fourth centuries B.C. and speculating that it was "a central feature of the religious and political education of the Athenian people"); ARISTOTLE, *POLITICS* bk. VIII, in *BASIC WORKS*, *supra* note 380, at 1305–16 (sketching a system of public education that bears some resemblance to the one advocated here).

the society in question were moderately modernized, there would be some left over. How should the surplus be divided? If, as we have assumed thus far, the objective is simultaneously to maximize and to equalize persons' access to the good life, the most plausible answer would seem to be: equally.

But perhaps that response is premature. Consider the following problem. If *X* decides to spend a significant portion of her leisure time playing chess while *Y* decides to perfect and exercise his skill in sailboat racing, the amounts of satisfaction they are able to obtain per unit of resource will diverge. Does not affording them equal access to the good life require giving *Y* many times the resources given *X*?⁴¹⁰ The question is difficult, but a combination of three concerns suggests no. First, the goal of maximizing all persons' access to the good life would be advanced by creating a disincentive to cultivate tastes for costly leisure activities, and an effective way of establishing such a disincentive would be to refuse to increase a person's allowance when he acquires an unusually expensive taste. Second, monitoring each person's relative capacity to make efficient use of resources — especially in view of the advantage of pretending to hold expensive tastes — would be prohibitively costly. Finally, in the opinions of at least some of the theorists to have addressed the issue, there is something "counterintuitive" about the notion that wine-lovers should get more of the medium of exchange than beer-lovers.⁴¹¹ These arguments are not without their difficulties,⁴¹² but in concert they seem sufficient to sustain the proposition that maximization and equalization of access to the good life requires that surplus goods and services be distributed equally.⁴¹³

⁴¹⁰ Cf. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls' Theory of Justice*, 70 J. PHIL. 245, 254 (1973) (identifying the difficulty).

⁴¹¹ See Dick, *How to Justify a Distribution of Earnings*, 4 PHIL. & PUB. AFF. 248, 251-52 (1975); Dworkin, *What is Equality?*, *supra* note 362, at 228-40; E. Rakowski, *supra* note 362, ch. 6, at 6.

⁴¹² The first, in particular, is vulnerable to the retort that, although discouraging the acquisition of expensive preferences may be necessary to prevent a spiral of competition in the cultivation of tastes that results in a society of equally unhappy gourmets, to some extent it limits opportunities for self-determination and ignores the fact that preferences for many kinds of leisure activity (for example, chess and sailboat racing) consist of a combination of cultivated taste (which can be altered) and aptitude (which cannot). Also troublesome is the risk that this system of incentives would result in a "dull, conformist, unimaginative, and otherwise unattractive community." See Dworkin, *What Is Equality?*, *supra* note 362, at 236.

⁴¹³ Further support for that conclusion may be found in J. ELSTER, cited above in note 366, at 524, 527; R. TAWNEY, *THE ACQUISITIVE SOCIETY* 260 (1920); and Lukes, cited above in note 391, at 79. But cf. D. MILLER, *supra* note 392, at 144-46 (arguing that "the principle of equal well-being" is superior to the principle of equality of resources). A nicely complex question (that does not implicate sufficiently the design of a system of intellectual property law to merit exploration here) is what mechanism for distributing resources would best approximate equality of the sort advocated in the text. For some speculations on the matter, see Dworkin, *What Is*

We now turn to the question how, if at all, the premise on which we have thus far proceeded should be altered. In other words, what considerations, if any, justify affording people unequal access to the good life and how much inequality (or what sort of inequality) do they legitimate?

3. *Distributive Justice*. — Over the centuries, moral philosophers have debated the merits of many different criteria for distributing shares of the social pie.⁴¹⁴ This section posits that only two of those theories are defensible: a variant of the “difference principle” popularized by John Rawls;⁴¹⁵ and the proposition that unequal effort warrants unequal reward. The principal arguments on which that sweeping judgment is based are presented below in highly abbreviated form. For their fuller elaboration, the reader should consult the sources cited in the margin.

To make the discussion concrete, consider the following case. Nan, using only a typewriter and a few reams of paper, manages, by dint of a year of hard work, to produce a novel whose brilliance is appreciated immediately by both critics and the reading public. Nan enjoys being a writer and is relatively nonmaterialistic, but is not entirely immune to the temptations of wealth. On what grounds might she argue that she should be accorded a better than average lot in life?

(a) *Labor-Desert/Entitlement Theory*. — First, Nan might assert that she has a natural right (which the law should recognize) to the fruits of her labor.⁴¹⁶ More precisely, she might claim that, because she created the text by herself and did not thereby diminish the resources or opportunities available to her fellow citizens, she should be entitled to set the terms upon which other people can gain access to her creation.⁴¹⁷ If, through voluntary transactions with those consumers, she can secure a larger than average share of society's resources, she deserves it.⁴¹⁸ The most compelling of the objections

Equality?, cited above in note 362, at 283–90; Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 PHIL. & PUB. AFF. 223, 240–42 (1975); and E. Rakowski, cited above in note 362, at 42–46.

⁴¹⁴ This way of framing the issue (indeed, even the use of the phrase “distributive justice”) assumes that a “social pie” exists to be “divided.” For the origins of this attitude, see ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 2, in BASIC WORKS, cited above in note 380, at 1005–06. For contemporary objections to it, see R. NOZICK, cited above in note 368, at 149–50, and Flew, *Justice: Real or Social?*, 1 SOC. PHIL. & POL. 151, 152–53 (1983).

⁴¹⁵ See J. RAWLS, *supra* note 192, at 60–83.

⁴¹⁶ The Lockean theory from which this line of argument derives is reviewed above in note 161 and the accompanying text.

⁴¹⁷ See R. NOZICK, *supra* note 368, at 181–82; A. RAND, CAPITALISM: THE UNKNOWN IDEAL 125–29 (1966).

⁴¹⁸ See R. NOZICK, *supra* note 368, at 150–53; cf. Fried, *Distributive Justice*, 1 SOC. PHIL. & POL'Y 45, 49–50 (1983) (outlining a similar argument — albeit tempered by a “duty of benevolence” unacknowledged by Nozick).

that may be made to this theory is that it fails to take account of the fact that "the accumulated results of many separate and ostensibly fair agreements [of the sort described above] . . . are likely in the course of time to alter citizens' relationships so that the conditions for free and fair agreements no longer hold"⁴¹⁹ and thus to impose "intolerable limitations on individuals' opportunities for autonomous living."⁴²⁰

(b) *Equity Theory*.⁴²¹ — Second, Nan might argue that she has done more than most of her neighbors to enhance the quality of their collective life, and that she deserves a reward commensurate with the magnitude of her contribution.⁴²² Enormous practical difficulties would accompany systematic implementation of this principle.⁴²³ But, assuming those impediments could be overcome, the theory should be rejected on the ground that it would make persons' lots in life depend to an excessive extent upon their natural abilities, the distribution of which is "arbitrary from a moral point of view."⁴²⁴ To the (large)

⁴¹⁹ Rawls, *The Basic Structure as Subject*, in *VALUES AND MORALS* 47, 52–53 (A. Goldman & J. Kim eds. 1978); see also Ackerman, *On Getting What We Don't Deserve*, 1 *SOC. PHIL. & POL'Y* 60, 65–66 (1983) (arguing that "[i]n a real-world market system, each of us finds himself burdened by a whole series of market imperfections, informational disadvantages, [and] transactional rigidities" and that, "[w]hile all of us have to deal with these inconveniences, some are crushed by [them]").

⁴²⁰ A. BUCHANAN, *MARX AND JUSTICE* 161 (1982). The theory is also somewhat vulnerable to the point that, stripped of the divine imperative upon which Locke relied when first advancing the argument, see J. LOCKE, *supra* note 161, at 309, it lacks an explanation why labor should give rise to ownership of the thing labored upon. See Epstein, *Possession as the Root of Title*, 13 *GA. L. REV.* 1221, 1227 (1979); O'Neil, *Nozick's Entitlements*, in *READING NOZICK* 308–10 (J. Paul ed. 1981). Admittedly, however, this traditional objection loses some of its force when applied to works of the intellect.

⁴²¹ The phrase is derived from the literature of social psychology, where it is used to describe the belief that justice entails giving each participant in a collective enterprise (whether it be a discrete project or a society) a share of its products proportional to his "contribution" to the venture. See M. DEUTCH, *DISTRIBUTIVE JUSTICE: A SOCIAL PSYCHOLOGICAL PERSPECTIVE* 9 (1985).

⁴²² For a sympathetic presentation of this argument, see J. FEINBERG, *SOCIAL PHILOSOPHY* 114–15 (1973). Although it resembles the labor-desert theory just considered, the equity theory differs from it in three respects: (i) in imperfect markets (and all markets are, after all, imperfect), the rewards that Nan could claim under the two approaches would differ; (ii) the equity theory could accommodate measures of Nan's contribution to "the quality of [her neighbors'] collective life" more refined than the amount of money those neighbors would pay for access to her creations; and (iii) the equity theory is more comprehensive, insofar as it provides a guide to the entitlements of workers (e.g., doctors, teachers, cashiers) whose activities cannot be characterized plausibly in terms of the creation of useful objects.

⁴²³ See *id.* at 115–16.

⁴²⁴ J. RAWLS, *supra* note 192, at 72; see also I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 9 (L. Beck trans. 1959); N. RESCHER, *DISTRIBUTIVE JUSTICE* 77 (1966) J. Rawls, *supra* note 192, at 104. For a sensitive summary of Rawls' views on these matters, see SANDEL, cited above in note 375, at 67–71. The gap in Rawls' argument identified by Sandel — the absence of any affirmative justification for the proposition that talents should be treated as "common assets" — can be filled by the proposition, central to the argument advanced here, that enabling all persons most fully to realize the good life is itself good.

extent that Nan's contribution to her fellow citizens' welfare is traceable to her better-than-average talents, she can no more convincingly assert a claim to a reward than she can by pointing to the talents themselves.⁴²⁵

(c) *Utilitarianism*. — Third, Nan might argue that justice requires, not that she and her neighbors receive equal lots in life, but that their shares be set by determining which deployment of resources would produce "the greatest good of the greatest number."⁴²⁶ It is far from clear that Nan would be happy with the outcome of such a calculus. Her love of her work might prompt Nan to continue writing equally fine novels (thereby giving pleasure to her readers) even if paid little, and her relative disinterest in consumer goods might mean that more total happiness would result from giving surplus resources to her neighbors than to her.⁴²⁷ Assume, however, that (as is likely) most of Nan's fellow citizens subscribe to the "equity theory" just discussed⁴²⁸ and thus would suffer disappointment or anxiety if she were denied the share that they believe she is due. Under those circumstances, net social utility would most likely be maximized by affording Nan a larger than average portion of society's surplus.⁴²⁹ The theory she invokes nevertheless should be rejected primarily⁴³⁰ on the ground that, to the extent it concentrates on "the total aggregate of pleasure or happiness" and counsels depriving a person of resources whenever so doing would secure the greater happiness of others, it fails to "take seriously the distinction between persons."⁴³¹

⁴²⁵ See J. RAWLS, *supra* note 192, at 72-73; J. RYAN, *DISTRIBUTIVE JUSTICE* 183-84 (1916). But cf. Fried, *supra* note 418, at 49-50 (arguing that, although a person does not "deserve" her talents, she is "entitled" to them and to "what [she] acquire[s] by those talents").

⁴²⁶ For the argument that this classic statement of the utilitarian criterion is so ambiguous as to be useless unless supplemented by "a further and at least equally fundamental principle," see N. RESCHER, cited above in note 424, at 25-41. For present purposes, I pass by this objection and assume the criterion could be coherently construed and applied.

⁴²⁷ That individuals' utility functions are simply not comparable in the manner presumed by this prediction is a traditional objection to utilitarianism, but a less fundamental criticism than those summarized below.

⁴²⁸ Recent empirical work suggests that the majority of contemporary Americans and Western Europeans adhere to some version of the view that rewards should vary with "contribution." See, e.g., Adams & Freedman, *Equity Theory Revisited: Comments and Annotated Bibliography*, in 9 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOLOGY* 43, 47-49 (L. Berkowitz & E. Walster eds. 1976). In other cultures and in others eras, however, this view has been less popular. See, e.g., M. DEUTCH, *supra* note 421, at 29, 164-79, 202-03.

⁴²⁹ Contemporary utilitarians are disturbed by the degree to which the distribution of income would seem to depend upon "external preferences" of the sort described in the text, see, e.g., R. HARE, *supra* note 361, at 104, but none has devised a coherent method for excluding such attitudes from the distributive calculus. See E. Rakowski, *supra* note 362, ch. 5.

⁴³⁰ Another powerful objection to the theory is that it is insensitive to considerations of merit or desert. See N. RESCHER, *supra* note 424, at 48. Those considerations are taken up in section V.A.3.e below.

⁴³¹ J. RAWLS, *supra* note 192, at 27; see also N. RESCHER, *supra* note 424, at 25-44; M. SANDEL, *supra* note 362, at 3; Hart, *supra* note 362, at 829-30.

(d) *Inequality that "Pays for Itself."*⁴³² — Frustrated, Nan might respond: at least we can agree upon the legitimacy of inequality that leaves no person worse off than a situation of perfect equality. Here she is on solid ground. A policy that increases the ability of some persons to realize the good life without decreasing the ability of others is unobjectionable.⁴³³ Full elaboration of this deceptively simple criterion⁴³⁴ would be exceedingly difficult,⁴³⁵ but a few implications are clear and germane. Some degree of inequality in income, decisionmaking responsibility, and access to meaningful work surely is justifiable when, through a system of incentives, it increases economic productivity and coordination enough to enhance the quality of life of the least advantaged individual.⁴³⁶ Thus, the creators of art should

⁴³² See N. RESCHER, *supra* note 424, at 93.

⁴³³ See J. RAWLS, *supra* note 192, at 530–41 (arguing that, under these circumstances, only envy could motivate the least advantaged to object, and that sentiment is unworthy of our deference); N. RESCHER, *supra* note 424, at 89–93, 101–04. As Nozick observes, the legitimacy of inequality up to this point is comparatively uncontroversial — and does not depend on the defensibility of Rawls' contractarian theory. See R. NOZICK, *supra* note 368, at 195–96. *But cf.* K. NIELSEN, *supra* note 391, at 49–53 (arguing that Rawls' "difference principle" would undermine the self-respect of persons on the bottom and "reflects both elitism and paternalism").

⁴³⁴ It should be noted that the statement of the principle set forth in the text differs from Rawls' difference principle in two respects: it requires that inequality not undermine the position of the least advantaged person, rather than the least well-off class, and it measures "advantage" in terms of access to the good life, rather than in terms of holdings of "primary goods." *Cf.* J. RAWLS, *supra* note 192, at 95–100. Some of the reasons for making these adjustments are reviewed in Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in READING RAWLS 292, 301–03 (N. Daniels ed. 1974); and Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1057–61 (1973).

⁴³⁵ One question that would have to be addressed is when does the strategy of differentiating lots in life and allocating positions for which demand exceeds supply on the basis of criteria not entirely within persons' control (e.g., a mixture of aptitude and commitment) so impair persons' capacity to shape their own lives (by limiting the sets of occupation from which they are able to choose their careers) that it is not justified by the enhancement of the society's material or cultural resources?

⁴³⁶ See, e.g., J. RYAN, *supra* note 425, at 181. Determining how much inequality could be justified by this guideline would be very hard, but two lines of recent research suggest that it would be less than is commonly assumed. The first consists of a growing set of studies concluding that substantial decentralization of decisionmaking responsibility need not impair either the total output of a firm or economy or the match between the amounts and kinds of goods and services produced and consumers' desires for them. See B. HORVAT, *THE POLITICAL ECONOMY OF SOCIALISM* 202–09 (1982); Jones, *British Producer Cooperatives, 1948–1968: Productivity and Organizational Structure*, in PARTICIPATORY AND SELF-MANAGED FIRMS, *supra* note 386, at 175–98; Jones & Svejnar, *Participation, Profit Sharing, Worker Ownership and Efficiency in Italian Producer Cooperatives*, 52 *ECONOMICA* 449, 460 (1985); Levin, *Issues in Assessing the Comparative Productivity of Worker-Managed and Participatory Firms in Capitalist Societies*, in PARTICIPATORY AND SELF-MANAGED FIRMS, *supra* note 386, at 45–47; M. Quarry, *Employee Ownership: Examining an Idea at Work* (Master's thesis, Dartmouth, 1986). The second consists of empirical research in social psychology that casts doubt on the conventional wisdom that laborers rewarded in proportion to their performance will do more and better work than laborers who receive equal rewards. See M. DEUTCH, *supra* note 421, at 198–99

be afforded better than average incomes (or greater freedom from drudgery) whenever, but only whenever, such a policy would increase their output enough to yield a net improvement in the lives of non-artists.⁴³⁷

(e) *Unequal Effort*. — Finally, Nan might seek to salvage something of the “equity theory” criticized above.⁴³⁸ Conceding that she is not entitled to a reward for that part of her achievement attributable to her innate talent, she might claim that her decision to devote unusual amounts of time and effort to the development and application of her ability deserves recognition. This argument also has merit. Rawls would have us reject Nan’s plea on the same grounds we rejected the argument based on a differential contribution: a person’s “character” — which, presumably, is what inclines and equips her to work hard — “depends in large part upon fortunate family and social circumstances for which [she] can claim no credit.”⁴³⁹ But this concedes too much to the determinist camp. Our intuitions and experience point toward — indeed, our capacity to make moral judgments of any sort depends upon — the proposition that persons are to *some* extent the architects of their characters and the agents of their actions.⁴⁴⁰ Once Rawls’ position on this point is rejected, Nan’s claim is strong. She does not deserve extra credit for every hour she spent in front of her typewriter; she has a duty to devote to the community a portion of her time and energy that, when combined with the equal contributions of her fellow citizens, will sustain the conditions that make it possible for everyone to realize the good life.⁴⁴¹ But the objective of providing all members of the society room for self-determination counsels permitting her to decide for herself if and how much to exceed that level of contribution. If she decides to devote

(1985) (reviewing the literature); M. LEPPER & D. GREENE, *THE HIDDEN COSTS OF REWARD* (1978).

⁴³⁷ This statement of the principle is intended to incorporate Rawls’ persuasive argument that the legitimacy of inequalities must be assessed at the level of generality of policies according special benefits to types of workers, not of rewards to particular individuals. See J. RAWLS, *supra* note 192, at 97–100. The problems associated with identifying the “least advantaged group,” see *supra* note 434, do not undermine that argument.

⁴³⁸ See *supra* pp. 1757–58.

⁴³⁹ J. RAWLS, *supra* note 192, at 104; see also M. SANDEL, *supra* note 375, at 71 (reading Rawls as taking a position similar to that expressed in the text).

⁴⁴⁰ See I. BERLIN, *FOUR ESSAYS ON LIBERTY* xxxv (1969); L. WEINREB, *supra* note 366, at 197; cf. Dick, *supra* note 411, at 257–58 (arguing for similar reasons that Rawls “pushes the doctrine of nonresponsibility too far”). For more general discussions of these issues, see J. LUCAS, *THE FREEDOM OF THE WILL* (1970), and P. VAN INWAGEN, *AN ESSAY ON FREE WILL* (1983).

⁴⁴¹ To mute the anxiety of those who fear that this line of argument tilts toward statism, it is worth noting that, if the proposition that meaningful work is rewarding and attractive, see *supra* pp. 1750–51, is accurate, little if any governmental coercion would be required to enforce this duty.

more time than her neighbors to activities from which they all benefit, she deserves more than an average share of society's surplus.⁴⁴²

4. *The Contours of the System.* — The comments made in the preceding fifteen pages leave many difficult questions unresolved. Among the more important are: Would socialism, capitalism, or some mixture of them best facilitate the requisite reforms of the economic system?⁴⁴³ What kind of governmental regulation would be necessary to allocate income and tasks in accordance with the modified "difference principle" and the unequal-effort principle?⁴⁴⁴ And how, in practice, would legitimate inequalities derived from those two criteria be reconciled?⁴⁴⁵

Nevertheless, the rough outlines of the utopian society are clear enough: compared to the United States today, the creativity and challenge of persons' jobs would be greater and more equal; the material resources at each person's disposal would be somewhat less (on average) and much more equal; and the state would be more extensively involved in fostering artistic innovation and providing people decent food, clothing, housing, and medical care and more-than-decent educations. A society organized along such lines would make accessible to all of its members the sort of life sketched at the outset of the analysis. More fundamentally, by celebrating such a life and by in-

⁴⁴² For much more elaborate developments of this argument, see Dworkin, cited above in note 362, at 304-14, and E. Rakowski, cited above in note 362, at 47-51. For a more modest discussion to the same effect, see Dick, cited above in note 411, at 260. Both Dworkin and Rakowski devote many pages to the contention that persons also ought to be permitted to augment (or diminish) their shares by undertaking "voluntary risks." See Dworkin, *supra* note 362, at 292-304; E. Rakowski, *supra* note 362, at 52-80. To the extent the choice to pursue a career in literature or art is unusually risky, that contention is germane to the problem before us. Assessing Dworkin's and Rakowski's argument would not be easy. It would require, at a minimum, a judgment regarding the degree to which risk-preference and risk-aversion are innate or socialized traits. Cf. *supra* pp. 1757-58 (discussing the illegitimacy of distributing resources on the basis of talent). But, insofar as the outcome of such an inquiry would not materially affect any of the proposals advanced in the following pages, it will not be pursued here.

⁴⁴³ Cf. J. RAWLS, *supra* note 192, at 280 (professing agnosticism on the question whether his theory of justice is consistent with socialism or capitalism). But cf. Clark & Gintis, *Rawlsian Justice and Economic Systems*, 7 PHIL. & PUB. AFF. 302 (1978) (arguing that Rawls' principles should prompt him to prefer socialism).

⁴⁴⁴ Cf. Letwin, *supra* note 391, at 36-37 (arguing that the scope of the regulatory apparatus [and concomitant impairment of individual freedom] necessary to sustain an egalitarian regime provides a powerful reason for not instituting one); M. WALZER, *supra* note 372, at 316-18 (arguing that popular commitment to the principles of distributive justice he advocates could sustain the sort of society he describes without undue statism); Dworkin, *supra* note 362, at 312-34 (sketching an extensive system of redistributive taxation necessary to sustain the degree and kind of equality he advocates).

⁴⁴⁵ Imagine, for example, that A's aptitude for theoretical physics "earns" him a specialized education and an unusually rewarding job engaged in primary research. He then devotes an unusually large portion of his time to his work. Does his extra labor entitle him to a larger than average share of the society's surplus goods even though he already enjoys an (undeserved) premium job?

culcating the habits, moods, and motivations crucial to it,⁴⁴⁶ the society would induce persons to seek and share it.

B. Paternalism

Although substantial movement in the direction of the society outlined above would require social and economic reform of many sorts, most of which are beyond the reach of the law of intellectual property, judicious reconstruction of the fair use doctrine could contribute in more than trivial respects to the overall program.⁴⁴⁷ Sections C, D, and E of this Part attempt to substantiate that assertion. Before commencing the analysis, however, we must confront a general objection to this way of approaching and justifying doctrinal reform. A goal of several of the specific proposals advanced in the following pages is to alter, through adjustments in the price or availability of different sorts of intellectual products, consumers' habits and desires so that they conform more closely to the predilections endorsed in Section A. To the extent such proposals are motivated by a judgment that many Americans do not now know what is in their best interest, are they not impermissibly "paternalistic" in character? In other words, do they not amount, at bottom, to efforts to limit persons' freedom "for their own good" — an activity in which government⁴⁴⁸ should not be engaged?

The challenge might be deflected to some degree by three observations. First, none of the reforms advocated below would force consumers to do or not do anything. True paternalism, it could be argued, involves coercion;⁴⁴⁹ the use of incentives or disincentives to

⁴⁴⁶ Cf. C. GEERTZ, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87, 89–123 (1973) (discussing the interaction of symbols, rituals, world view, moods, and motivations in defining and sustaining a religion). The connection between Geertz's argument and the discussion in section IV.D.7 of the power of the state to mold persons' preferences should be apparent.

⁴⁴⁷ At various points in the following pages, it will be evident that a particular objective could be advanced more effectively through an adjustment in some other field of doctrine, like the federal income tax, than through modulation of the fair use doctrine. If and when opportunities for meaningful reform in those fields arise, they should of course be seized. In the meantime, however, we should not hesitate to harness copyright law merely because more powerful or efficient engines of change are imaginable.

⁴⁴⁸ The challenge could be sharpened by pointing out that most of the proposals involve changes in judge-made law. Arguably, the reasons to be uneasy about paternalistic intervention by government in general apply with special force to interventions by unelected officials. See Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988). In keeping with the overall approach of the article, see *supra* p. 1699, the following discussion will not directly address this question of institutional competence.

⁴⁴⁹ See, e.g., Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 105 (1971) ("The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or, in its extreme form, to guide them, whether they like it or not, toward their own good." (emphasis added)); G. Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 108 (R. Wasserstrom ed.

alter persons' outlooks and conduct should not cause us the same alarm.⁴⁵⁰ Second, the American legal system is rife with rules whose most plausible justification is that they limit persons' freedom for their own good, and many of those rules are the inventions of judges.⁴⁵¹ The suggestion that, in modifying copyright law, we might profitably attend to concerns that already undergird much of the law of contracts, torts, and consumer protection arguably should not be troubling. Third, the program outlined below is as much designed to foster in future generations tastes and capacities that will enable and urge them to realize the good life as it is to change the preferences of current consumers. To that extent, it is not paternalistic at all, but falls well within the category of "redistributive" rules — limitations on the freedom of some persons to advance the interests of others.⁴⁵²

Unfortunately, none of these responses, reassuring as they may be, reaches the heart of the matter. As to the first, several philosophers have recently argued persuasively that noncoercive interference with persons' freedom in order to promote their own welfare implicates, at least in muted form, the same moral difficulties raised by coercive interference.⁴⁵³ The second argument in truth only expands the set

1971) ("By paternalism I shall understand roughly the interference with a person's *liberty of action* justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being *coerced*.") (emphasis added).

⁴⁵⁰ Indeed Mill, the first and foremost of the modern opponents of paternalism, was untroubled by governmental policies of the sort defended below — efforts to enhance persons' appreciation of certain kinds of art by making them readily and cheaply available. See J. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 953–54 (7th ed. 1871).

⁴⁵¹ Such rules include statutes requiring motorcyclists to wear helmets and forbidding the sale or possession of certain drugs; bans on self-enslavement, the sale of organs, and suicide; and the nonwaivability of certain contract terms (like the warranty of habitability implied in residential leases). See generally H. HART, *LAW, LIBERTY, AND MORALITY* 32 (1963); D. VANDEVEER, *PATERNALISTIC INTERVENTION* 13–15 (1986); Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 763–64 (1983). But cf. Shapiro, *supra* note 448, at 529–45 (discussing the strength of antipaternalist sentiment in the American public, legislatures, and judiciary).

⁴⁵² See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 571–72 (1982). A clever variation on this argument is the contention that a paternalistic rule is justified when, in its absence, the person whose freedom is at stake would undergo changes sufficient to warrant describing him as a new and different "self," and that the new self would regret that the old self had been permitted to act as he did. Intervention under these circumstances, so the argument goes, is justified to protect one "person" from harm by another (earlier) "person." See Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 122–27 (R. Sartorius ed. 1983); Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 *YALE L.J.* 826 (1976). Both authors rely heavily on Derek Parfit's theory of personal identity. See Parfit, *Later Selves and Moral Principles*, in *PHILOSOPHY AND PERSONAL RELATIONS* 137 (A. Montefiore ed. 1973). The strategy might be invoked to defend several of the proposals advanced below, but the flaws in the strategy itself, insightfully summarized in J. KLEINIG, *PATERNALISM* 45–48 (1984), are sufficiently serious to make it not worth the effort.

⁴⁵³ See, e.g., G. Dworkin, *Paternalism: Some Second Thoughts*, in *PATERNALISM*, *supra*

of rules that must be justified, and the third answer fails to justify the proposals insofar as they are aimed at current consumers.

We turn then to the question: to what extent, if at all, is it legitimate to use the law of copyright to change persons' minds and habits for their own good? We may profitably begin by isolating the grounds on which philosophers have either criticized legal paternalism or tried to delimit its acceptable scope. Four themes (in various combinations) dominate the literature. (a) Drawing on the central argument of most modern forms of liberalism,⁴⁵⁴ many analysts contend that government ought to remain neutral as to alternative theories of the good and therefore that paternalistic intervention in a person's affairs can be justified, if at all, only when it enables him to realize his own conception of his well-being⁴⁵⁵ more effectually than would leaving him to his own devices.⁴⁵⁶ (b) Building on an argument first advanced by Mill,⁴⁵⁷ some commentators insist that, although a person does not always know which course of action would be in his best interest, he is usually a better judge of his welfare than an officious government official (at least given extant systems for selecting government officials), that the rare cases in which the official's judgment would be superior cannot be isolated, and that therefore a general (or nearly general) rule against legal paternalism would do more good than harm.⁴⁵⁸ (c) Other writers eschew such a consequentialist approach as too unreliable a bulwark of individual liberty and contend, usually on Kantian grounds,⁴⁵⁹ that a person's freedom to choose his own course of action is the supreme value and should always prevail over others' desires to protect him from harm.⁴⁶⁰ (d) Finally, some

note 452, at 105-07; Gert & Culver, *Paternalistic Behavior*, 6 PHIL. & PUB. AFF. 45, 45-50 (1976); Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, in PATERNALISM, *supra* note 452, at 39, 52-55.

⁴⁵⁴ See *supra* note 364; cf. J. KLEINIG, *supra* note 452, at 3-4 (associating the emergence of the "problem" of paternalism with the rise of liberalism).

⁴⁵⁵ Much of the discussion in the literature is concerned with differentiating a person's own conception of his well-being from the collocation of his revealed preferences, thereby providing a foothold for paternalism consistent with liberalism. See, e.g., J. KLEINIG, *supra* note 452, at 68 (attempting to differentiate a person's central values from his peripheral wants); Dworkin, *supra* note 452, at 121-22 (distinguishing a person's choices from his overarching "life-plans"); Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 467-72 (distinguishing a person's "values" from his "wants").

⁴⁵⁶ See, e.g., D. VANDEVEER, *supra* note 451, at 110-12; Luban, *supra* note 455, at 472-74; Wikler, *supra* note 453, at 39.

⁴⁵⁷ See J. MILL, *supra* note 377, at 273.

⁴⁵⁸ See, e.g., Brock, *Paternalism and Promoting the Good*, in PATERNALISM, *supra* note 452, at 237, 253-55. Special concern with the likelihood that government officials would abuse their authority is evinced in Wikler, cited above in note 453, at 43-44, and Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891 (1972).

⁴⁵⁹ See J. KLEINIG, *supra* note 452, at 25-26. But see J. FEINBERG, *supra* note 374, at 94-97 (distancing himself from Kant).

⁴⁶⁰ See, e.g., J. FEINBERG, *supra* note 374, at 61-62; D. VANDEVEER, *supra* note 451, at

writers argue that individuality (in the sense of full development of one's faculties), while perhaps not the supreme value, is surely an important one, and that leaving persons free to make choices (and mistakes) is the best way to enable them to develop the moral muscles upon which individuality depends.⁴⁶¹

When these four arguments are exposed to the utopian vision set forth in section A, the first and third quickly fall away. As to the first, a premise of the analysis of this Part is that government should *not* remain neutral as to alternative conceptions of the good; the fact that a paternalistic rule presupposes "some idea of what is a fitting life for a person," consequently, is no objection to it.⁴⁶² As to the third, the particular conception of the good life ventured in section A.1. does not hold up autarchy as the supreme value.

But the game is far from up for the antipaternalist. One of the components of the proffered vision of the good life is a particular conception of self-determination.⁴⁶³ Insofar as a paternalistic law enhances persons' capacity and tendency to choose and shape their roles, relationships, jobs, and communities (for example, by freeing them of habits and outlooks endemic to electronic consumer culture that stunt or distort their imaginations),⁴⁶⁴ it is commended by, rather

88, 112-15; Wikler, *supra* note 453, at 38-39. Writers who take this position commonly argue that only the "incompetence" of the person at issue, *see infra* note 464, or his prior, hypothetical, or subsequent consent to the restraint on his liberty, *see, e.g.,* Carter, *Justifying Paternalism*, 7 CAN. J. PHIL. 133 (1977); G. Dworkin, *supra* note 449, at 119-20, provide legitimate justifications for paternalism.

⁴⁶¹ See J. KLEINIG, *supra* note 452, at 25-27 (attributing such an argument to Mill); *cf.* Kennedy, *supra* note 452, at 640 (adopting a moderate version of the argument).

⁴⁶² See G. Dworkin, *supra* note 449, at 111. Dworkin argues that the ban on contracts of self-enslavement must rest on some idea of what life is fitting but is justifiable nevertheless. *See also* Kennedy, *supra* note 452, at 628 (insisting that paternalism often properly depends on judgments that the sorts of relationships into which people are willing to enter are simply bad for them); Kronman, *supra* note 451, at 786-97 (arguing that a number of paternalistic doctrines in contract law are justified by their tendency to cultivate persons' "facult[ies] of moral imagination"); Luban, *supra* note 455, at 482-84 (conceding that his proposed system for distinguishing legitimate from illegitimate paternalism "imposes a bias in favor of rational dialogue" that is not "neutral among theories of the good and the groups that hold them"); *cf.* Brock, *supra* note 458, at 250-53 (recognizing that the more one's "theory of the good for persons" incorporates states of affairs independent of persons' "desires," the greater the scope one will accord legal paternalism).

⁴⁶³ See *supra* pp. 1748-50.

⁴⁶⁴ See *supra* pp. 1750-51. This argument builds on a concession made by all but the staunchest of the opponents of paternalism. Virtually every writer in this field acknowledges the legitimacy of actions or rules that limit the freedom of persons who have been deprived (either temporarily or permanently) of the capacity to make "rational," "voluntary," or "informed" choices. *See, e.g.,* D. VANDEVEER, *supra* note 451, at 88; G. Dworkin, *supra* note 449, at 123-24; Feinberg, *supra* note 449, at 110-13; Hodson, *The Principle of Paternalism*, 14 AM. PHIL. Q. 61, 65 (1977); Murphy, *Incompetence and Paternalism*, 60 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 465-86 (1974). As Professor Brock persuasively argues, very few if any of our decisions are fully rational, voluntary, and informed, and none of the opponents of pater-

than repugnant to, that conception.⁴⁶⁵ But too many such laws would diminish the set of choices available to persons more than could be justified by the augmentation of their "positive freedom"⁴⁶⁶ to avail themselves of the remaining options. That a particular rule would limit persons' opportunities for self-determination is not necessarily a fatal objection to it; for example, the rule might sufficiently enlarge persons' access to creative work to be nevertheless justifiable. But, from the standpoint of the theory advanced here, the fact that a rule would have a net adverse impact on persons' choices does count against it. In addition, when considering the wisdom of particular paternalistic incentives or constraints, the educational value of mistakes must constantly be borne in mind. Finally, the dangers identified by the consequentialist argument — that government officials either will abuse their authority or will make good-faith errors when adopting laws for persons' own good — remain salient.

Where does this leave us? Not inveterately opposed to paternalism, certainly, but not cavalier in our acceptance of it either. In general terms, the argument suggests that when and only when it can be predicted — with sufficient confidence to warrant running the risks just canvassed — that a particular policy designed to alter persons' tastes for different types of intellectual products would, on balance, increase their access to the good life (taking due account of the need to preserve opportunities for self-determination), it should be adopted. A rough principle, to be sure, but it enables us to proceed and will help guide the more contextual judgments made in the course of the ensuing analysis.

C. Reconstructing the Fair Use Doctrine

This section considers how a judge who had time on his hands and extensive access to information, who knew that other courts would adhere to his rulings, and who fully shared the utopian vision advanced in this Part might rebuild the fair use doctrine. The follow-

nalism has persuasively justified his decision to select an arbitrary line in the spectrum of voluntariness, and to immunize from paternalistic constraint all decisions that fall to one side of it. See Brock, *supra* note 458, at 239–49. For the most extensive effort to justify drawing such lines, which nevertheless fails to meet Brock's objections, see J. FEINBERG, cited above in note 374, at 94–142. What is proposed here is merely to recognize certain attitudes and habits fostered by contemporary American culture as sufficient impediments to fully voluntary choice to justify paternalistic intervention. Cf. G. LUKACS, *HISTORY AND CLASS CONSCIOUSNESS* 51–54, 64–65, 72 (R. Livingstone trans. 1971) (developing a similar argument about involuntariness in the context of class consciousness).

⁴⁶⁵ Cf. Regan, *supra* note 452, at 116–21 (making a similar argument). For a less sympathetic explication of this approach, plagued by an overly abstract conception of the "freedom" that is to be maximized, see J. KLEINIG, cited above in note 452, at 51–53.

⁴⁶⁶ See I. BERLIN, *supra* note 440, at 131–34; cf. L. WEINREB, *supra* note 366, at 152–55 (exploring the concept of "liberty as power").

ing section extracts from that discussion a set of proposals a real federal court might practicably and comfortably adopt.

A quick review is in order. Artists make money by extracting fees from persons who desire access to their works. Part IV showed why, in many circumstances, it would be inefficient to empower an artist to demand payment from every person who wished to put her works to one of the uses listed in section 106 of the Copyright Act. Part IV also showed that it matters *which* activities consumers are permitted to engage in for free and which are deemed to require the consent of the artist. The rights prescribed by section 106 vary in the amount of benefit they provide copyright owners per unit of cost to the rest of us. Generally speaking, the economist would like to avoid two situations: one in which artists are accorded entitlements from which they gain little but which cost the public a good deal, and one in which they are denied entitlements from which they could gain much at modest cost to the public. Somewhat more precisely, maximization of allocative efficiency can be achieved by arranging the set of activities putatively reserved to copyright owners by section 106 in order of their incentive/loss ratios,⁴⁶⁷ identifying the point in the series at which the benefits secured by holding out monetary incentives to talented persons exceed by the maximum amount the attendant monopoly losses, and declaring all uses above that point fair and all uses below it unfair.⁴⁶⁸

A modified version of this technique could be put to good use by our hypothetical judge. If full exploitation of the rights prescribed by section 106 would afford creators of a particular type of intellectual product more income than they deserve, the judge would be able to promote his goals by declaring fair (and thus encouraging) activities that would contribute to the attainment of the good society and by declaring unfair activities that would not. How, then, should he decide which uses fall into which category? That question reduces to two problems. The first, addressed in subsection 1, is how might the judge go about ranking the putatively infringing uses of a particular sort of copyrighted material in terms of their relative importance to his agenda. The second, addressed in subsection 2, is where in that series he should draw the line between fair and unfair activities.

1. *Ranking Entitlements.* — Because, other things being equal, the judge would rather that people be better rather than worse off by their own lights, he would have to take into account all of the considerations identified by the portion of the economic analysis directed toward arranging uses in the right order. But sections A and B of

⁴⁶⁷ In other words, placing at the top of the list the use with the lowest ratio and at the bottom the use with the highest ratio.

⁴⁶⁸ For a fuller statement of the principle, see pp. 1715–16 above.

this Part have identified a number of goals other than maximizing the satisfaction of current consumers' tastes that the judge would seek to advance. Specifically, sensitivity to the five concerns itemized below could and should affect his determination of the optimal order of entitlements.

(a) *Transformative Uses*. — Active interaction with one's cultural environment is good for the soul. A person living the good life would be a creator, not just a consumer, of works of the intellect. This is not to say that all passive uses of cultural artifacts are bad; even in utopia, people can be expected to listen to symphonies without playing along, to attend dramatic performances without mounting the stage, even to watch some television.⁴⁶⁹ But the proportion of active to passive activities in the lives of most Americans today is too low. Whitman's contention that, to realize the promise of democracy, to create and sustain a society in which people flourish, we must cultivate a new kind of "character" — one not only more "attentive," more capable of appreciating the texture of the surface of life, but also more energetic, more actively engaged in the production and transformation of "Culture"⁴⁷⁰ — is even more applicable to the United States of the 1980's than it was to the United States of the 1860's.⁴⁷¹

What does that have to do with the fair use doctrine? It suggests that uses of copyrighted material that either constitute or facilitate creative engagement with intellectual products should be preferred to uses that neither constitute nor foster such engagement. Our hypothetical judge should thus modify the sequence of uses generated by economic analysis, which takes as given Americans' present tastes, either by shifting transformative uses upward or by shifting passive uses downward. Assume, for example, that he has succeeded in ranking according to their incentive/loss ratios the various ways in which copyrights in feature movies could be violated. Included in the list are home videotaping of the sort at issue in *Sony* and the production of "sequel" movies.⁴⁷² Because the latter is more creative than

⁴⁶⁹ Cf. J. ELSTER, *supra* note 366, at 87–88 (arguing that Marx's emphasis on creation and production as opposed to consumption was excessive). But cf. J. MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 24, 51 (1978) (offering, as one of his four arguments, that television has corrupted American culture in part because it has "substituted secondary, mediated versions of experience for direct experience of the world").

⁴⁷⁰ See W. WHITMAN, *Democratic Vistas*, in WALT WHITMAN: COMPLETE POETRY AND SELECTED PROSE 929–94 (Library of America ed. 1982) (1st ed. 1867–68).

⁴⁷¹ See R.P. WARREN, *America and the Diminished Self*, in *DEMOCRACY AND POETRY* 3–37 (1975). If Whitman missed the mark at all, it was by undervaluing the capacity of great works of art to stimulate and provide raw material for creative impulses. Shakespeare need not be poisonous to the pride and spontaneity of the common people. Some of the reasons why Whitman's dreams have not yet been realized are considered above at p. 1747.

⁴⁷² In recent years, the use in a film of characters that first appeared in a copyrighted film has been held to constitute infringement. See 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 2.12, at 2-171–2-178.2 (1987) and cases cited therein.

the former,⁴⁷³ the latter should be moved up in the series, or the former should be moved down.⁴⁷⁴

For two related reasons, systematic application of this procedure would advance the utopian agenda. First, it would create more opportunities for Americans to become actively involved in shaping their culture, thereby increasing access to the good life. Second, by altering the relative ease with which Americans can engage in different sorts of activities — that is by making creative activities less expensive or more convenient and making noncreative activities more expensive or less convenient — the procedure would modify consumers' habits and eventually their desires, thereby enhancing not just their access to but also their appreciation of the good life.⁴⁷⁵

(b) *Education*. — During the prolonged debate that resulted in the 1976 comprehensive reform of the Copyright Act, it was often suggested that some sort of special exemption for "educational" uses of copyrighted materials be incorporated into the statute.⁴⁷⁶ Only a few of these various proposals found expression in the language of the statute that Congress ultimately adopted.⁴⁷⁷ Despite this meager

⁴⁷³ In other words, whereas home videotaping for the purpose of "time-shifting" neither entails nor facilitates any transformation of the recorded movie, producing the sequel enables a large number of writers, actors, and directors to "make something of" the original.

⁴⁷⁴ Needless to say, all the uses in the list should be scrutinized on the same basis, and all creative uses moved up or all noncreative uses moved down. Examples from the case law of activities that would qualify for preferential treatment include: incorporating portions of a copyrighted Amos and Andy show in the script of a theatrical production, *see Silverman v. CBS, Inc.*, 632 F. Supp. 1344, 1352 (S.D.N.Y. 1986) (holding that the activity was not a fair use), and using portions of copyrighted Charlie Chaplin films to make a 13-minute "compilation" of "highlights" for presentation at the Academy Awards and a film biography of Chaplin. *See Roy Export Co. v. CBS, Inc.*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (holding that neither activity was a fair use), *aff'd on other grounds*, 672 F.2d 1095 (2d Cir. 1982).

⁴⁷⁵ Viewed from the latter angle, it should be clear, the proposed strategy implicates the discussion of paternalism in the preceding section. Review of the guidelines offered there suggests that the proposed bias in favor of transformative uses is justifiable: it promises to help free persons from the mentality and habits of consumerism and enable them to assume greater control over their lives without unduly constricting the set of activities available to them; the probability that it would indeed have such an effect seems high; and the risks of error or abuse of authority in its administration are small enough to be acceptable.

⁴⁷⁶ The initiative that went furthest was the effort of groups purporting to represent authors, publishers, and educators to develop a set of "guidelines for educational copying" to be codified as a separate section 107(b) of the Act. For the authoritative history of these conferences and their outcome, *see* W. PATRY, cited above in note 6, at 296-304.

⁴⁷⁷ The most significant traces of the educators' suggestions are: (i) the ambiguous reference, in the opening sentence of section 107, to "teaching (including multiple copies for classroom use), scholarship, or research" as among the "purposes" for which copying copyrighted works might constitute a fair use; (ii) the clause in section 107(i), observing that "whether [a] use . . . is for nonprofit educational purposes" is a relevant aspect of "the purpose and character of the use"; and (iii) a provision for remittitur of statutory damages in cases in which the defendant was an employee of a "nonprofit educational institution, library, or archive." 17 U.S.C. § 107, 504(c)(2) (1982). For discussion of the puzzling origins of these provisions, *see* W. PATRY, cited

congressional acknowledgment of the special character of education and despite the fact that, in recent litigation, "nonprofit educational users have been singularly unsuccessful in asserting fair use,"⁴⁷⁸ a suspicion persists among many students of the doctrine that educational activities should stand on a somewhat different footing from other kinds of uses.⁴⁷⁹

The utopian vision advanced in this Part provides a way of giving shape to and justifying that intuition. Recall that one of the important features of the good society would be an extensive system of public education, which would include not just "schooling," but also a variety of institutions designed to enhance people's knowledge of public affairs and appreciation of different kinds of art. Realization of that objective plainly would require a good deal more than reform of copyright law. But until such time as the federal or state governments can be induced to provide an educational regime of the sort envisioned, the fair use doctrine can and should be crafted to implement parts of it.⁴⁸⁰ A good way of doing so would be to accord preferential treatment in the fair use calculus to activities that facilitate education — either by enhancing access to information and argument on matters of public importance⁴⁸¹ or by increasing the ability of teachers to design and deliver to students the packages of materials they deem most effective.

above in note 6, at 304. Though no statutory provision was produced by the meetings mentioned above in note 476, a set of "guidelines" agreed upon by the parties did meet with the approval of the House and Senate committees, and is included in the committee reports. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68–72 (1976) (setting forth the guidelines and indicating that they constitute "a reasonable interpretation of the minimum standards for fair use"); H.R. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 70 (1976) (describing the guidelines as "part of [the Conference Committee's] understanding of fair use"). The guidelines were not intended and have not been interpreted to be binding on the courts, but have been taken into account in some infringement actions. *See, e.g.,* *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983). For analyses of the content of the guidelines, see D. CHISUM, *INTELLECTUAL PROPERTY: COPYRIGHT, PATENT, AND TRADEMARK* 5-80–5-89 (1980), and W. PATRY, *supra* note 6, at 404–08.

⁴⁷⁸ W. PATRY, *supra* note 6, at 408 & n.253 (reviewing the pertinent cases).

⁴⁷⁹ *See, e.g.,* A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES* 491 (2d ed. 1985); Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 62 (1987).

⁴⁸⁰ *Cf. Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 206 (2d Cir. 1983) (arguing that the fair use doctrine "ensures a proper balance of the citizenry's need to be informed and the author's monopoly of his original writings"), *rev'd*, 471 U.S. 539 (1985).

⁴⁸¹ Underlying this guideline is the proposition that the law should be organized not just to avoid inhibiting debate on public issues, *see* *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), but to foster and enrich that debate, *cf. Goldstein, Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 988–90, 1009, 1011–14 (1970) (arguing that the fair use doctrine properly "accommodates" the public's "right to hear" and the need to encourage artistic expression by excusing "otherwise infringing conduct where the subject matter appropriated is relevant to the public's interest in its own political and cultural advancement and the infringer dedicates the subject matter to a use independently conducive to the public interest"). In assessing the tendency of different sorts of putatively infringing works to inform and enliven public debate, there is no reason to assume that "factual works" will contribute more than commentary or fiction. *See* Gorman, *supra* note 108, at 586.

The more a particular use would advance that end, the more of a boost it should get.

Examples, drawn from the case law, of uses that would qualify on this basis for special protection include:⁴⁸² taking from a book defending a woman's right to an abortion portions of interviews of women who had had abortions and publishing them in a book arguing against such a right;⁴⁸³ reprinting excerpts from an author's copyrighted letters in a critical biography of him;⁴⁸⁴ reproducing in a biography of a composer passages from a previously published biography for the purpose of substantiating criticisms of the first biographer's conclusions or use of evidence;⁴⁸⁵ and copying, for classroom use, portions of copyrighted materials unavailable in the form deemed most educational by a teacher.⁴⁸⁶

To apply this procedure sensitively, a judge would have to bear in mind that the degree of preferential treatment to which a particular activity is entitled depends on how important use of the copyrighted

⁴⁸² The reader should not infer from the length of this list that virtually all uses of copyrighted material will be entitled to preferential treatment on the ground that they are "educational" (and thus that the factor is useless in differentiating between uses). Many recent fair use cases have involved activities that surely would not qualify under even the most expansive interpretation of the standard. See, e.g., *Bourne Co. v. Speaks*, 670 F. Supp. 777, 779-80 (E.D. Tenn. 1987) (holding that unauthorized amateur performances of copyrighted songs at "Country Music Theatre" were not fair uses); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 714-15 (S.D.N.Y. 1987) (deeming the use of a facsimile of a copyrighted depiction of the relationship between New York City and the rest of the United States for the purpose of promoting the movie *Moscow on the Hudson* to be unfair); *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 663 F. Supp. 214, 219 (D. Kan. 1987) (holding the copying by one publisher of portions of a telephone directory compiled by another publisher to be unfair). Many more activities to which the fair use doctrine is, in theory, applicable — for example, the conduct of "Pirate Publishing Company" described in section IV.B — also would not qualify.

⁴⁸³ See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) (holding the use was fair), *cert. denied*, 107 S. Ct. 2201 (1987).

⁴⁸⁴ See *Salinger v. Random House*, 811 F.2d 90 (2d Cir.) (holding the use was unfair), *cert. denied*, 108 S. Ct. 213 (1987).

⁴⁸⁵ See *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (declaring copying for the purpose of impugning the prior biographer's assertions to be fair, but declaring copying for the purpose of "mak[ing] a richer, better portrait of Stravinsky" to be unfair).

⁴⁸⁶ See *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (holding that the fair use doctrine did not permit a teacher of public-school "food service career classes" to copy portions of a copyrighted booklet on cake decorating and include them in a packet of materials, substantial portions of which were original, made available to her students); cf. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247 (W.D.N.Y. 1983) (holding that it was not a fair use to copy for classroom use copyrighted programs broadcast over the public airwaves when those programs were available for rental). Because the copying in *Encyclopedia Britannica*, apparently unlike the copying in *Marcus*, did not facilitate the preparation of a set of materials tailored to the teachers' lesson plans, it would be entitled to less preferential treatment in the proposed fair use analysis. However, because it did facilitate education to some degree, if only by enabling the defendants to spend more on other resources or activities, it would deserve a modest boost.

material is to the activity's educational value. If, for example, much of the credibility and force of a "pro-life" argument derives from the author's ability to quote interviews conducted by an advocate of the right to an abortion,⁴⁸⁷ the place of the activity in the sequence of uses should be changed significantly. By contrast, if the reader's capacity to assess one historian's criticism of another is enhanced only marginally by the former's quotation of passages from the latter's work, then sensitivity to the educational value of such criticism does not require adjustment of the sequence of putatively infringing uses.

(c) *Diversity*. — Closely related to the goal of facilitating education is that of fostering cultural diversity. The objective of producing a society in which people exercise (and thereby develop) their faculties of choice and discrimination will be served by providing the populace as wide a range of cultural artifacts as possible.⁴⁸⁸ One way to advance that end is to give special consideration, when deciding which uses of a type of copyrighted material should be deemed fair, to those likely to produce "derivative works"⁴⁸⁹ that will add to the variety of intellectual products available to the public.

In most circumstances, this consideration will reinforce the two guidelines just considered. So, for example, parody deserves a boost in the fair use calculus, partly because it is a transformative use,⁴⁹⁰ partly because it improves the ability of consumers to assess the merits of the parodied work,⁴⁹¹ and partly because it increases the variegation of the artistic environment.⁴⁹²

⁴⁸⁷ See *Maxtone-Graham*, 803 F.2d at 1256-57; cf. *Time v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (basing its conclusion that the reproduction of the Zapruder photographs was a fair use partly on the ground that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy" and that the photos made the defendant's assassination theory "easier to understand").

⁴⁸⁸ For development of this point, see pp. 1751-52 above. Cf. Stewart, *Regulation in a Liberal State*, 92 YALE L.J. 1537, 1568-81 (1983) (arguing that one of the goals of administrative law should be enhancement of the "diversity of economic, cultural, and physical environments," and applying that proposal to environmental law and the regulation of broadcasting).

⁴⁸⁹ See 17 U.S.C. § 106 (1982) (according copyright owners the exclusive right to prepare or authorize the preparation of such works).

⁴⁹⁰ Judge Newman made this point powerfully and precisely in an opinion excusing from copyright liability the makers of a television show that parodied the character Superman: "It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor." *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 242 (2d Cir. 1983) (footnote omitted). The insight embodied in this passage was missed by the district court judge who, while imposing liability on the creators of a series of "singing telegrams" that parodied Superman, opined: "Defendants have the right to discuss, and even to criticize, plaintiff's stories and characterizations; but defendants do not have the right to change plaintiff's property by altering the popular associations carefully wrought by plaintiffs." *DC Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110, 118-19 (N.D. Ga. 1984).

⁴⁹¹ See Davis, *Criticism and Parody*, 26 THOUGHT 180, 181-82 (1951); Note, *Parody Defense*, *supra* note 13, at 1395; R. POSNER, *supra* note 299, ch. 7, at 41.

⁴⁹² Cf. *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per

(d) *Protecting the Creative Process.* — In his efforts to afford the public opportunities to transform and learn from intellectual products, the judge should be careful not to lose sight of the concerns of producers.⁴⁹³ In particular, both to ensure that artists (as well as consumers) have maximum opportunities for engaging in meaningful work and to increase the maturity and diversity of the artifacts they generate, he should be loath to privilege activities that threaten the creative process.⁴⁹⁴ So, for example, he should disfavor conduct that results in disclosure of works of art before their creators deem them finished, insofar as both premature divulgence itself and fear of such disclosure undercut artists' willingness and ability to take the time

curiam) (relying partly on the principle that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody," in affirming a ruling that the song "I Love Sodom" (a parody of the popular jingle, "I Love New York") constituted a fair use).

⁴⁹³ Arguably, the primary interest of most producers of intellectual products is maximizing their income. The questions of how and how much that concern may be accommodated are reserved for section V.C.2.

⁴⁹⁴ Some commentators have argued that respect for artists' dignity and personhood requires not only that they not be disturbed when creating their works, but also that their finished creations be protected from alteration, destruction, and unflattering public display. See, e.g., Katz, *The Doctrine of Moral Right and American Copyright Law — A Proposal*, 24 S. CAL. L. REV. 375, 381 (1951). The French system of *droit moral* has long accorded artists some degree of this kind of protection, see Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554–55 (1940), and the question whether the United States ought to adopt some or all of the French system is currently being considered in many contexts, see, e.g., Horowitz, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. LEGIS. 153, 200–06 (1988) (discussing proposed amendments to the federal copyright statute that would incorporate portions of the French regime); Schiller, *Black and White and Brilliant: Protecting Black-and-White Films From Color-Recoding*, 9 COMM./ENT. L.J. 523 (1987) (discussing current controversy over the "colorization" of black-and-white films); Scott & Cohen, *An Introduction to the New York Artists' Authorship Rights Act*, 8 COLUM. J. ART & L. 369 (1984) (describing an art preservation statute of the kind now in force in several states); *House Panel Opens Copyright Hearings*, N.Y. Times, June 18, 1987, at C20, col. 4 (describing the debate over whether the United States should ratify the Bern Convention).

Careful analysis of this topic would carry us some distance from the fair use doctrine, but a few points bear mention. Insofar as the argument for adoption of the French system rests on the proposition that the alteration or destruction of a work of fine art threatens the "artistic personality" of the creator, the claim is shaky. It does not seem essential either to the idea of creativity or to the larger conception of meaningful work elaborated in these pages that the fruits of creative labor should remain unaltered forever or even for a significant period; the artistry of an architect, cabinetmaker, or chef is not impaired by the fact that we do not or cannot prevent the purchasers of their products from changing or destroying them. Insofar as the argument depends on the proposition that the destruction of a work of fine art threatens the diversity and richness of our artistic heritage (both by permanently removing an artifact from the collection and by discouraging fame-conscious artists from creating new artifacts), it is considerably stronger. See Elsen, *Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 953 (1976) (quoting from the Hague Convention of 1954); *supra* section V.A.2.c. But it is not clear that the most effective and appropriate route to that end is to accord artists inalienable rights to block the destruction of their works — a reform that most likely would compel them to accept reduced compensation from purchasers.

they need to refine their works to their satisfaction.⁴⁹⁵ The courts' current reluctance to recognize as fair any copying of "unpublished" materials⁴⁹⁶ goes a considerable distance toward accommodating this concern. More precise would be a guideline that simply incorporated the concern itself — namely, that disfavored unauthorized uses of materials the creators of which were still considering revising.⁴⁹⁷

(e) *Equalizing Public Access*. — One of the major conclusions of the argument summarized in section A.3 was that, in the good society, people's lots in life would be much less unequal than they are in the United States today. The bearing of that proposition on the ways in which we compensate artists is considered in the next subsection. A less apparent but equally important implication of the conclusion is that the law should be adjusted to equalize consumers' access to works of the intellect.

Clearly, the most direct route to the latter goal would be to redistribute wealth and income in American society, thereby providing persons more equal means to purchase access to copyrighted materials. Unfortunately, fundamental reform along those lines does not appear imminent. Until it happens, our hypothetical judge can and should make adjustments in the fair use doctrine to effect, in some small measure, the sort of levelling commended by the utopian vision; other things being equal, activities that would tend to equalize public access to intellectual products should be given priority over activities that would not. So, for example, the fact that the behavior of Bestseller Book Club described in Part IV⁴⁹⁸ impedes Plaintiff's ability to engage in price discrimination in the marketing of her work should count against it. Conversely, an activity that facilitates price discrimination should be favored.

2. *Compensating Creators*. — Like the economic analysis of Part IV, the utopian analysis deployed in this Part is notably less helpful in determining where the line should be drawn between fair and unfair activities than it is in ranking entitlements. Nevertheless, this subsection argues, a few guidelines may be derived from the approach.

Recall that section A.3 isolated two grounds on which the creators of intellectual products might legitimately be accorded lots in life better or worse than average: the proposition that unequal effort warrants unequal rewards; and a modified version of Rawls' difference

⁴⁹⁵ See Goldstein, *supra* note 481, at 1004. An additional cause for concern is the danger that artists would not undertake projects that would be vulnerable to premature disclosure.

⁴⁹⁶ See *supra* pp. 1674–75.

⁴⁹⁷ An example of a case in which adoption of the more precise criterion would have made a difference is *Salinger v. Random House*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987). See *supra* p. 1771. The letters copied by the defendant in that case had not been published but surely were considered finished by the plaintiff.

⁴⁹⁸ See *supra* pp. 1709–10.

principle. Unfortunately, the impediments to using the fair use doctrine to implement those ideals are substantial.

As to the unequal-effort criterion, two obstacles seem insurmountable. First, courts cannot obtain the information necessary to apply the principle to particular cases. It may be true that *M*, who by dint of concentration and effort produces a respectable symphony despite his modest talent, deserves more income than *N*, who dissipates her enormous talent and produces only a respectable symphony, but accumulation of the data necessary to determine which artists are more like *M* and which are more like *N* plainly would be infeasible.⁴⁹⁹ Second, even if courts had the requisite information, the importance of enabling both the creators and the users of intellectual products to predict in advance what activities will and will not give rise to liability⁵⁰⁰ would counsel against the sort of case-by-case adjudication that tying rewards to effort and not talent would require.

The barriers to accommodation of the modified difference principle at first blush seem nearly as formidable. Remember the difficulties we encountered in giving effect to the formula for the maximization of allocative efficiency that emerged from Part IV.⁵⁰¹ Applied to copyright law, the variant of the difference principle elaborated in section A.3 differs from the economist's formula in two respects, both of which seem to exacerbate rather than reduce those difficulties. First, because it permits increasing the incomes of categories of artists only up to the point beyond which additional rewards would cease to yield net improvement in the life of the least advantaged member of the society, the levels of compensation commended by the difference principle would be both lower⁵⁰² and even harder to ascertain than the economist's test. Second, the contribution to each citizen's powers of imagination and communication made by seminal works of literature and art⁵⁰³ — which the modified difference principle, unlike the economist's test, takes into account⁵⁰⁴ — would be extremely difficult

⁴⁹⁹ See F. HAYEK, *supra* note 391, at 95. This is not to suggest that we must be content with a regime in which artists' incomes bear no relation whatsoever to their effort; all else being equal, differences in artists' diligence to some degree will, through the ordinary operation of the market structured by copyright law, result in corresponding differences in their incomes. But manipulating the fair use doctrine to assure that artists receive precisely what they deserve seems, for the time being, out of the question.

⁵⁰⁰ See *supra* p. 1720.

⁵⁰¹ See *supra* pp. 1718, 1739.

⁵⁰² Cf. Scanlon, *supra* note 434, at 1049 (arguing that Rawls' difference principle imposes severe constraints on the use of inequalities of income to establish incentives for productive labor).

⁵⁰³ See *supra* pp. 1752–53.

⁵⁰⁴ The reason the modified difference principle does take such things into account is that it measures net impact on each person's access to the good life. See *supra* pp. 1759–60. The reason the economist's test does not do so is that it measures consumers' aggregate willingness to pay for goods, services, and states of affairs and, for the reasons indicated by Dworkin, cited

to measure and might well more than offset the constraint just mentioned.⁵⁰⁵ In short, if drawing the line between fair and unfair uses using economic analysis was difficult, drawing it using the difference principle often would be nearly impossible.

Upon reflection, however, it appears that the proffered theory of distributive justice may not be altogether toothless. In three contexts, itemized below, it could provide our hypothetical judge some assistance.

(a) *Superfluous Income*. — The most obvious but perhaps most important implication of the theory is that, if the diminution in the incomes available to the creators of a particular type of work caused by shifting the line between fair and unfair uses from point X to point Y would not cause any significant reduction in the quality or quantity of works produced, the judge ought to make the move. In this respect, the utopian analysis leads to precisely the same conclusion as the economic analysis — and both repudiate the labor-desert/entitlement theory advocated by some commentators.⁵⁰⁶ For the reasons suggested in Part IV, this guideline may have more real-world applications than one might suspect. Thus, if further empirical research confirmed Judge Breyer's predictions regarding the insignificant impact of a reduction in copyright protection for tradebooks upon their production,⁵⁰⁷ a substantial expansion of the set of fair uses of such books would be warranted.

(b) *Diversity*. — If the choice between point X and point Y *would* make some difference in the future output of works, the judge should be less willing to pick the lower of the two points if consumer demand for intellectual products of the type in question is currently low than if the demand is high. The reason is that the modified difference principle urges us to adopt the system of incentives that (as compared to a regime of strict equality) would yield the greatest net improvement in the quality of life of the least advantaged member of the society, and one important source of her quality of life is diversity in the cultural artifacts to which she is exposed.⁵⁰⁸ So, for example, a judge who could simultaneously adjust the fair use doctrine as applied to poetry, sculpture, detective novels, and Broadway musicals should set the lines higher for the first two than for the third and fourth.

above in note 321, at 147–52, increases in opportunities for allusion and nuance are unlikely to figure significantly in that calculus.

⁵⁰⁵ In other words, the increase in the quality of life of every member of the culture secured by encouraging, in each generation, a few more persons with the potential of Melville, Ansel Adams, or Stanley Kubrick to develop and apply their talents might well justify (even under the severe limitations imposed by the difference principle) holding out to all artists very large incentives.

⁵⁰⁶ See *supra* pp. 1756–57.

⁵⁰⁷ See *supra* pp. 1717–18.

⁵⁰⁸ See *supra* pp. 1751–52.

(c) *Minimal Compensation.* — One of the major implications of the arguments summarized in section A.3 is that a just society would be a relatively egalitarian society. It may be impossible to predict the schedule of incomes for different types of artists and other workers that the application of the unequal effort and modified difference principles would yield, but it can be said with some confidence that no one's share of resources would fall dramatically below the mean.⁵⁰⁹ In this respect, the utopian analysis points in a very different direction from economic analysis. To illustrate, imagine that the producers of a particular type of intellectual product — say, the designers of video games — are passionate about their work and would continue doing it even if paid poorly.⁵¹⁰ Moreover, only those who love the job do it well. Consistent application of the argument developed in Part IV would require expansion of the set of fair uses of video games to the point where their creators were left only enough income to live on. Fidelity to the conceptions of just compensation advanced in this Part, by contrast, would require that the expansion be halted when further movement would leave designers of average talent and diligence incomes substantially below the national average.⁵¹¹

Can we offer the judge any further guidance? Two additional potential applications of the utopian analysis to the task of setting artists' incomes do suggest themselves. On balance, however, both seem inadvisable. They — and the reasons for rejecting them — are reviewed briefly below for the purpose of showing the limits of the theory.

(d) *Detoxification.* — It might be contended that the "diversity" guideline proposed above is too mild. If Americans currently indulge to excess their tastes for certain sorts of intellectual products, should we not undertake more vigorous initiatives to change their behavior? For example, if the amount of time people devote to noncreative, passive pursuits — like watching television⁵¹² — is too great, why not use more drastic measures to help free them from their addiction? One such measure seems at hand: if we expanded radically the set of

⁵⁰⁹ See *supra* pp. 1761–62.

⁵¹⁰ But cf. *Tron* (1982) (movie depicting video game designers as highly motivated by financial rewards).

⁵¹¹ Identifying artists who fall into this loosely defined category, ascertaining their incomes, and comparing those figures with the national mean would surely not be easy. But a judge with the time and information-gathering capability assumed by this section's analysis would not find application of the minimal compensation guideline impossible.

⁵¹² The average American adult watches television three to four hours a day (approximately 50% of his free time), the average child even more. See J. MANDER, *supra* note 469, at 24; Cuniberti, *Leisure Time Measured in New Survey*, L.A. Times, Jan. 13, 1986, pt. 5, at 1, col. 6. The prevalence of the habit does vary substantially by occupational group, class, and race. See Poll: *Farmers Don't Watch Much TV*, U.P.I. News, Feb. 25, 1986; Sanoff & Thornton, *TV's Disappearing Color Line*, U.S. NEWS & WORLD REPORT, July 13, 1987, at 56.

uses of copyrighted television programs deemed fair, fewer such programs (or poorer quality programs) would be produced. The less attractive the menu of material "on the air," the more time people would probably spend in more active leisure activities.

Unfortunately, to be effective, the reduction in the quantity or quality of television programs would have to be very substantial, which would render the tactic objectionable on two grounds. First, it would entail a functionally "coercive" limitation on consumers' freedom to choose how to spend their free time in a context in which misguided decisions do not do them irreparable harm and in which, arguably, people become thoughtful regulators of their behavior only by making and learning from mistakes. As such, it is vulnerable to especially strong versions of the argument against certain forms of paternalism.⁵¹³ Second, it would likely require that the incomes of many of the persons who assist in the production of television programs be reduced to levels well below the national average. As such, the proposal would entail deliberately doing injustice in order to advance the utopian agenda. Even assuming such a tactic is in some contexts justifiable,⁵¹⁴ it is sufficiently troubling to counsel against adoption of the plan.

(e) *Rewarding Quality*. — Individual works of art surely differ in the degree to which they contribute to our common stock of allusions and insights. Should we not try to stimulate the production of intellectual products that would do so most? Specifically, should we not narrow the scope of the fair use doctrine as applied to those individual copyrighted works that enhance especially noticeably the complexity and resonance of our language? In support of such a proposal, it might be argued that judges construing the current fair use doctrine already frequently protect covertly works they consider of "high quality" and disfavor original or derivative works they regard as "trash,"⁵¹⁵ that they cannot be prevented from making such aesthetic judgments, and that empowering the parties to contest — and requiring judges to defend — those evaluations would improve them. Moreover, the

⁵¹³ See *supra* p. 1766.

⁵¹⁴ Utopian theorists have been notoriously lax in addressing this question. See S. LUKES, *MARXISM AND MORALITY* 86–140 (1985) (criticizing the "wait-and-see" consequentialism of most Marxist theorists).

⁵¹⁵ See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 181–82, 185 (2d Cir. 1981) (quoting derogatory references to the quality of the defendant's work and concluding: "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society."). But see *id.* at 191 (Mansfield, J., dissenting) (criticizing the majority's reasoning and observing: "[P]arody 'has thrived from the time of Chaucer.' Even the *Canterbury Tales* indulged largely in sexual satire." (citation omitted)).

proposed modification of the fair use doctrine would enable us to reduce (at least marginally) the incidence of the phenomenon — all too common in American literary history — of an unusually talented writer, financially strapped or simply discouraged by a meager income, producing less or poorer quality work than he is capable of.⁵¹⁶

Unfortunately, three considerations require rejecting the proposal. First, although it is possible in retrospect to identify works of art that have made especially large contributions to American culture, determining in advance which works will have such an impact would be extremely difficult.⁵¹⁷ Second, for such a system of incentives to work effectively, it would be essential that persons contemplating either creating or using works of art be able to predict reasonably accurately how federal judges would assess their quality — the chances of which seem slim. Third, though the proposal would not empower judges to engage in censorship, it would entail some degree of governmental control over the definition of good and bad art, and the history of experiments in regulation of that sort should give one pause.⁵¹⁸

In sum, for the time being, it seems wisest to limit judges' involvement in the compensation of artists to: (i) the avoidance of superfluous income; (ii) the promotion of cultural diversity by favoring types of art for which popular demand currently is low; and (iii) providing artists (to the extent practicable) minimal levels of income.

⁵¹⁶ For example, Melville's long period of withdrawal and self-doubt beginning in the mid-1850's and, broken only by the brilliant flash of *Billy Budd*, extending to his death in 1891, see W. BERTHOFF, *THE EXAMPLE OF MELVILLE* 47–62 (1962), had at least something to do with the unprofitability of his work. See H. MELVILLE, *PIERRE* 1441 (Library of America ed. 1984) (noting that Melville's lifetime earnings from his eight books totaled approximately \$10,400); E.M. METCALF, *HERMAN MELVILLE, CYCLE AND EPICYCLE* (1953). In Fitzgerald's case, the artistic and physical deterioration that began with the publication of *Tender is the Night* (1934) — the waste of his time and talent on "popular" stories, movie scripts, and alcohol — had a good deal to do with the diminishing income generated by his serious fiction. See A. MIZENER, *THE FAR SIDE OF PARADISE* 263–338 (rev. ed. 1965). Other American authors whose work suffered for similar reasons include Hawthorne, Henry James, Nathanael West, and Edmund Wilson.

⁵¹⁷ For a strong statement of skepticism regarding the feasibility of such determinations, see R. POSNER, *supra* note 299, at 6–7, 19.

⁵¹⁸ See, e.g., D. MACKENZIE & M. CURRAN, *A HISTORY OF RUSSIA AND THE SOVIET UNION* 549–59 (rev. ed. 1982) (documenting the repressiveness of the "anticosmopolitan" policy pursued during the "Zhdanovshchina era"); F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND* 1476–1776 (1952) (describing the establishment and deterioration of a comprehensive system of censorship); Hauptman, *Suppression of Art in the McCarthy Decade*, in 1 LAW, ETHICS, AND THE VISUAL ARTS 268–75 (J. Merryman & A. Elsen eds. 1987); Herbert, *Impressionism, Originality and Laissez-Faire*, 38 RADICAL HIST. REV. 7, 11–14 (1987) (discussing the impact of "the system of prizes, government purchases and church commissions" in nineteenth-century France, not only upon traditional artists, but also upon the work of the upstart impressionists). For a vehement and influential statement of the risks associated with empowering judges to resolve copyright controversies on the basis of aesthetic judgments, see *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (Holmes, J.).

D. A Modest Proposal

The preceding section outlined an approach to comprehensive reform of the fair use doctrine — an approach that might be put to good use by the Supreme Court or, better yet, by Congress. Unfortunately, an amendment of the copyright statute is not likely in the near future, and, in its absence, the Supreme Court would probably be reluctant to undertake as thorough a reconstruction of the field as the discussion contemplated. That circumstance does not deprive the analysis of all practical significance, however. We may be stuck for the foreseeable future with the traditional case-by-case approach to the resolution of fair use controversies, but we can at least modify the factors to which the courts attend when making their determinations. Such a reform would surely not alleviate all of the problems that plague the field, but would be a good deal better than nothing. This section takes on that task. Drawing on the arguments of sections II.B (the criticism of the litany of factors currently employed by the courts) and IV.E (the lessons of the economic approach) in addition to the analysis just completed, it proposes a practicable, four-step procedure for deciding fair use cases. The next (and final) section will suggest how that procedure might have been applied to the facts of the *Sony* and *Harper & Row* cases.

When the defendant in a copyright infringement action seeks to escape liability on the ground that his conduct constituted a fair use, the district court judge should proceed as follows:

(1) He should first determine whether, at the time the putative infringement occurred, the creator considered her work finished. A finding that she was still considering making changes in the work should be sufficient by itself to deprive the defendant of the fair use defense — on the theory that the threat to the creative process posed by premature divulgence of incomplete works is so serious⁵¹⁹ and the circumstances in which the benefits of early release offset that threat are so rare that adoption of a per se rule is warranted. A finding that the creator considered the work complete would not favor the defendant, but would simply require the judge to proceed to step 2.⁵²⁰

⁵¹⁹ See *supra* pp. 1773–74.

⁵²⁰ This proposed factor differs in two respects from the published/unpublished factor recently endorsed by the Supreme Court: (i) it draws the line at completion of the work, rather than at the moment of publication; and (ii) it treats completion as a prerequisite to invocation of the fair use doctrine, rather than as simply a consideration to be weighed with other factors. Thus, to take two examples, the proposed test would be more hospitable than the present doctrine to unauthorized copying of portions of a completed manuscript or film that has received limited circulation prior to its public release and less hospitable to unauthorized news stories that include passages from uncorrected proofs of forthcoming books. Cf. *Copyright Law Revision — Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* at 27 (H.R. Comm. Print, 88th Cong., 1st Sess. Feb. 1963) (discussing

(2) The judge next should estimate the harm to producers of the type of copyrighted material at issue that would be caused by legitimating conduct of the sort engaged in by the defendant. For the reasons summarized in sections II.B.1 and IV.E.1, "harm" should be defined expansively; any predictable adverse impact on the welfare of the producers caused by depriving them of the right either to forbid the activity in question or to charge persons who wish to engage in it should be included. In defining the "type of copyrighted use at issue" and "conduct of the sort engaged in by the defendant," the judge should employ categories as narrow as is consistent with preservation of the ability of artists and users to ascertain with some confidence the camps into which they will fall.⁵²¹ In making his estimate, the judge may consider whether the activity in question is "commercial" in character and how much of the copyrighted material is used.⁵²² He should bear in mind, however, that these considerations are mere adjuncts to the central question of the magnitude of the injury and do not constitute separate factors.⁵²³

(3) If either of the following two conditions obtain, the judge without further ado should declare the use fair:

(a) harm of the sort just described would be insubstantial;⁵²⁴

the two sorts of putative infringement); Montgomery, *Ehrlichman Says Burger Discussed Court's Cases*, N.Y. Times, Dec. 10, 1981, at A18, col. 1 (exemplifying the second of the activities).

⁵²¹ The reasons for selecting categories of this sort are summarized in section IV.D.1. Categorization of the latter sort has already been implicitly approved by the Supreme Court. See *Sony*, 464 U.S. at 451 ("A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that *if it should become widespread*, it would adversely affect the potential market for the . . . work." (emphasis added)). Categorization of the former sort would require a change in the courts' approach.

⁵²² In some contexts, variability in the amount of copying involved will make categorization of the "type" of conduct at issue difficult. For a possible solution to the difficulty, see p. 1721 above.

⁵²³ For discussion of the degrees to which these criteria function as proxies for the magnitude of harm, see pp. 1672-73 and pp. 1677-78 above.

⁵²⁴ Situations in which this first condition applies would be unusual. Indeed, the mere fact that the plaintiff has brought suit ordinarily shows that privileging conduct of the sort engaged in by the defendant would result in injury (as defined in the preceding paragraph) to the producers of such works. In only two scenarios is this likely not to be true: (i) the plaintiff is eccentric; unlike the plaintiff, most producers of works of the type in question would feel benefited rather than hurt by a rule that the conduct in question is fair; and (ii) producers of the type of work in question customarily assign their copyrights to others (e.g., to their publishers) and for some reasons injuries sustained by the copyright holders would not redound to the detriment of the producers. A rare example of the latter scenario might have been the photocopying of articles from medical journals at issue in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). See *supra* note 62. The harm (if any) suffered by the plaintiff publisher as a result of the copying apparently had no impact on the fortunes of the authors of the articles, simply because "[t]he authors, with rare exceptions, are not paid for their contributions." 487 F.2d at 1359.

(b) the harm would be substantial, but it would not materially reduce either the quantity or quality of the producers' output.⁵²⁵

(4) If the tests set forth in paragraphs 1–3 fail to resolve the controversy, the judge should decide the case by assessing the relative strength of the following factors:

(a) *Magnitude of the injury*. The more serious the harm caused to producers of the type of work at issue by privileging the conduct in question, the less willing the judge should be to deem the conduct fair.

(b) *Creativity*. The more the activity in question constitutes or makes possible creative, transformative use of copyrighted material, the more willing the judge should be to declare it fair⁵²⁶ — on the theory that (i) derivative works both are “public goods” in their own right⁵²⁷ and add to the diversity of artifacts available to the public,⁵²⁸ and (ii) such a policy will enable more persons to participate in shaping their cultural environments.⁵²⁹

(c) *Education*. The more that privileging the activity in question would either (i) improve the public's access to information and debate on matters of public importance or (ii) facilitate the efforts of teachers to assemble and make available to students the materials they consider best suited to their courses, the stronger the argument for fair use.⁵³⁰

(d) *Price Discrimination*. The more that privileging the activity would undermine the ability of copyright owners to engage in price discrimination, the weaker the case for fair use, because price discrimination both increases the rewards available to creators (without increasing monopoly losses)⁵³¹ and equalizes consumers' access to works of the intellect.⁵³²

Admittedly, the proposed procedure is far from ideal. Its principal weakness is that, like all case-by-case approaches, it prevents com-

Thus, application of the proposed doctrine to the facts of *Williams & Wilkins* would have yielded the same result as that reached by the Court of Claims — namely, that the copying constituted a fair use.

⁵²⁵ It is important that the judge determine not only that the output of current producers would not be adversely affected, but also that the recruitment and productivity of future producers would not be impaired. Fidelity to the “minimal compensation” principle, *see supra* p. 1777, would require that this instruction to the judge be qualified by the proviso: “unless the result would be to depress markedly below the national mean the incomes of the majority of producers.” However, the infrequency with which the proviso would be material, combined with the difficulty of accumulating the data necessary to apply it, *see supra* note 511, counsel against including it in the proposal.

⁵²⁶ In other words, we should resurrect the “productivity” factor that once figured prominently in fair use cases. *See supra* p. 1685.

⁵²⁷ *See supra* pp. 1730–31.

⁵²⁸ *See supra* p. 1772.

⁵²⁹ *See supra* pp. 1768–69.

⁵³⁰ *See supra* pp. 1770–72.

⁵³¹ *See supra* p. 1742.

⁵³² *See supra* p. 1774.

parative evaluation of the various ways in which a particular type of copyrighted material may be put to putatively infringing use and thus would generate a less-than-optimal pattern of entitlements. In several other respects as well, it trades precision for practicability in the advancement of the good society.

Nevertheless, the proposal is markedly superior to the approach now employed by most courts. It jettisons those aspects of the current doctrine that seem altogether ill-advised⁵³³ and remedies the principal defects of the remaining factors.⁵³⁴ Most importantly, the proposal provides what the current regime lacks: an integrated vision of the objectives of the doctrine as a whole.⁵³⁵ The benefits for the administration of the doctrine of reorganizing it around such a vision would be cumulative. At the outset, the goal of advancing the good society outlined above would assist courts in interpreting and applying the individual factors. And, over time, the accretion of judicial opinions construing the factors would modify and refine the vision, increasing its power to guide the resolution of future controversies.⁵³⁶ That ongoing process of modification and refinement, moreover, would have an important incidental advantage: by engaging lawyers and judges in the project of applying and improving a vision of the good life and the good society,⁵³⁷ it would enlist them in the campaign to reinfuse American legal argument and political discourse with substantive conceptions of the public interest.⁵³⁸

E. Applications

This section completes the utopian analysis by considering how the proposal outlined above might have been applied to the facts of

⁵³³ Most notably, it abandons the "custom and propriety" factor adopted by the Supreme Court in *Harper & Row*. See *supra* p. 1679. The reasons for making this change are: (i) in only a minority of cases will there be any colorable justification for invoking that consideration, see *supra* p. 1681; and (ii) the conservative effects of tying copyright law to society's "shared values" (in the unusual cases in which such a consensus exists) are inconsistent with the utopian program.

⁵³⁴ For example, the proposed approach modifies the "publication" factor to align it more precisely with its rationale, demotes the "amount-of-copying" and "commercial/noncommercial" factors to proxies for the question of harm to the copyright owner, and redefines "harm" itself to incorporate the arguments advanced in sections II.B.1 and IV.E.1.a.

⁵³⁵ See *supra* pp. 1691-92.

⁵³⁶ Cf. L. Sargentich, Complex Enforcement 106-07 (unpublished draft of March 1978) (describing how federal courts in the 1970's, called upon to bring prisons, schools, mental hospitals, and other institutions into conformity with the Constitution, gradually worked out "model decrees," which clarified the constitutional provisions at issue and helped administrators to anticipate and comply in advance with the courts' determinations).

⁵³⁷ For an example of how such reflection might proceed, see note 563 and accompanying text below.

⁵³⁸ See *supra* pp. 1694-95; cf. F. Michelman, Law's Republic (unpublished draft May 1988) (pursuing alternative routes to the same end).

Sony and *Harper & Row*. It concludes that, although resolution of neither dispute would have been a simple matter, in each instance conscientious application of the proposal would likely have produced a decision different from that rendered by the Court. The principal purpose of this section, however, is not to demonstrate that the cases were wrongly decided, but, by illustrating the suggested revisions of the doctrine, to show their helpfulness and practicability in resolving real cases.

*Sony Corporation v. Universal City Studios*⁵³⁹

Viewed from the standpoint of the proposed doctrine, the operative question is whether Sony Corporation should be excused from contributory copyright liability on the ground that using VCRs to "time-shift" copyrighted television programs constitutes a fair use.⁵⁴⁰ Resolution of the question might proceed as follows:

(1) *Completion of the Work*. — At the time VCRs are used for time-shifting, the creators of the programs at issue have abandoned any plans to revise their works, so the first criterion has no bearing on the case.

(2) *Assessing Harm*. — The proper measure of the injury the producers of the programs stand to sustain by a finding of fair use is the extra income they could earn if Sony (and other VCR manufacturers) were not relieved of liability and the studios could therefore extract fees from persons who wish to use the machines to time-shift.⁵⁴¹ To estimate that income, the Court must determine what relief it would order if it deemed the recording unfair and how that

⁵³⁹ For a summary of the facts of the case, see pp. 1664–65 above. The discussion below will also draw upon information available to the Supreme Court in 1984 through amicus briefs or independent research. Left to one side is the question whether it would have been proper for the Court, in one fell swoop, to modify substantially the fair use doctrine and to decide the case at bar partly on the basis of evidence not adduced at trial. The reader may imagine, if troubled by the point, that the Supreme Court set forth a new legal test, then remanded the case to the district court (by way of the court of appeals) for retrial in light of the new doctrine, and that the information referred to in this subsection was properly presented at that trial.

⁵⁴⁰ Note that this way of framing the issue, in contrast to the approach (ostensibly) adopted by the Supreme Court, telescopes the questions of whether time-shifting constitutes a fair use and whether Sony should be held liable for contributory copyright infringement. There are two reasons for approaching the case in this way. First, in most contexts, assessing liability against individual VCR users would be impracticable. See 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[F][5][b][i], at 13-123 (1987). But cf. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (discussed below in note 557). Second, the proposed procedure makes the correct answer to a fair use problem turn substantially on predictions of the net cultural and economic impact of alternative rulings, which cannot be ascertained without knowing, at a minimum, whether the defendant will ultimately be held liable.

⁵⁴¹ See *supra* pp. 1670–71.

remedy would affect the parties' subsequent conduct.⁵⁴² Two courses of action are open to the Court. First, it could simply enjoin Sony from selling VCRs until such time as the company secured the permission of the copyright owners. Most likely what would then occur is that Sony and the other manufacturers would negotiate some kind of blanket licensing agreement with the studios,⁵⁴³ pursuant to which a portion of the purchase price⁵⁴⁴ of every machine containing a tuner and recording device⁵⁴⁵ would be turned over to a private organization, which would then distribute those monies to the studios in approximate proportion to the frequency with which their products were taped.⁵⁴⁶ Second, the Court could establish (or, more plausibly, could instruct the district court to establish) a compulsory royalty system, under which the manufacture and sale of VCRs would be lawful so long as Sony paid the studios a judicially determined fee.⁵⁴⁷

⁵⁴² Cf. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 448 (1930) (arguing that legal rights can be prescribed sensibly only with an awareness of what remedies will flow from them).

⁵⁴³ For discussion of the nature (and economic advantages) of such agreements, see pp. 1728–29 above.

⁵⁴⁴ Such a regime would of course increase the purchase price of each machine. The significance of that impact is discussed at pp. 1786–87 below.

⁵⁴⁵ See *Sony*, 464 U.S. at 422 (describing the components of a VCR and their respective functions). In 1984, several manufacturers produced VTPs (videotape players that did not contain tuners or recording devices) in addition to VCRs. See *id.* at 458 n.1 (Blackmun, J., dissenting). Because VTPs cannot be used to tape copyrighted programs, they would not be subject to the contemplated regime — and thus their price would not rise.

⁵⁴⁶ That negotiation of such an agreement would be the outcome of a simple declaration that Sony is liable for contributory copyright infringement was predicted by the studios' trade association. See Brief of Motion Picture Association of America, Inc., *Amicus Curiae*, at 22–23 (suggesting the possibility of establishing a system analogous to ASCAP or BMI). The Association's stake in the outcome of the case might well lead the Court to view its promise with some skepticism, but the fact that such an agreement would benefit everyone lends the representation credibility. See also Gordon, *supra* note 185, at 1621 (predicting such a development). An alternative imaginable system for augmenting the revenues of the copyright owners without impeding the manufacture of VCRs would entail paying the studios a portion of the purchase price of each blank videotape. Cf. Brief *Amicus Curiae* of Creators and Distributors of Programs at 29 (discussing Sony's one-time support for such a solution). Leaving aside the awkwardness of the fact that some videotape manufacturers do not produce VCRs and thus would seem to be beyond the Court's reach, the difficulty with this proposal is that it would not provide a practical way of extracting money from consumers who engaged only in time-shifting (and thus had no need for more than a few tapes).

⁵⁴⁷ See 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[E], at 13-112–13-113 (1987). The nature, advantages, and practical difficulties associated with judicial management of such a compulsory licensing system are considered at pp. 1723–27 above. The power to order establishment of such a system could most plausibly be derived from 17 U.S.C. § 502(a), which authorizes a district court, having found copyright liability, to issue "final injunctions on such terms as it may deem reasonable." For further discussion of the point, see note 282 above. The respondents in *Sony* and other similarly situated studios urged the Court to rule that the lower court had authority to mandate adoption of a compulsory license system. See Brief for Respondents at 55–56; Brief *Amicus Curiae* of Creators and Distributors of Programs at 28–29.

Although the second course would have certain economic advantages,⁵⁴⁸ the burdens it would impose on the judiciary⁵⁴⁹ would probably be sufficient to make the first course preferable. Whichever option the Court picked, the result would be to allow the manufacture and sale of VCRs to proceed (though at a somewhat reduced volume)⁵⁵⁰ while providing the studios a new and important source of revenue. In sum, the answer to the second question in the proposed test is that an adverse ruling, which would deny the studios access to those monies, would cause the producers very substantial injury.

(3) Because of the magnitude of the anticipated injury, condition (3)(a) clearly does not obtain. As to condition (3)(b), the Court would be unable to say with confidence that the projected harm would not materially affect the quantity or quality of copyrighted programs produced by the studios. To be sure, the Court would be warranted in viewing skeptically the allegations of many groups involved in the production of such programs that the quality of material they generated *would* be impaired.⁵⁵¹ But to decide the case on the basis of this test, the Court would need more than skepticism regarding the motives of the producers; it would need evidence showing that their dire predictions were inaccurate. Neither Sony nor its supporters came forward with such documentation, and the likelihood that they could do so if afforded the opportunity seems small.

(4) Resolution of the case therefore requires weighing the four (modified) factors.

(a) *Magnitude of the Harm.* — For the reasons discussed above, the size of the injury to which the studios are exposed is very large. This factor thus weighs heavily against a finding of fair use.

(b) *Creativity.* — In estimating the impact of alternative rulings on Americans' capacity and tendency to engage in creative interactions with their cultural environments, it is important to bear in mind that

Clearly, this remedy, like the first option, would result in an increase in the retail price of the machines.

⁵⁴⁸ See *supra* p. 1723 (discussing the benefits associated with shrewd regulation of compulsory license fees).

⁵⁴⁹ Those burdens would include inducing or compelling (perhaps through additional litigation) other VCR manufacturers to abide by the system. See *supra* note 284 and accompanying text; cf. *Sony*, 464 U.S. at 500 n.51 (Blackmun, J., dissenting) (observing that "[f]ashioning relief of this sort . . . might require bringing other copyright owners into court through certification of a class or otherwise").

⁵⁵⁰ The reason for the reduction would be that somewhat fewer consumers would be willing and able to pay the increased cost of the machines.

⁵⁵¹ See, e.g., Brief of the Authors League of America, Inc., as *Amicus Curiae* at 4-5; Brief for Volunteer Lawyers for the Arts, Inc., as *Amicus Curiae* at 4-7; cf. *VCRs Zap Ad Bucks, Says MPAA's Valenti*, MARKET AND MEDIA DECISIONS (Jan. 1983), at 40 (President of the Motion Picture Association arguing that VCRs "threaten the very lifeblood of the creative community").

a rejection of the fair use defense would not halt the sale and use of VCRs, but would simply increase their retail price.⁵⁵² Thus, the consumers significantly affected by the case would be those who would have bought VCRs at the old price but not at the new, higher price.⁵⁵³ Excusing Sony from liability would likely *decrease* rather than *increase* the willingness and ability of consumers to engage in the sort of “transformative” behavior we wish to foster, because its principal effect would be to increase the amount of time they spent watching television programs — a paradigmatically passive activity.⁵⁵⁴ To be sure, the machines are susceptible of other, more active uses — the most important of which is making home movies.⁵⁵⁵ But to make movies one does not need a VCR equipped with a tuner,⁵⁵⁶ and the incidence of other active uses is unlikely to offset the undesirable cultural impact of increasing television usage. In sum, the second factor also tilts against a finding of fair use.

(c) *Education*. — Of the various ways in which a VCR can be used to gain access to information or instruction, one entails use of a tuner: time-shifting news or educational programs broadcast over the public airwaves.⁵⁵⁷ Consumers priced out of the VCR market by a

⁵⁵² More precisely, it would increase the price of machines that included tuners and recorders. See *supra* note 545.

⁵⁵³ The consumers who could and would pay the higher price would be affected to the degree that they had somewhat less disposable income to spend on other things. But how that diminution in their spending power would affect their capacity and tendency to engage in active interaction with their cultural environments is so unpredictable as not to merit further attention.

⁵⁵⁴ Surveys conducted by the parties prior to trial lent support to this prediction. See *Sony*, 480 F. Supp. at 439 (stating that 81.9% of the defendants' pre-trial interview subjects “watched the same amount or more of regular television as they did before owning a VCR”). Recent studies confirm the forecast. See Rothenberg, *VCRs Are Friends, Not Foes to Network TV*, A.P. News, Aug. 1, 1986; Gendel, *Study Shows VCRs Providing More Network Viewers*, L.A. Times, June 17, 1986, part 6, at 1, col. 1. Other creativity-threatening uses of VCRs are imaginable. For example, ingenious companies have recently devised ways of enabling consumers to experience some of the pleasures of such activities as childrearing while being spared the associated tribulations and inconveniences. See Ricklefs, *What a Darling Baby! Let's Push Rewind and See Her Again*, Wall St. J., Nov. 24, 1987, at 1, col. 4. However, those developments could not (and need not) have been anticipated by the Court.

⁵⁵⁵ See *Consumer Reports: Choosing a VCR*, Wash. Post, Sept. 26, 1983, at B5, col. 1.

⁵⁵⁶ See *id.* Thus a consumer distressed by the rise in the price of VCRs who still wished to make home movies could purchase a machine that did not contain a tuner — the price of which would not have changed. The same can be said of a consumer who wished only to rent prerecorded movies.

⁵⁵⁷ Cf. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (holding that extensive copying of educational programs broadcast over the airwaves is not a fair use). In 1984, a variety of “instructional” videotapes were available for purchase or rental, and it could have been predicted that the menu of such materials would expand rapidly, see, e.g., Alexander, *Home Repair Goes Video*, BOSTON GLOBE, Dec. 18, 1987, at 37; Mitang, *Schools that Joined Computer Age Now Turning to VCRs*, A.P. News, Nov. 24, 1986. To use such materials, however, one needs only a tape player, not a recorder.

decision in favor of the studios would be prevented from engaging in that activity. This factor thus inclines in favor of a finding of fair use.

(d) *Price Discrimination*. — The greater the ability of the studios to segregate the market for their products into groups with different price elasticities of demand, the more effectively they can practice price discrimination.⁵⁵⁸ The studios currently subdivide the market to a considerable degree by releasing their works at different times, in different formats, at different prices.⁵⁵⁹ This procedure enables the maker of the film to engage in a form of price discrimination known as “skimming” — to extract as much revenue as possible from persons willing and able to pay a substantial fee to see the film, then gradually to reduce the price in order to penetrate broader and broader markets.⁵⁶⁰ A declaration that time-shifting is not a fair use would significantly enhance the studios’ capacity to discriminate in this fashion, by enabling them to differentiate persons who wish to watch television broadcasts “live” from those who wish to record them for replay at a later time. Viewers in the latter category, generally speaking, are willing to pay⁵⁶¹ more than viewers in the former. Either of the licensing schemes described above in paragraph (2) would allow the studios to charge the latter more without raising the cost to the former.⁵⁶² Thus, a finding in favor of the VCR manufacturers would undermine a potentially lucrative price discrimination scheme — a circumstance which argues against a finding of fair use.⁵⁶³

⁵⁵⁸ See E. MANSFIELD, *supra* note 197, at 297; F.M. SCHERER, *supra* note 204, at 315.

⁵⁵⁹ Thus, a feature film is commonly first made available to the public by licensing its display in theatres. Some months later, it is typically licensed to pay cable or over-the-air pay television channels, and prerecorded videotapes are made available in rental stores. When demand for the videotape at the rental stores drops, the film is licensed to one of the major television networks for public broadcast. Finally, it is syndicated to individual television stations for multiple exhibition. See Brief *Amicus Curiae* of Creators and Distributors of Programs at 4; *cf. Sony*, 464 U.S. at 421–22 (recognizing the diversity of ways in which the studios “exploit their rights”).

⁵⁶⁰ See J. DEAN, *MANAGERIAL ECONOMICS* 419–21 (1951); F.M. SCHERER, *supra* note 204, at 319.

⁵⁶¹ When programs are broadcast by non-pay television stations, members of the former group “pay” for the right to see them by buying more of the products advertisements for which are embedded in the films.

⁵⁶² Ironically, consumers with VCRs “pay” less under the present regime than do consumers without VCRs because those with VCRs can more easily avoid viewing the advertisements. See *supra* note 52.

⁵⁶³ Recall that one reason why the proposed doctrine protects price discrimination schemes is that they tend to equalize public access to copyrighted works. The problem at hand provides an important illustration of that principle. During the past few years, the share of the American viewing audience enjoyed by the major television networks has become smaller and less affluent, as more “upscale” viewers take advantage of the entertainment opportunities created by cable systems and VCRs. See Powell, *TV: The Vanishing Viewer*, *Newsweek*, May 18, 1987, at 60; Sanoff & Thornton, *supra* note 512. The predictable result has been that the programming

In sum, of the four factors, one favors excusing the conduct of the manufacturers, while three favor not excusing it. Taking due account of the relative strength of the factors, a decision rejecting the manufacturers' invocation of the fair use doctrine seems more consistent with the utopian program than a decision accepting their plea.

*Harper & Row v. Nation Enterprises*⁵⁶⁴

The result produced by an application of the modified fair use doctrine to the second of the cases is more difficult to predict, primarily because a number of facts crucial to the analysis cannot be ascertained either from the lower court opinions or from other material available to the Supreme Court. Set forth below are some plausible alternative resolutions of the controversy and a discussion of the evidence needed to choose between them.

(1) *Completion of the Work.* — It appears that, at the time *The Nation* published its story, neither President Ford nor his ghost writer anticipated making any further changes to the manuscript.⁵⁶⁵ However, statements in two of the briefs raise the possibility that Ford had not completed the book when the copying occurred.⁵⁶⁶ Unfortunately, the district court did not resolve the issue.⁵⁶⁷ Because this

purchased and shown by the networks has deteriorated. See Shales, *Signing Off: The Year on Television*, Wash. Post, Jan. 4, 1987, at G1; Shales, 1987: *The Year in the Arts*, Washington Post, Jan. 3, 1988, at G1. Had *Sony* been decided differently, enabling the studios to extract fees from the members of the television audience who wish to tape their shows, that trend would likely have been retarded. Not entirely dependent on revenues provided by advertisers, the studios would have been willing to produce better material for television, knowing that the portion of the total "VCR tax" they received would be determined by the number of persons who taped their shows. See *supra* note 546 and accompanying text. The net effect would have been to ameliorate the increasing inequality of access to entertainment in the United States — in which the poorest people, who are unable to purchase VCRs or subscribe to cable systems, get the poorest fare.

⁵⁶⁴ Again, it will be assumed that the reader is familiar with the principal facts of the case. For a summary, see pp. 1666–67 above.

⁵⁶⁵ Most of the amici seem to have taken for granted that the work was finished. See, e.g., Brief of the American Association of Publishers, *Amicus Curiae*, at 5 (emphasizing that the case involves an "unpublished, but about to be published manuscript"); Brief of the Gannett Company, Inc., Los Angeles Times, Newsweek, Inc., The New York Times Company and The Washington Post, *Amici Curiae*, at 6 (arguing that Ford "had consented to imminent publication of the memoir") [hereinafter Gannett Brief].

⁵⁶⁶ See Brief for Petitioners at 31 (arguing that "the *Nation* copied an unpublished typescript which was still subject to revision" and "had no way to know that there would be no significant changes in the material which it copied"); Brief for Volunteer Lawyers for the Arts, Inc. as *Amicus Curiae* at 7 (asserting, without citation, that "President Ford's manuscript was to be published in only a few weeks, and he was still making changes in it"). But cf. Brief for Respondents at 37 n.27 (arguing that "[t]here was no evidence that the material on which *The Nation* reported differed from that in the published book").

⁵⁶⁷ The court did find that Ford made extensive changes in the manuscript sometime in March of 1979, that "[b]y mid-March, . . . work on the memoirs was nearing its completion,

question is central to the proposed revision of the doctrine, a remand for a finding on it would be essential. A determination that the authors were still making revisions would be sufficient to classify the use as unfair. A determination that they were not would remove this factor from the case.

(2) *Assessing Harm*. — As a first approximation, it seems plausible to define “the type of copyrighted work at issue” as memoirs of “public figures”⁵⁶⁸ and “conduct of the sort engaged in by the defendant” as prepublication copying sufficient to preempt the serialization of such memoirs.⁵⁶⁹ Once those categories have been selected, estimation of the potential injury to the copyright owners becomes comparatively easy. Public figures who write memoirs often stand to gain considerable revenue (directly or indirectly)⁵⁷⁰ from selling the serial rights to their works.⁵⁷¹ The greater the danger that magazines like *The Nation* will obtain copies of memoirs and preempt their serialization, the smaller the compensation that the publishers of such works will be willing to pay their authors.⁵⁷² That danger, in turn, would be increased significantly by a ruling that preemptive copying of the sort

[and t]he manuscript was in galleys,” and that Mr. Navasky, Editor of *The Nation*, received the copy he used in writing his article “[t]owards the end of March.” District Court Findings of Fact and Conclusions of Law Supplemental to Opinion of Feb. 16, 1983, ¶¶ 19, 26, 33, reprinted in Petition for Writ of Certiorari, at C-12, C-17, and C-20 [hereinafter “Findings of Fact”]. The court did not determine, however, whether revisions were still ongoing when the copying occurred.

⁵⁶⁸ Defining the category this way has the merit of allowing us to incorporate by reference the definition of a “public figure” developed by the courts in setting constitutional limits to defamation actions. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The boundaries of that category are far from precise, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §12-13, at 879-82 (2d ed. 1987), but they are sufficiently familiar to federal judges to do satisfactory service in this context.

⁵⁶⁹ Incidentally, this is not a category so narrow as to include only the *Harper & Row* case. See, e.g., *Radji v. Khakbaz*, 607 F. Supp. 1296 (D.D.C. 1985) (involving unauthorized serialization in Farsi of the memoirs of a former Iranian official subsequent to publication of an English edition of the book but prior to publication of a Farsi edition); *Montgomery*, *supra* note 520, at A18, col. 1 (reporting without authorization essential details of a former public official’s memoirs). A similar controversy that has not (yet) produced any litigation was generated by *The Boston Herald’s* unauthorized publication of portions of *MAN OF THE HOUSE*, the autobiography of “Tip” O’Neill. See Woodlief, *Tip Socks It to ‘Em*, *Boston Herald*, July 19, 1987, at 1, col. 1.

⁵⁷⁰ In this case, it appears to have been *Harper & Row* that stood to profit from the serialization by *Time*, but the *Harper & Row* editors’ awareness of the book’s serialization potential undoubtedly affected the terms of the contract into which they entered with President Ford.

⁵⁷¹ See Findings of Fact ¶ 28. For an account of the increasingly common and economically important practice of selling first serial rights, see Marks, *Subsidiary Rights and Permissions*, in *WHAT HAPPENS IN BOOK PUBLISHING*, cited above in note 228, at 230-33.

⁵⁷² See Brief *Amicus Curiae* of the Association of American Publishers, Inc. at 18 (arguing that “[i]t is difficult, at best, to see how first serial rights in non-fiction works can survive in the atmosphere condoned by the Court of Appeals”).

at issue constitutes a fair use. In sum, the magnitude of the potential injury is substantial.

(3) The foregoing conclusion renders test (3)(a) inapplicable. Test (3)(b), however, cannot be dismissed so easily. The amounts of money most public figures can earn by writing and publishing their memoirs — even absent legal protection of their first serial rights — are considerable. Moreover, such persons often have motives other than financial gain for making public their accounts of the roles they played in public affairs.⁵⁷³ Thus, this may be one of the rare cases in which the income the producers would gain from a declaration that the use is unfair would be superfluous — in the sense that no diminution in the quality or quantity of their works would result from denying the producers access to those monies.⁵⁷⁴ Unfortunately, although that prediction is plausible, the parties did not present evidence that would enable the Court confidently to make such a finding. Again, therefore, a remand to the district court for presentation of evidence on this issue would be essential to an application of the proposed fair use doctrine.

(4) If that evidence were inconclusive, it would be necessary to proceed to an assessment of the relative weight of the four modified factors.

(a) *Magnitude of the Injury*. — For the reasons indicated above, the potential injury is large. This factor thus weighs against a finding of fair use.

(b) *Creativity*. — The opportunities for transformative interaction with the cultural environment that would be created by privileging the activity in question are minor. To be sure, some creativity is involved in the processes of selecting the most evocative passages from the memoirs and embedding them in original prose,⁵⁷⁵ but, as the facts of this case suggest, not a great deal.⁵⁷⁶ The support that this factor lends the case for the copyist is therefore slight.

(c) *Education*. — By contrast, the capacity of the activity in question to improve the public's access to information and debate on matters of public importance seems substantial. As this case illus-

⁵⁷³ Cf. Alters, *Reagan Slams Regan's Book*, Boston Globe, May, 10, 1988, at 9, col. 1 (noting that Donald Regan, former White House Chief of Staff, "will donate to charity the proceeds from" his recently published memoirs).

⁵⁷⁴ Not surprisingly, Harper & Row argued that "[t]he precedent set by [the Court of Appeals] will adversely affect . . . the incentives to authorship," Brief for the Petitioners at 28, but offered no evidence to support this contention.

⁵⁷⁵ See Gannett Brief at 3-4, 22-23 (emphasizing the creative aspects of the jobs of "selecting and organizing material" and "paraphrasing").

⁵⁷⁶ Apparently, the only person who engaged in meaningful work on the article was Victor Navasky himself, who "spent about 6 to 10 hours reading the manuscript and another 6 to 10 hours writing the article." Findings of Fact ¶ 34. In his deposition, Navasky characterized his original contribution to the article as "invisible." *Id.* at ¶ 36.

trates, not only the facts contained in the memoirs of public figures, but also the authors' more subjective responses to the courses of events they helped shape may be of considerable importance and interest, and selective quotation from their manuscripts may be essential to convey that information.⁵⁷⁷ Assessment of the net educational impact of the sort of conduct engaged in by *The Nation*, however, requires determination of what would have happened absent the copying. In this case, for example, *Time* planned to release an article at least as informative as *The Nation's* piece thirteen days later.⁵⁷⁸ Accelerating by two weeks public disclosure of President Ford's descriptions and reflections does not seem overwhelmingly important. Had authorized publication been less imminent, on the other hand, *The Nation's* behavior would have had major educational benefits. To summarize, in some cases falling within the category of uses identified at the outset of the analysis,⁵⁷⁹ the "educational" factor would tilt sharply toward a finding of fair use; in others, it would incline only slightly. A sensible response to that circumstance would be to subdivide the category. Before taking up that task, however, we should complete our review of the relevant factors.

(d) *Price Discrimination*. — The market for the memoirs of a public figure typically includes a small group of persons sufficiently interested in its contents to be willing to pay the price of a hardcover edition of the book, a large group sufficiently interested to pay the cost of a paperback version, and an even larger group sufficiently curious to pay a part of the price of a magazine that contains an article summarizing the "juiciest" portions. Analogizing from the case

⁵⁷⁷ The important issue is the likelihood that subjecting works of the *type* in question to uses of the *type* at issue will facilitate education, broadly conceived. To be avoided, if possible, are case-by-case judgments regarding "which publications address issues of 'general or public interest' and which do not." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). At the time *The Nation* article appeared, both Ford and Alexander Haig, who figured prominently in the book, were contenders for the Republican Presidential nomination; the public, consequently, had considerable interest in knowing why Ford had pardoned President Nixon and what he thought of Haig. That circumstance is relevant to administration of the proposed fair use test, but only as an illustration of the kind of educational value that activities of the type in question can have.

In the opinion of one amicus, the disclosures of former government officials will so often be of public importance that the ability of such an official to copyright "description[s] of events, incidents, or facts in which he participated" should be "extremely limited." Brief for Pen American Center, *Amicus Curiae*, at 6–7, 43–48. This generalization is plausible, but the proposed response is unnecessarily crude. The analysis developed in the text contemplates allowing such descriptions to be freely copyrighted (thereby encouraging their creation) while privileging (by declaring "fair") uses thereof that will ensure that the information reaches the public reasonably expeditiously.

⁵⁷⁸ Findings of Fact ¶¶ 24, 27. The book itself was scheduled to be made available in bookstores approximately two weeks after publication of the *Time* article. See Brief for the Petitioners at 10.

⁵⁷⁹ See *supra* p. 1790.

of Plaintiff v. Defendant discussed in Part IV,⁵⁸⁰ it might seem that the best way for a publisher to “skim” such a market would be to authorize publication of the magazine article only well after release of the hardcover and paperback editions. Unfortunately (for the publisher), enough of the information contained in the book would by then be in the public domain to reduce radically popular interest in an article. By licensing prepublication serialization of the memoirs, the publisher can avoid that effect without materially undermining the demand for the book itself. This brief account should make clear that the procedure Harper & Row attempted to follow in this case constitutes a form of price discrimination. To the extent copying of the sort at issue threatens that procedure, the case for declaring it fair is weakened.

To summarize, the first and fourth of the factors together tilt moderately toward rejection of the fair use defense, and the second is largely irrelevant. The third factor tilts toward acceptance of the defense — and seems the most important of the four considerations — but its strength will vary enormously between different cases falling within the general category of “prepublication copying sufficient to preempt serialization.” Under these circumstances, the Court could do one of two things. First, it might declare that because, in the case at bar, the educational benefit of the defendant’s conduct was modest, its activity was unfair.⁵⁸¹ Second, and more helpfully, adapting the test proposed by Justice Holmes in the famous *INS* case,⁵⁸² the Court could declare (or could remand to the district court with instructions to declare) that, in this case and henceforth,⁵⁸³ prepublication copying of modest portions of the memoirs of a public figure constitutes a fair use if and only if done more than a certain number of weeks prior to the date on which the information in question would otherwise have been made public.⁵⁸⁴

In conclusion, had the approach advocated here been employed in *Harper & Row*, the case might have come out one of three ways,

⁵⁸⁰ See *supra* p. 1709.

⁵⁸¹ Although the Court in its actual decision did not purport to limit its ruling to situations in which publication of an authorized serialization was imminent, some commentators have suggested that its judgment might be so cabined. See *The Supreme Court, 1984 Term — Leading Cases*, *supra* note 27, at 299.

⁵⁸² See *International News Service v. Associated Press*, 248 U.S. 215, 248 (1918) (Holmes, J.).

⁵⁸³ The advantages of this second course are that it would provide guidance to persons like Victor Navasky regarding what they can and cannot do in the future, and it would discourage authors and publishers from delaying release of memoirs containing information of public importance, while allowing them (as long as they moved promptly) to reap extra revenues through licensing serialization of the works.

⁵⁸⁴ It would make sense to impose on the publisher the burden of showing that release of a serialized (or hardcover) version of the book was scheduled for a particular date — a burden that Harper & Row would have had no difficulty sustaining.

depending on the findings of the district court on remand: (i) if the authors of *A Time to Heal* had not completed their revisions at the time of the copying, the activity would have been held unfair; (ii) if the authors had completed their revisions and the district court had concluded that elimination of the income that similarly situated authors stood to reap through sale of first serial rights would not diminish their production of memoirs, the activity would have been held fair; (iii) had the case not been resolved on either of the foregoing grounds, assessment of the four modified factors would probably have led to a declaration that *The Nation's* conduct was unfair but that, when authorized publication of the material was less imminent, such conduct would be fair.

CONCLUSION

The fair use doctrine, recently revamped by the Supreme Court, is in bad shape. Confronted with a defendant who seeks to avoid liability under the Copyright Act on the ground that his action, though inconsistent with section 106, was nevertheless "fair," a court is now obliged to undertake an examination of the "particular facts and circumstances" of the case, guided only by a nonexhaustive list of "factors," many of which are ambiguous or flawed, and by four general "objectives" (drawn from four different traditions in political theory) that frequently will point toward different outcomes. The difficulty of predicting how courts will make such judgments has left many producers and users of copyrighted materials uncertain as to their legal rights.

It is imperative that the courts rebuild the doctrine along more sensible lines. This Article has explored two ways in which the rebuilding might proceed. The first would have the federal courts reshape the doctrine with a view toward increasing efficiency in the use of scarce resources. The second would have them deliberately use the law to advance a substantive conception of the good life and an associated vision of a utopian society.

The application of these approaches has sought to accomplish two things. First, it has tried to provide judges — and, incidentally, Congress — practicable programs for reform. Although implementation of a full-blown version of either approach is beyond the capacity of the judiciary, both analyses yield several specific recommendations that could be incorporated without great difficulty into the current doctrine. The two sets of suggestions overlap to a significant degree;⁵⁸⁵ where they do, the argument for making the reforms in ques-

⁵⁸⁵ Examples of recommendations that emerge from both of the two approaches are: the desirability of facilitating price discrimination by copyright owners; the importance of giving extra latitude to critics and parodists; and the preferential treatment that should be accorded transformative uses of copyrighted materials.

tion is especially strong. In contexts in which the two analyses suggest different amendments of the extant law,⁵⁸⁶ the author, for the reasons developed in the text, advocates adoption of the proposal that emerges from the utopian theory.

Second, the Article has sought to cast light on the merits of the modes of inquiry exemplified by the two approaches. To the growing body of literature concerning the nature and value of economic analysis of law, Part IV contributes a variety of insights, the most important of which are: (a) recognition of the inability of the approach to deal satisfactorily with the phenomenon of endogenous changes in preferences;⁵⁸⁷ and (b) appreciation of just how encompassing and complex a serious effort to maximize allocative efficiency must be.⁵⁸⁸ Part V attempts, not to refine a familiar approach, but to lend credibility to a neglected one. It argues, by example, that it makes sense to reflect upon the sort of life we would most like to live and the society that would most conduce to its widespread attainment, and then to determine how a field of law could be reshaped to bring us closer to those ideals.

⁵⁸⁶ Examples of issues as to which the two approaches diverge are: whether original works or uses thereof that foster cultural diversity should be given preferential treatment; whether uses that facilitate debate on public issues deserve a boost in the fair use calculus; and whether judges should take into account society's "shared values" in determining whether particular activities are fair.

⁵⁸⁷ See *supra* pp. 1736-39.

⁵⁸⁸ See *supra* pp. 1718-19, 1739.