UNDERSTANDING FAIR USE

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I

INTRODUCTION

Most discussions of the fair use of copyrighted works provide answers without ever asking the right question. That question is not "what is fair use?" but "what is copyright?" This, of course, is because fair use is a derivative concept, not an original one, and the nature of its host, so to speak, should determine its content. The thesis of this essay is that confusion about the meaning of fair use is due to different views concerning the source of copyright, that is, whether copyright derives from natural law, the product of universal understanding as to what is just, or positive law, the enactment of a legislative body.

History shows that copyright was influenced by both natural law and positive law thinking that resulted in two different copyrights: a statutory copyright, a matter of positive law, and a common law copyright, a matter of natural law. The positive law copyright is essentially regulatory in nature; legislators, concerned with the public welfare, grant rights to the copyright owner but also limit those rights and thereby make copyright a regulated, and therefore a regulatory, concept. In contrast, the common law copyright is essentially proprietary in nature; the judges, concerned with rights between litigants, tend to treat the common law copyright as the author's plenary property by reason of creation, consistent with natural law.

Fair use is the right to make a limited use of another's copyright, but prior to creation of the fair use doctrine, others had what was effectively an unlimited right to use another's work in a different form. A second author, for example, could abridge (or translate) the first author's work and thereby obtain his or her own copyright. For a second author to reap what he or she had not sown was deemed to be unfair, and courts limited the right to do so by the fair use doctrine. That doctrine, a right of limited use supplanting a doctrine of unlimited use, enlarged the rights of the copyright owner.

The natural law basis of the common law copyright was thus the source of the fair use doctrine. This explains the confusion about fair use: lawmakers treat the statutory copyright as a positive law concept, but they treat fair use as a natural law concept.[1] The difference is of some consequence; a derivative

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This article is dedicated to Chairman Robert W. Kastenmeier.

1. The House Report on the 1976 Copyright Act, for example, characterizes fair use as an "equitable rule of reason." HR Rep No 94-1476, 94th Cong, 2d Sess 65 (1976), reprinted in 1976

legal concept treated as having been derived from a jurisprudential source different from that of its host tends to be more parasitic than complementary.

My argument in support of the above propositions proceeds as follows. Part II explains the sources of copyright theory. Part III traces the development of copyright in the early United States. Part IV analyzes *Folsom v. Marsh*,[2] the 1841 opinion by Justice Story, in which the fair use doctrine originated. Part V explores the fair use doctrine and the change in copyright law resulting from the 1909 Copyright Revision Act,[3] which, with unforeseen results, granted the copyright owner a right to *copy* the copyrighted work. Part VI considers the scope of the right to copy, the right considered to be the essence of copyright. Part VII is in the nature of a reprise, summarizing ideas discussed in the paper to show how they can be utilized better to understand copyright.

II

THE SOURCES OF COPYRIGHT THEORY

A. Positive Law

To understand copyright as a positive law concept, one may begin with either the 1710 English Copyright Act, the Statute of Anne, or the 1976 American Copyright Act,[4] which is the direct descendant of the English act, by way of the copyright clause of the U.S. Constitution[5] and the Copyright Act of 1790.[6] Although nearly three centuries separate the two statutes, both embody the same concept of copyright: the granting of a series of rights that define the uses to which a given work may be subject for a limited period of time. The similarity is explained by two factors. First, the language of the copyright clause tracks the language of the title of the Statute of Anne;[7] second, the First Congress used the English act as the model for the Copyright Act of 1790.[8]

The rights of use granted in the Statute of Anne and the 1790 Act were the rights to print, reprint, publish, and vend the copyrighted work. Under the 1976 Act, the rights of use were broadened to include the rights to reproduce, adapt, publicly distribute, publicly perform, and publicly display the

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USCCAN 5659, 5679; see L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright* (U Georgia Press, 1991), where these ideas are discussed and developed in greater detail.

2. 9 F Cas 342 (CCD Mass 1841).

3. 17 USC §§ 1 et seq (1909 Act).

4. Pub L No 94-553, 94th Cong, 2d Sess, 90 Stat 2541, codified as amended at 17 USC §§ 101-914 (1988).

5. US Const, Art I, § 8, cl 8. The copyright clause is part of the intellectual property clause, which also contains the patent clause.

6. 1 Stat 124.

7. The title reads: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned." 8 Anne, c 19 (1710). The copyright clause of the Constitution reads: "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ." US Const, Art I, § 8, cl 8.

8. 1 Stat 124.

copyrighted work.[9] Though these rights are much more extensive than those in the 1790 Act, so too are the works that may be copyrighted. Despite these differences, the copyrights granted in all American copyright acts reflect the positive law theory of copyright as the statutory grant of a series of limited rights to which the copyrighted work is subject for only a limited period of time.

B. Natural Law

The natural law thinking that influenced the development of copyright law was the self-serving rationalization of eighteenth-century London booksellers seeking to negate the Statute of Anne's limiting effects on their monopoly by urging the recognition of an author's common law copyright. Thus to understand copyright in terms of natural law theory, one need only examine the litigation in eighteenth-century England that came to be known as "The Battle of the Booksellers."[10] The background of this controversy may be briefly recounted as follows: The booksellers' monopoly was built on the basis of a perpetual copyright the booksellers themselves had created as members of the Stationers' Company, the London company of the booktrade.[11] This copyright became known as "the stationers' copyright," because it was limited to members of the company. The stationers' copyright had been sustained and supported by the private law of the Stationers' Company, thus making it a positive law concept from the beginning. However, the stationers' petitions—and the government's desire to control the output of the press—led the Star Chamber and then Parliament to grant the copyright public law support in provisions of the various decrees and acts of censorship.[12] When the last of these acts, the Licensing Act of 1662, lapsed for the final time in 1694,[13] the stationers' copyright (and thus the monopoly it supported) was left naked unto the enemies of the booksellers.

The booksellers sought relief from Parliament.[14] The end result of their sixteen-year lobbying effort was the Statute of Anne, which provided less than

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9. 17 USC § 106 (1988).

10. For a history of copyright, see L. Ray Patterson, *Copyright in Historical Perspective* ch 8 (Vanderbilt U Press, 1968) (chapter entitled "Copyright in England from 1710 to 1774"), which recounts the Battle of the Booksellers in detail. A shorter, less detailed history is Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia U Press, 1967).

11. Cyprian Blagden, *The Stationers' Company, A History, 1403-1959* (Harvard U Press, 1960).

12. Star Chamber Decrees relating to printing were issued in 1566, 1586, and 1637. The Long Parliament abolished the Star Chamber in 1640, 16 Car I, c 10, but Parliament enacted a series of ordinances regulating the press during the Civil War period and the interregnum, the main ones being the Ordinances of 1643, C. H. Firth & R. S. Rait, eds, 1 *Acts and Ordinances of the Interregnum* 184-87 (W. M. Gaunt, 1972) ("*Acts and Ordinances*"); the Ordinances of 1647, id at 1021-23; and the Ordinances of 1649, Firth & Rait, 2 *Acts and Ordinances* at 245-54. The Star Chamber Decrees of 1637 served as the model for the Licensing Act of 1662, 14 Car II, c 33, § XVII.

13. The Licensing Act contained a sunset provision and therefore had to be periodically renewed. Parliament renewed it from session to session until the dissolution of the Cavalier Parliament, 16 Car II, c 8 (1664); 17 Car II, c 4 (1665); it was revived for seven years in 1685, 1 Jam II, c 17, § XV, and was renewed for three years in 1692, 4 W&M c 24, § XIV. Parliament refused to renew it again, and it expired for the last time in 1694.

14. See Patterson, *Copyright in Historical Perspective* at 140-41 (cited in note 10).

the monopolists sought but more than they deserved. The new copyright act eliminated those features of the stationers' copyright that had made it such an effective instrument of monopoly and censorship (namely, its perpetual nature and its limitation to members of the Stationers' Company), but it continued the old copyrights—the stationers' copyrights—for a period of twenty-one years from the statute's effective date of April 1710. The year 1731 is thus a convenient date to mark the beginning of the forty-year Battle of the Booksellers, which lasted until 1774 when the House of Lords decided *Donaldson v. Beckett*.[15]

The important point of the Battle of the Booksellers is that the booksellers' intent was to override the Statute of Anne, positive law, with the judicial recognition of an author's perpetual common law copyright, a matter of natural law. The reason, of course, was that the statutory copyright of limited duration had replaced the stationers' copyright of perpetual duration.

To the booksellers, the issue was a matter of their livelihood (or at least the size of their profits), and they proved to be skillful combatants. Ignoring the fact that the Statute of Anne was the result of their incessant pleas to Parliament for a decade and more, they now argued that the statute should be treated as mere surplusage in the larger scheme of the law. An author as creator of a work, they said, had a common law copyright in that work by reason of the natural law. Being a product of the universal justice recognized as natural, this common law copyright existed in perpetuity, and custom decreed that the author should assign this perpetual copyright to a bookseller.[16]

These facts made the booksellers' argument that the perpetual common law copyright was to benefit authors so transparent that the surprising result was not that they lost in the end, but that they almost won. Since emotion almost always prevails over reason, their near success must be attributed to the emotional appeal of the argument that an author as a matter of natural law *owns* that which he or she creates. The natural law theory of copyright, in fact, has never been justified on any other grounds.

This concept of universal justice that supposedly underlies natural law is not very persuasive when used to support a perpetual copyright that will inure primarily to the benefit of entrepreneurs rather than authors. The fact that authors write books does not explain why it is just that they should have a common law copyright to protect their works in perpetuity when their mortality is certain. Likewise, it fails to explain why it is just that authors should be entitled to this perpetual, rather than term, monopoly over their works, since as creators they are inevitably more imitators than originators.

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15. 1 Eng Rep 837 (1774).

16. See *Millar v Taylor*, 98 Eng Rep 201 (1769), for a King's Bench decision in which the Court by a vote of three to one gave the booksellers what they wanted, the recognition of an author's common law copyright in perpetuity despite the Statute of Anne. The case, however, was not appealed and was not the decision of a court of last resort. The authoritative decision is the House of Lords' decision of *Donaldson v. Beckett*, which effectively overruled *Millar*. The importance of *Millar* is that it legitimized the natural law theory of copyright.

Finally, there has never been any explanation of why it is just that natural law should operate to the benefit of the booksellers who were not creators but merely published the works.

That the booksellers' claims on behalf of authors were not lightly dismissed, however, is indicated by the fact that the final case in the Battle of the Booksellers, the House of Lords' decision *Donaldson v. Beckett*,[17] bespeaks a de facto, if not de jure, compromise. The Lords held that when an author published a work, the only protection available to him or her was the statutory copyright, which, of course, was a matter of positive law. The compromise was that *before* publication the author did indeed own the work he or she had created by reason of the common law or, in other words, the natural law.

The conclusion was sound, for who else would own the *work* either before or after publication? It was also irrelevant, however, since the copyright statute dealt only with the ownership of the copyright, not ownership of the work. Yet this ownership of the work before publication came to be known as the common law copyright.

Donaldson is thus the source of the author's common law copyright, and this has created confusion about the source of the statutory copyright. The rationale can be explained as follows: because an author by reason of creation owns the common law copyright of a work before publication, and because creation is also a condition for statutory copyright after publication, it follows that the source of the author's right to a statutory copyright is the act of creation.

The irony in this reasoning is that the requirement of creation for the statutory copyright was an anti-monopolistic condition intended to facilitate the demise of the booksellers' monopoly and hence the enlargement of material in the public domain. Thus the limitation of copyright to newly created works meant that only new works would be subject to copyright and old works could not be recaptured by copyright. The fallacy in the reasoning, of course, is that the common law copyright was merely a property right not a true copyright. Copyright gave the exclusive right of continued publication; the common law copyright gave only the exclusive right of first publication. Fifteen years after the creation of the English common law copyright—which was to cause so much confusion in this country—the power of Congress to enact copyright statutes as a matter of positive law was made a part of the Constitution of the United States.

III

COPYRIGHT RECEIVED INTO THE UNITED STATES

There is little direct evidence concerning the drafting of the copyright clause of the U.S. Constitution or the passage of the Copyright Act of 1790. The loss is not great, however, because the story of copyright in England before 1789 provides the source material as to what copyright meant to the

17. 1 Eng Rep 837.

Founding Fathers. The title of the Statute of Anne was the source of the language of the copyright clause in 1787, and Congress substantially enacted the Statute of Anne as the Copyright Act of 1790. In addition, the Supreme Court later used the House of Lords' decision in *Donaldson v. Beckett*[18] as governing precedent for its first copyright case, *Wheaton v. Peters*,[19] decided in 1834.

It is apparent from this history that copyright was received into the United States as the grant of a statutory monopoly, not as the natural law right of the author. Moreover, there is evidence that the new Americans did not accept the English copyright blindly and, similarly to the English, understood copyright as a device to promote learning that was both anti-monopolistic and anti-censorship in nature. The copyright clause, for example, is both a limitation on and a grant of congressional power. Congress may grant the "exclusive right" only to authors, only for their writings, and only for limited periods of time. Since the title of the Statute of Anne read that the act applied to "authors" and "purchasers of copies" (that is, booksellers or publishers), it is significant that the U.S. copyright clause limits copyright to authors only, a limitation that suggests a measure of independence on the part of the framers.[20]

The 1790 Act also illustrated a measure of independent thought by denying copyright protection to the works of foreign authors.[21] There is, however, a caveat to be noted here. This bit of provincialism may have resulted from a misreading of section VII of the Statute of Anne, which provided that nothing in the act should be construed to prohibit the importation of books in foreign languages printed beyond the seas. This provision of the English statute had a counterpart in section V of the Licensing Act of 1662, which required that imported books receive the imprimatur of the licenser.[22] Since the drafters of the Statute of Anne had resorted to the provisions of the Licensing Act in writing the copyright statute, section VII was almost surely intended to preclude the use of the copyright act for purposes of censorship. Perhaps more persuasive of the independence of the American legislators is the 1790 Act's protection of unpublished works, that is, manuscripts, which are not protected by the Statute of Anne. At any rate, the xenophobic provision limiting copyright protection to American authors and the protection of the author's common law copyright show the influence of both the positive law and natural law theories of copyright.

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18. Id.
19. 33 US (8 Pet) 591 (1834).
20. This exclusion should be considered in light of the fact that in 1783, James Madison, who almost surely drafted the copyright clause, was a member of a committee of the Continental Congress that recommended to the states their enactment of copyright legislation for the benefit of authors and publishers. "Resolution passed by the Continental Congress, recommending the several States to secure to the Authors or Publishers of New Books the Copyright of such Books." Copyright Office Bulletin No 3 at 1 (May 2, 1873) (Revised 1973).
21. 1 Stat 125, § 5.
22. 13 and 14 Car II, c 33 § V.

In *Wheaton v. Peters*,[23] the Supreme Court finally anointed the positive law theory of copyright as official U.S. doctrine. The case contained two strong dissents, however, urging acceptance of the natural law theory that had been advocated vigorously by Wheaton's lawyers. The residual effect of their arguments, which were printed with a report of the case, is uncertain. It is clear, however, that the positive law theory of copyright created the conditions that led to the development of the doctrine of fair use, a natural law doctrine. We also know that the creator of the fair use doctrine, the noted Justice Story, had heard the natural law arguments as a member of the Supreme Court when *Wheaton* was decided.[24]

IV

THE ORIGIN OF FAIR USE

With this background, we can now examine the origin of the fair use doctrine, *Folsom v. Marsh*,[25] an opinion written by Justice Story while sitting as circuit judge. When *Folsom* was decided, the statute in force was the Copyright Revision Act of 1831.[26] Since the copyrighted works in *Folsom* were books, only the rights relating to books were relevant. These rights were the same as in the 1790 Act—the right to print, reprint, publish, and vend—and they were very narrow, applying to a book only as it had been printed or published. Therefore, courts, in accordance with the positive law theory of copyright, held that it was not an infringement of the copyright for another author to abridge a copyrighted book, because in doing so the second author produced a new book. One could also translate or dramatize another's copyrighted work with impunity.[27] In modern terms, one could legally use another's copyrighted work to prepare a derivative work without permission.

In *Folsom*, the defendant had used the plaintiff's twelve-volume biography and writings of George Washington in writing his own two-volume biography of the first president. The defendant had several defenses, but the only one of present concern is the abridgment doctrine. Although well established in American law, the abridgment doctrine was based on the positive law theory of copyright and was a product of English precedent that American judges did not like. Whether intuitively or otherwise, the judges must have been influenced by the notion that it was unfair for a later author or publisher to take a free ride on the original author's back. Such a result was inconsistent with the universal notions of justice that comprise natural law.

This perceived conflict between natural law and the abridgment doctrine explain why Justice Story utilized natural law theories in *Folsom*, with the

23. 33 US (8 Pet) 591.

24. For the definitive treatment of the history of *Wheaton v Peters*, consult Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich L Rev 1291 (1985).

25. 9 Fed Cas 342 (CCD Mass 1841).

26. 4 Stat 436, 21st Cong, 2d Sess, c 16.

27. See Eaton S. Drone, *The Law of Property in Intellectual Productions* 433-67 (1879) ("*Drone on Copyright*").

intent that his fair use doctrine be used to supplant the abridgment doctrine. Attributing motives to a judge is, of course, a risky endeavor, but in this instance Justice Story provided sufficient evidence to warrant the inference in *Gray v. Russell*,[28] a case he decided two years before *Folsom*. In *Gray*, Story held a Latin grammar copyrightable as a compilation. In deciding whether a taking constitutes a piracy or an abridgment, Story wrote, "Although the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright; yet this proposition must be received with many qualifications."[29] This language is part of a passage that clearly shows Story's distaste for the abridgment doctrine and sets up *Gray* as a prelude to *Folsom*.

Story later used stronger language in *Folsom*, leading up to his statement of fair use, that can be said to be a rejection of the abridgment doctrine altogether:

> *The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.* Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not. It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work.[30]

The "entirety of the copyright" was only the right to print, reprint, publish, and vend the book as published. As a series of rights to which a work was subject (for a limited period of time), copyright was, of course, distinct from the work itself. Yet Story's language—"the entirety of the copyright"—implies that the copyright and the work are to be treated as one, consistent with natural law theory.

A great judge may write an opinion contrary to accepted doctrine, but he does not do so unwittingly or without purpose. Story's apparent purpose in *Folsom* was to end a rule he perceived to be unjust in order to replace it with one he deemed just. Thus, Story held that the defendant had infringed plaintiff's copyright and followed the above quoted passage with a paragraph stating the fair use doctrine:

> In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[31]

The three *Folsom* factors, then, were (1) the nature of the work, (2) the amount of the work used, and (3) the effect of the use on the work's economic value. If the general rule had been that one could freely abridge any copyrighted work because in doing so he or she was creating a new work, in theory the nature of the work would make no difference, and both the amount used and the effect on the economic value of the copyrighted work were irrelevant. Thus, the mere act of naming these factors was in itself an attack on the abridgment doctrine.

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28. 10 Fed Cas 1035 (CCD Mass 1839).
29. Id at 1038.
30. 9 Fed Cas at 348 (emphasis added).
31. Id.

Story, however, did not succeed in eradicating the abridgment doctrine, and the success of the fair use doctrine in the nineteenth century is problematic. Later cases were decided contrary to fair use and consistent with the abridgment doctrine, and Congress ignored fair use in the 1870 and 1909 revisions of the Copyright Act.

To understand the slow acceptance of fair use, it is necessary to understand the concept of copyright for books at the time *Folsom* was decided. The rights of use granted were limited to the book *as it was published.* It is this point that provided the rationale for the abridgment doctrine, since the abridged work was a "new" work that did not infringe the copyright. In jurisprudential terms, an abridgment was not seen as a use of the copyright, but as a use of the work. Acceptance of the fair use doctrine, then, would have meant that an abridgment had become a use of the copyright and therefore an infringement. General approval of the *Folsom* fair use doctrine would have enhanced the copyright monopoly by judicial fiat, which courts less confident of their power (and powers) than Justice Story resisted without statutory sanction.

Thus, contrary to the common perception of fair use as limiting the copyright monopoly, its original effect—in accordance with Story's intention—was to enlarge that monopoly. The leading copyright treatise, for example, states, "Congress may, in its discretion, limit the copyright monopoly under the doctrine of fair use."[32] Story's theory must have been that the statutory monopoly did not create, but only secured, the author's natural law property right.[33] Even if so, however, Story's reasoning did not change the positive law nature of copyright. The fair use doctrine was (and remained) a natural law doctrine attached to copyright, which was (and remained) a positive law concept. Copyright owners in the future would use fair use in an attempt to modify copyright by enlarging the copyright monopoly and then would seek to eliminate fair use. They would do this by first claiming fair use to be applicable to all users (not merely, as in *Folsom*, use by competitors), and then claiming that *any* copying by *anyone* was an infringement, not a fair use.

This development did not occur on a large scale until the late twentieth century when the widespread use of the photocopying machine enabled copyright owners to perceive the opportunity "of gathering great profits in small payments"[34] by charging users a fee to copy a work or any portion thereof. Such a claim was presaged by the 1909 Copyright Revision Act,

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32. Melville B. Nimmer & David Nimmer, 3 *Nimmer on Copyright* § 1.10[D], at 1-92 (Matthew Bender, 1991).

33. As a member of the Supreme Court when *Wheaton* was decided, Story was familiar with this argument. Paine, counsel (with Daniel Webster) for Wheaton, argued, "had the convention designed to take away, or to authorize Congress to take away the common law property, they would have used the words *vest*, or *grant*; and would have carefully avoided the word *secure*." 33 US (8 Pet) at 602-603 (emphasis in original).

34. *Motion Picture Patents Co. v Universal Film Manufacturing Co.*, 243 US 502, 513 (1916).

however, in which Congress enhanced the copyright monopoly in an unexpected way.

V

FAIR USE AND THE RIGHT TO COPY

Three pieces of evidence support the conclusion that the *Folsom* fair use doctrine was a fair-*competitive*-use doctrine: (1) it was intended to limit a competing author's use of a copyrighted work; (2) the rights of the copyright owner then (to print, reprint, publish, and vend) were so narrow that only a competitor could exercise them; and (3) the doctrine recognized the basic constitutional policy of copyright. This recognition is reflected in Eaton Drone's statement of the fair use doctrine in his 1879 treatise:

> It is a recognized principle that every author, compiler, or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication. The recognition of this doctrine is essential to the growth of knowledge; as it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors.[35]

What Drone did not say, however, is as important as what he did. He did not say that the individual consumer's use of a copyrighted work may be a fair use. One could argue that this was either because fair use was not available for, or because it was not applicable to, the individual consumer. The only rational conclusion, however, is that fair use was not applicable to the consumer, since only a potential infringer needed the fair use defense. The individual user, not being a competitor, was not an infringer under the then-applicable law, even if he or she copied the work.

Thus, before the 1909 Act, fair use did not encompass the individual's right to copy a work for personal use because it was a limitation only on a competitor's use.[36] Yet confusion as to fair use has developed to the point that the central issue today is whether its role has been enlarged to encompass personal use by the 1909 Act, new technology, and the 1976 Act.

On this issue, one must first consider the meaning of the right to copy, which Congress gave the copyright owner in 1909. Superficially this was a general right, for the 1909 Act listed the rights to print, reprint, publish, copy, and vend the copyrighted work without any differentiation.[37] The right to copy was thus to be seen, and treated, as a new right of use that enhanced the copyright monopoly to the ostensible benefit of the author. But a House report shows that in wording the Act Congress merely intended to return to the language of the 1790 Act:

> Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the addition of the word "copy," practically adopts

35. *Drone on Copyright* at 386 (cited in note 27).

36. This last point explains the so-called "productive use" requirement. That is, to be fair, a use had to be productive of a new work, a limitation that made little sense if fair use encompassed personal use. Since a personal use, by definition, is not productive, the only rational conclusion is that fair use criteria did not apply to personal uses of the copyrighted work.

37. 35 Stat 1075, § 1(a).

> the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.[38]

It is unlikely that Congress would have retained the "old phraseology . . . so often construed by the courts" if it had intended any major change in the prior law. Thus the reference to section 4952 of the Revised Statutes is the key to understanding Congress' intent in adding the right to copy to the copyright owner's rights of use. Section 4952 read in relevant part:

> The author, inventor, designer, or proprietor of any book, map, chart, . . . *engraving, cut, print,* or *photograph* or negative thereof, or of a *painting, drawing, chromo, statue, statuary,* and of models or designs intended to be perfected as works of the fine arts . . . shall have the sole liberty of printing, reprinting, publishing, completing, *copying,* executing, finishing, and vending the same. . . .[39]

In general, when section 4952 was drafted, one would print, reprint, and publish books, maps, or charts, and one would execute and finish models or designs, but one would *copy* engravings, cuts, prints, photographs, paintings, drawings, statues, or statuary. The language of section 4952 thus suggests that the right to copy, as one of the rights of use in the 1909 Act, was indeed a general right, but one intended to apply to works of art, just as the right to print and publish was a general right intended to apply only to literary works. The persuasive factor on this point is that this interpretation is consistent with the provisions of all copyright acts after the 1790 Act and before the 1909 Revision Act. The relevant provisions differentiated the conduct that constituted infringement for literary works from that for works of art. To infringe the copyright on a book, one had to print, reprint, or publish it; to infringe the copyright on a work of art, one had only to copy it.[40]

Moreover, this conclusion is supported by the common sense proposition that the right to copy a literary work was already protected by the exclusive rights to print, reprint, and publish, just as the model or design was protected by the right to execute and finish. To print another's copyrighted book, or to execute and finish a model, one must copy it. Thus to give the copyright owner of books and models or designs the additional right to copy them was superfluous.

The term "to copy," then, was almost surely used as a word of art applying to works of art. While its use as a generic term might imply that Congress had rejected the positive law theory of copyright in favor of natural law by choosing to expand the author's proprietary control over copyrighted works, other provisions of the 1909 Act yield convincing evidence that Congress had no such intention. To prevent monopolization of the recording industry, Congress created the compulsory recording license for musical compositions. In justification of this innovation, the House reported that

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38. HR Rep No 2222, 60th Cong, 2d Sess 4 (1909) ("1909 House Report").
39. 26 Stat 1106, 1107 (1891) (emphasis added).
40. See L. Ray Patterson, *Free Speech, Copyright and Fair Use,* 40 Vand L Rev 1, 40-41 (1987).

> [t]he enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . .[41]

The misreading of the 1909 Act's provisions as to the right to copy, however, has been woven into the fabric of copyright law. Indeed, the right to copy is now viewed as the essence of copyright,[42] and the scope of the right to copy determines the scope of the copyright monopoly as well as the scope of fair use. The important issue today, then, is the scope of the copyright owner's right to copy.

VI

THE SCOPE OF THE RIGHT TO COPY

For purposes of analysis, the crucial issue concerning the scope of the right to copy is whether the right is dependent or independent. If it is dependent, the scope is limited to the right to make copies for sale; if it is independent, there are no limitations. The importance of the question is such that it merits an answer under both the 1909 Act and the 1976 Act.

A. The 1909 Act

The inevitable conclusion is that the scope of the right to copy in the 1909 Act was no broader than the scope of the rights to print, reprint, and publish. Just as those rights were necessary in order to vend copies of a literary work, we can reasonably infer that the right to copy was also necessary to enable the copyright owner of works of art to vend copies of his or her work.

Further, an observer in 1909 would have been hard pressed to argue that the right to copy, even of literary works, was independent of the right to sell. Indeed, before the new technology that resulted in the photocopying machine, there were no reasons to argue for such an expansive reading of the right to copy books; it offered no gain to the copyright owner but clearly would have meant harm to the public's right of access.

B. The 1976 Act

The right to copy in the 1976 Act is also dependent in nature as evidenced by the structure of section 106 of the Act and the copyright clause of the Constitution.

1. *Section 106.* Section 106 is a single rule consisting of five parts which define each of the copyright owner's rights of use: the reproduction right, the adaptation right, the public distribution right, the public performance right,

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41. 1909 House Report at 7 (cited in note 38).

42. Probably in part because of the semantic error in assuming that the "copy" in copyright is the verb rather than the noun.

and the public display right.[43] Of these rights, only the reproduction (copying) right is necessary or appropriate for the exercise of the other four rights. It is clearly necessary to copy a work to adapt it or distribute it publicly, and copying enables one to perform or display a work or a copy publicly.

Presumably the parts of Section 106 were intended to be both consistent and coherent so the rule could be read as an integrated whole. This goal suggests that all five rights should comport with one another. Thus if the right to copy is limited, the same limitation(s) should apply to the other rights and vice versa. While the reproduction right and the adaptation right are not limited by their terms, three of the rights are specifically limited to public uses: the distribution right, the performance right, and the display right. Presumably the public limitation means that the copyright owner's rights are infringed only when the uses are exercised publicly. Thus one can freely make and distribute a single copy privately to a friend or family member, sing a copyrighted song in the shower, or display a work of art in the privacy of one's own home without infringing the copyright.

Since the exercise of these rights privately involves, and may even require, copying, it follows that, if the right to copy is an *independent* right, the consumer who made a single copy for private distribution, private performance, or private display has infringed the copyright. The reproduction right could thereby be used to override the limitations on the copyright owner's rights of public distribution, performance, and display rights as well as section 107's right of fair use. The copyright owner's rights, clearly limited by the statute, would become unlimited.

Yet, as provided by section 106 of the 1976 Act, the copyright owner has the exclusive right to do or authorize any of the five named uses, subject only to the exceptions detailed in sections 107 through 118. Many interpret this to mean that the reproduction right is independent and absolute. One subtlety seems to have been ignored, however. *Exclusive* is a term of dual meaning. Taken out of context, section 106 appears to mean that the rights are exclusive *to* the copyright owner. But when read in the context of the entire copyright act and the copyright clause of the Constitution, it is clear that the rights granted are instead exclusive *of* other rights, that is, they are limited to those specifically stated. The copyright owner has only the five rights as stated. This meaning is ignored because the rights as stated in the 1976 Act are sufficiently comprehensive so that the copyright owner would have little else to do with a copyrighted work in order to obtain a profit.

The meaning of *exclusive* in limiting the copyright owner to the stated rights, however, is more important than copyright owners may wish to admit. The monopoly problem that copyright poses has meant that copyright statutes have always been interpreted to limit the rights of copyright to preclude any absolute right for the copyright owner, even when the statute

43. 17 USC § 106 (1988).

did not include a limitation. For example, although the copyright owner had the unmodified right to vend the copyrighted work, this right was deemed exhausted when the work was first sold.[44]

The pattern of the 1976 Act, which as enacted includes twelve sections limiting the five rights in section 106, reflects this bias against any absolute right for the copyright owners. The effect is to limit the copyright monopoly in ways to preclude an absolute monopoly in any respect, such as through fair use and compulsory licenses. The issue is whether section 106 reflects this same goal of precluding any absolute right of the copyright owner that would have the effect of negating other limitations.

The answer to the question is yes but only if the right to copy is treated as a predicate right for exercising the other four rights. As a predicate right, the right to copy is dependent in nature; its existence is conditioned on the use of the copyright to adapt the work or to distribute, perform, or display it publicly—all of which can be classified as primary or subject rights.

If a section of a statute is subject to various interpretations, only one of which is congruent to and consistent with the overall statute, that one is obviously the preferred interpretation. A reasonable conclusion as to section 106, then, is that the copyright owner's right to copy is exclusive of the right of others only as a predicate right. A consumer's freedom to copy a work for personal use is consistent with the fair use of a work by a competitor. The difference is this: to copy a work as a predicate right is to use the copyright rather than the work, because to do so is to enable one to exercise a primary right reserved to the copyright owner; but to copy a work for personal use is to use only the work, not the copyright, because the copying, not being a predicate to the exercise of a primary right, is the exercise of a right that is not exclusive to the copyright owner.

2. *The Copyright Clause.* The test of the above analysis, however, is not only the language of section 106 but also the language of the copyright clause of the U.S. Constitution. The precise language of the clause provides that "[t]he Congress shall have Power . . . *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."[45] Since that clause is both a limitation on and a grant of congressional power, one may reasonably infer that the limitations represent constitutional policies relevant to the copyright owner's rights. That Congress can grant copyright only to promote learning, only to authors, only for their writings, and only for limited times is thus a matter of some significance.

The two policies of promoting learning and limiting the copyright term function to promote public access. While protection is given to a particular

44. *Harrison v Maynard, Merrill & Co.*, 61 F 689 (2d Cir 1894).

45. US Const, Art I, § 8, cl 8 (emphasis added). Since the copyright clause is contained in the intellectual property clause, which also includes the patent clause, it should be read distributively, which is the purpose of the emphasis.

writing, the Constitution implicitly states that it is given only to promote learning, and thus the writing may be used for a learning purpose. The public, in other words, is entitled to have access to copyrighted works. Once the copyright term lapses, however, the work is no longer protected, and the learning policy is no longer needed. But access to useful information is the cornerstone of the copyright clause, and the policy applies as long as the copyright continues.

A major difficulty in interpreting the copyright clause is the "exclusive right" language. To which right does this language refer? There are two major reasons for concluding that this language was intended to mean only the exclusive right of publication. First, copyright historically meant only the right of exclusive publication. This view is supported by three incontestable propositions: (1) the printing press gave rise to copyright; (2) copyright was used as an instrument to control the output of the press in sixteenth and seventeenth century England; and (3) until the 1976 Act, copyright did not come into existence until the work was published. To claim, then, that the framers of the Constitution intended more than exclusive publication by the term "exclusive right" is to give them credit for a prescience to which even their great minds are not entitled.

Second, the stated constitutional purpose of copyright is to promote learning. Obviously, learning would not be promoted unless the author exercised the right to publish the work. If the author's exclusive right meant more, it would give the author the power of information control by allowing him to use copyright to *inhibit* rather than *promote* learning. For example, an author could impose a use tax. The Constitution arguably precludes the equating of the right to copy with the exclusive right to publish, unless there is to be a return to the early use of copyright as an instrument of censorship.

The problem of the scope of the right to copy, so easily resolved analytically, is less tractable as a practical matter. The complication is a result of widespread use of the photocopying machine. But that is precisely the point. The ease of copying means that most copying is a matter of convenience. Arguably, then, the making of such copies does only imaginary harm to the copyright owner; copying without the payment of a fee raises a specter of a lost opportunity for additional profit. A copyright owner, for example, who can charge the purchaser of its publication fifty cents per page for copying will soon gain large profits from small payments. These perceived losses lead to consequentalist reasoning: the copyright owner's right to copy is claimed as absolute and independent, not because the copying results in harm, but because it has so much potential for new profit.

The question, then, is whether copyright in the future should be shaped to provide publishers the power to amass private fortunes in small charges, or whether it should continue to be shaped consistently with the copyright clause and the public interest. More simply, the question is whether copyright exists to provide owners with the right to impose a user's tax as well as a purchase tax on learning materials. To ask the question is to answer it. Therefore, we must conclude that the copyright owner's right to copy is a dependent right.

VII

UNDERSTANDING FAIR USE

As stated at the beginning of this article, to understand fair use, one must answer the question "what is copyright?" The answer is that copyright is a positive law concept consisting of a series of limited rights to which a given work is subject. Therefore, it follows that fair use, being derivative of copyright, should also be a positive law concept correlated to the uses of copyright. Although the major barrier to fair use as a positive law concept (its common law status) has now been removed, fair use still carries baggage from the past. Even Congress itself has called fair use an "equitable rule of reason."[46]

Most persons will agree, however, that fair use as a natural law right has generated confusion. While the narrow scope of the copyright monopoly has strictly limited that confusion, Congress has now made the monopoly both wider (in terms of coverage) and deeper (in terms of time). Recognizing that trading a confused fair use doctrine for an enhanced copyright is a luxury a free society can not afford, Congress codified fair use to counterbalance the enhanced copyright monopoly. The codification alone makes it easy to jettison the dated fair use baggage and to gain a better understanding of the concept.

The first paragraph of section 107 of the 1976 Copyright Act tells us two things: (1) the fair use of a copyright is not an infringement and (2) copying may be a fair use. This language tells us that the infringement of copyright is not in the copying but in the use of the copy and copies that are made. Since copying is not an infringement per se, it follows that copying is treated as a predicate right in section 107. Therefore fair use is directed to the use of the copyright, not the use of the work. Thus while one *uses* a work, one *infringes* the copyright of the work.

This last point is supported by the four fair use factors,[47] all of which are directed to the economic impact of the use. This, of course, is wholly consistent with the *Folsom* fair use doctrine. Under the first factor, one must determine if the use is commercial; under the fourth factor, one must determine the impact of the use on the potential market for, or economic value of, the work. The second factor focuses on the nature of the work, and the third focuses on the amount used in relation to the total work. These

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46. HR Rep No 94-1476, 94th Cong, 2d Sess 65 (1976).

47. The statute provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit or 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.

17 USC § 107 (1989).

factors make sense only in economic terms, particularly in view of the philosophy underlying American copyright law: the protection of the copyright owner's economic rights in the marketplace. It is only when the same premises are used for both copyright and fair use that it is feasible to engage in the refined analysis necessary to prevent the greed factor from inhibiting the constitutional purpose of copyright.

The positive law view of copyright inevitably trumps fair use as an equitable rule of reason, but the positive law view of copyright is balanced by the positive law view of fair use. In short, fair use ceases to be viewed as taking advantage of the copyright owner and becomes instead a recognized right of the user.

The analysis, however, should be compatible not only with section 107 of the 1976 Act but also with the Act itself. Under the statute, copyright is available only for three types of original works: imaginative works, derivative works, and compiled works. These three types can be further categorized as literary, musical, dramatic, choreographic, works of the visual arts, audiovisual works, and sound recordings.

The point here is that copyright protection varies for both the kinds and the categories of works, and that, to accommodate these variations, the fair use doctrine should vary accordingly. The variations are necessary because copyright is not only a matter of statutory rights but also of constitutional rights.[48] On the subject of compilations, the Supreme Court has said that

> [i]t may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." . . . It is rather, "the essence of copyright" . . . and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts."[49]

The language implies that the right to make a reasonable use of a work is a constitutional right, and a reasonable use is a fair use. It also echoes a sentiment that the Supreme Court expressed long ago that is applicable to the efforts of copyright owners to restrict the fair and personal uses of copyrighted works:

> A restriction which would give to the plaintiff such a potential power for evil . . . is plainly void, because . . . if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortune.[50]

The Supreme Court's constitutionalization of copyright law is almost surely to prevent lower courts from unwittingly expanding copyright beyond its constitutional limits. The development of new communications technology has enhanced the danger. Thus, copyright owners are asserting a proprietary control of copyrighted works to an unparalleled extent (with the ultimate goal, perhaps, being the displacement of free public libraries by

48. *Feist Publications, Inc. v Rural Telephone Service Co., Inc.*, 111 S Ct 1282 (1991).
49. Id at 1289-90 (citations omitted).
50. *Motion Picture Patents Co. v Universal Film Mfg. Co.*, 243 US 502, 519 (1917).

rental libraries). The primary intellectual weapon against this onslaught is the fair use doctrine. Therefore, it behooves the potential victims of an enhanced copyright monopoly to seek a better understanding of both fair use and copyright itself. Otherwise, the doctrine will be co-opted by copyright owners and litigated out of existence.

VIII

CONCLUSION

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

Fair use is the most viable concept for this purpose, but so far it has not been developed and utilized to the best advantage. Fair use as a concept should apply only to the copyright owner's use of the copyright. It should not be used to restrict the right of personal use—the individual's use of the *work*, for his or her learning. Perhaps the greatest disservice of natural law to the jurisprudence of copyright is the emphasis it has placed on the individual's right to be rewarded for his or her creations. Before any creator contributes to culture, he or she takes *from* that culture, and that is a consideration to be factored into the equation when seeking to balance the right of creators and consumers.

The point is made that copyright—as all agree—is a claim of limited duration and what the author takes from the public domain, he or she must ultimately return, albeit in embellished form. In the interim, society gives the author or artist a limited easement to benefit from his or her creative efforts. The ultimate problem may well be determining the extent of that easement during the interim, which is where fair use comes in. The goal of learning cannot wait until the copyright term comes to an end. Consequently, society must ensure that the copyright owner, the creator-entrepreneur, not make an unfair use of copyright itself by expanding his or her claims beyond statutory limits and gorging with unseemly profits.

There is a vital link between learning and liberty. If that link becomes subject to the plenary control of copyright entrepreneurs and learning becomes weighted with proprietary claims, experience tells us that it will be used merely to promote the accumulation of private fortune. With this as their goal, the money-makers will take our liberty to learn. That is the beginning of tyranny, and that is why fair use applies to copyright owners in their use of the copyright as well as to consumers in their use of the work.