

## Lawful Personal Use

--Jessica Litman\*

“We are perfectly fine with personal use.”

--*Mitch Bainwol, Recording Industry Association of America (2005)*<sup>1</sup>

Despite its having sued more than 18,000 of its customers,<sup>2</sup> the recording industry wants the world to know that it has no complaint with personal use. Copyright lawyers of all stripes agree that copyright includes a free zone in which individuals may make personal use of copyrighted works without legal liability.<sup>3</sup> Unlike other nations, though, the United States hasn't drawn the borders of its lawful personal use zone by statute.<sup>4</sup> Determining the circumstances under which personal use of copyrighted works will be deemed lawful is essentially a matter of inference and analogy, and differently striped copyright lawyers will differ vehemently on whether a particular personal use is lawful or infringing.<sup>5</sup>

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\* Professor of Law, University of Michigan. An unusually large number of people have helped me come to grips with this topic. I owe particular thanks to Jon Weinberg, Graeme Dinwoodie, Nina Mendelson, Jonathan Cohen, Pamela Samuelson, Rebecca Tushnet, Roberta Kwall and Jane Ginsburg whose questions caused me to rethink crucial questions and come up with different answers.

<sup>1</sup> Future of Music Coalition 5<sup>th</sup> Annual Policy Summit, Sept 12, 2005, at 10:53 a.m. (audio recording on file with author)

<sup>2</sup> See Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing “Contained,”* USA Today, June 12, 2006, online at URL: [http://www.usatoday.com/tech/products/services/2006-06-12-riaa\\_x.htm](http://www.usatoday.com/tech/products/services/2006-06-12-riaa_x.htm).

<sup>3</sup> Professor Marci Hamilton coined the phrase “free use zone” to describe these uses. See Marci A. Hamilton, *Impact of The Trips Agreement on Specific Disciplines: Copyrightable Literary And Artistic Works: Article: The Trips Agreement: Imperialistic, Outdated, and Overprotective*, 29 Vand. J. Transnat'l L. 613 (1996).

<sup>4</sup> Contrast, e.g., Canada; Norway. See, e.g., *BMG Canada v. Doe* [2004] F.C. 88 (Can.); Tarja Koskinen-Olsson, *The Notion of Private Copying in Nordic Legislation in the Light of European Developments in Recent Years*, 49 J. Copr. Soc'y 1003 (2002).

<sup>5</sup> Compare, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 300(1996) (“courts have generally declined to find personal copying as infringing”) with Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 51 J. Copyright Soc'y USA 113 (2003) (“U.S. and international copyright law

The dispute is not simply a question of where one lives on the copyright food chain. The contours of lawful personal use are fuzzy as well as contested.<sup>6</sup> Every time a study of copyright law queries the scope of lawful personal use, it concludes that the answer to the question whether any particular personal use is lawful is indeterminate.<sup>7</sup> Wherever the fuzzy borders of lawful personal use lie, however, most would agree that the lawful personal use zone is shrinking.

Congress has significantly expanded the breadth of copyright protection in the past few decades; some of that expansion has come at the expense of personal use.<sup>8</sup> The proliferation of digital technology has made personal use both easier to track, trace and charge for,<sup>9</sup> and a more formidable threat to conventional commercial exploitation of copyrights.<sup>10</sup> Copyright owners have therefore launched a variety of initiatives to replace unmetered and unmonitored personal uses with licensed ones. They have demanded the restraint of unauthorized personal use as a necessary step in encouraging the new commercial services to flourish.<sup>11</sup> Meanwhile, individuals' claims to make personal copies and pass them on to friends and family seem more

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have increasingly recognized that the author's right to authorize, or at least be compensated for, the making of copies, extends...to end users who make individual copies for private consumption"). See also NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 129 (2000):

Perhaps the most contentious current copyright issue concerns the legality of private, noncommercial copying. ... The extremes of the positions on this issue are well established and heavily subscribed to. Some rights holders seem to believe that all, or nearly all, unauthorized reproduction of their works, whether private or public, commercial or noncommercial, is an infringement. Many members of the general public appear to believe that all or virtually all private, noncommercial copying of copyrighted works is lawful.

<sup>6</sup> See Jessica Litman, *War Stories*, 20 Cardozo Arts & Entertainment L.J. 337, 338-50 (2002).

<sup>7</sup> See Alan Latman, *Fair Use of Copyrighted Works*, study number 14, at 12, 2 Arthur Fisher Memorial Edition at 790; Borge Varmer, *Photoduplication by Libraries*, Study # 15, at 51, 2 Arthur Fisher Memorial Edition at 817, *Digital Dilemma*, supra note 5, at 129-36. OFFICE OF TECHNOLOGY ASSESSMENT, *COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW* 5-14 (1989).

<sup>8</sup> E.g., Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727; Computer Software Rental Amendments Act of 1990, title VIII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat 5089, 5134; No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (1998).

<sup>9</sup> See, e.g., Sonia K. Katyal, *Privacy v. Piracy*, 9 Int'l J. Comm. L. & Policy 7 (2004-05); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 Dayton L. Rev. 587, 602-13 (1997).

<sup>10</sup> See, e.g., Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. Copyright Soc'y of the USA 113 (2003).

<sup>11</sup> See, e.g., *American Library Association v. F.C.C.*, 406 F.3d 689 (D.C. Cir. 2005).

questionable when those copies are digital.<sup>12</sup> Copyright owners have insisted, with some success, that digital devices must be equipped with copy-prevention technology before being made available to consumers.<sup>13</sup> Increasingly, what consumers have viewed as a “right” to make fair uses of copyrighted works is painted as a historically and technologically contingent privilege that may need to yield to copyright owners’ new licensing strategies.<sup>14</sup>

Fifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public.<sup>15</sup> Twenty years ago, when the Supreme Court’s decision in *Sony v. Universal Studios*<sup>16</sup> was still fresh, people believed they were free to use copyrighted works non-commercially, and the law for the most part backed that belief up.<sup>17</sup> Today, however, the recording industry has sued more than 18,000 individuals for making personal uses that can be characterized as “commercial” only by redefining commercial to mean “unlicensed.” Today, trading music with your friends is called “piracy” and collecting photocopied articles relevant to your job is stealing. Today, it’s a big deal when the lawyer representing the recording industry concedes to the Supreme Court that it is lawful for 22 million iPod owners to use them to listen to music they’ve copied from purchased recordings.<sup>18</sup>

Whether the shrinking of lawful personal use should disturb us depends on whether personal use has intrinsic value. If personal use was once lawful solely because of enforcement difficulties, the easy enforcement of copyright prerogatives against individuals for unlicensed personal uses is yet another benefit of technological

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<sup>12</sup> See Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 300-01 (1996); The Digital Dilemma, *supra* note 5, at 126-45.

<sup>13</sup> See, e.g., *Universal Studios v. Corley*, 273 F.3d 429, 436-44 (2d Cir. 2001). See also Electronic Frontier Foundation, Endangered Gizmos, at URL: <http://www.eff.org/endangered/> (visited Aug. 25, 2006).

<sup>14</sup> See, e.g., Jane C. Ginsburg, *supra* note 5, at \_\_; Jane C. Ginsburg, “*the Exclusive Right to Their Writings*”: Copyright and Control in the Digital Age, 54 Me L. Rev. 495 (2002); See also In re Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure (Nov. 18, 1993) at \_\_ (remarks of Bruce A. Lehman, Chairman, Working Group on Intellectual Property) (suggesting that fair use may be unnecessary in an electronic environment).

<sup>15</sup> See Jessica Litman, *The Exclusive Right to Read*, CARDOZO ARTS & ENTERTAINMENT L.J. (1994); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. Intell. Prop. L. 319 (2003).

<sup>16</sup> *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417 (1984).

<sup>17</sup> See, e.g., *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970-71 (1992); H.R. Rep. No. 873, part 1, 102d Cong., 2d Sess. (1992); Joel L. McQuin, *Home Audio Taping Of Copyrighted Works And The Audio Home Recording Act Of 1992: A Critical Analysis*, 16 Hastings Comm/Ent 311 (1994).

<sup>18</sup> See Transcript of Oral Argument, *MGM v. Grokster*, No. 04-480, March 29, 2005, URL: [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-480.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf) at 11-12.

progress. If the only factors discouraging us from welcoming the reduction in the scope of lawful personal use are concerns for the collateral damage to our privacy arising from vigorous enforcement of copyright within the home, or the effects of reduced access on social equality, we could address those fears directly by legislating new privacy rights or encouraging the adoption of innovative pricing models.

If those suggestions fail to quell the queasiness you feel at the idea that fewer and fewer personal uses remain lawful, then perhaps we've overlooked some role that personal use plays in the copyright system. Missing such a thing would certainly be understandable. We tend not to talk much about personal use when we're considering copyright reform.<sup>19</sup> Personal users have historically found fervent advocates in copyright law discussions only when they're employing consumer electronic devices, and only from the manufacturers of those devices.<sup>20</sup> Although copyright scholarship has wrestled with the lawfulness of personal uses since Universal Studios sued to enjoin the Sony Betamax,<sup>21</sup> we've had some difficulty coming up with useful formulations. As copyright law has expanded to encompass more and more territory, our vocabulary to describe the remainder has seemed to shrink as well.

Particular scholars have sought to infuse the debate with a more nuanced analysis. Professors Julie Cohen,<sup>22</sup> Yochai Benkler,<sup>23</sup> Rebecca Tushnet,<sup>24</sup> and Neil Netanel,<sup>25</sup> among others, have attempted to derive legal principles that protect the interests of those who experience rather than create copyrighted works from the first amendment.<sup>26</sup> Professor L. Ray Patterson, among others, found users' rights in the

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<sup>19</sup> See Jessica Litman, *Copyright Legislation and Technological Change*, 68 Ore. L. Rev. 275, 348-53(1989).

<sup>20</sup> JESSICA LITMAN, DIGITAL COPYRIGHT (2001); see Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*

<sup>21</sup> See, e.g., Wendy Jane Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. \_\_ (1982); L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 VANDERBILT L. REV. 1 (1987)

<sup>22</sup> Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 Conn. L. Rev. 981 (1996); Julie E. Cohen, *Copyright and the Jurisprudence of Self Help*, 13 Berkeley Tech. L.J. 1089, 1123 (1998).

<sup>23</sup> Yochai Benkler, *The Public Domain: Through The Looking Glass: Alice And The Constitutional Foundations Of The Public Domain*, 66 Law & Contemp. Prob. 173(2003); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 Fed. Comm. L.J. 561(2000); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999).

<sup>24</sup> Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535 (2004).

<sup>25</sup> Neil Weinstock Netanel, *Copyright in a Democratic Civil Society*, 106 Yale L. J. 283 (1996)

<sup>26</sup> See also, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891 (2002); Malla Pollack, *The Democratic Public Domain: Reconnecting the First Amendment and the Original Progress Clause (a.k.a. the Copyright and Patent Clause)*, 4 Jurimetrics 23 (2004); Jed Rubenfeld, *Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002);

copyright and patent clause of the constitution.<sup>27</sup> Professors Joseph Liu and Glynn Lunney, among others, have suggested that we find a theoretical basis for protecting consumers within the four corners of copyright law itself.<sup>28</sup> Both Cohen and Liu have criticized as reductionist the common depictions of users in the copyright literature, and have sought to refine our understanding of how the interests of users and consumers have been under-appreciated in current copyright law and copyright legal scholarship.<sup>29</sup>

In the summer of 2005, the unanimous Supreme Court decision in *MGM v. Grokster* caused the unsettled issue of personal use to assume increased importance.<sup>30</sup> The decision drew a line between the distributors of technology that makes infringement easier who would be liable for their customers' infringing use, and the distributors of like technology who would not.<sup>31</sup> The difference, the Court held, lay in whether the distributors had promoted infringing or non-infringing use. To assess likely contributory liability we need to know what personal uses are infringing. That question is more pressing because the recording and motion picture industries, which initially painted their suits against individuals as a last resort given the lower court rulings in *Grokster*'s favor,<sup>32</sup> have apparently found the practice of suing hundreds of peer-to-peer file sharers each month too delicious a habit to break. The suits generate a few thousand dollars each and may have some deterrent value. The economics of defending them make it unlikely that individual defendants will choose to litigate.<sup>33</sup> We therefore face the prospect that thousands of consumers will pay stiff peer-to-peer taxes to the recording and motion picture industry each year without a meaningful chance to establish whether they are doing something illegal.<sup>34</sup> Nor should we feel confident that the assault on personal use will stop at peer-to-peer file sharing. Flush from its victory over *Grokster*, the recording industry changed its tune and explained

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Diane Leenheer Zimmerman, *Is There A Right To Have Something To Say? One View Of The Public Domain*, 73 Fordham L. Rev. 297 (2004).

<sup>27</sup> L. Ray Patterson, *Eldred v. Reno: An Example Of The Law Of Unintended Consequences*, 8 J. Intell. Prop. L. 223 (2001); L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1 (1987). See also Deborah Tussey, *From Fan Sites To Filesharing: Personal Use In Cyberspace*, 35 Ga. L. Rev. 1129, 1134 (2001) (arguing that the policies underlying the copyright and patent clause support the enactment of a personal use privilege).

<sup>28</sup> See Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 Boston College Law Review 397 (2003); Glynn Lunney, *Fair Use and Market Failure: Sony Revisted*, 82 B.U. L. Rev. 975 (2002).

<sup>29</sup> See Liu, *supra* note 28; Julie E. Cohen, *The Place of the User in Copyright Law*, 74 Fordham L. Rev. 347 (2005).

<sup>30</sup> *MGM v. Grokster*, \_\_\_ U.S. \_\_\_ (2005). See Jonathan Band, *So What Does Inducement Mean?*, Computer & Internet Lawyer (November 2005).

<sup>31</sup> \_\_\_ US at \_\_\_.

<sup>32</sup> See *Pornography, Technology and Process: Problems and Solutions on Peer to Peer Networks*, Hearing Before the Senate Comm. on the Judiciary, 108<sup>th</sup> Cong. (Sept. 9, 2003).

<sup>33</sup> See Jessica Litman, *The Sony Paradox*, 55 Case Western L. Rev. 917 (2005).

<sup>34</sup> See Brief of Amici Curiae Glynn S. Lunney, Jr., and Other Law Professors in Support of Respondents, *MGM v. Grokster*, No. 04-480.

that the copyright piracy threat posed by P2P file sharing was insignificant compared with the threat posed by unauthorized CD burning, and that the industry was rolling out copy-protected CDs to meet the threat.<sup>35</sup> Meanwhile, both the motion picture industry and the recording industry seek law requiring consumer electronics companies to incorporate copy prevention technology into digital televisions and radios.<sup>36</sup> Thus, the effort to capture control over personal uses is moving further and further into consumers' homes.<sup>37</sup>

This paper seeks to refocus the discussion of users' and consumers' rights under copyright, by placing people who make personal use of copyright works at the center of the copyright system. The view of copyright that such a reconfiguration permits yields some useful insights. It allows us to look at 19<sup>th</sup> and 20<sup>th</sup> Century copyright cases in a new light: Rather than viewing those opinions as decisions by common law judges construing statutes stingily,<sup>38</sup> we can appreciate them as interpretations informed by a view of copyright in which readers and listeners are as important as authors and publishers.

I propose in this paper to look at the place of readers, listeners, viewers and the general public in copyright through the lens of personal use. After *Grokster*, the topic of personal use is timely, indeed critically so. Limiting myself to personal use, moreover, allows me to evade, for now, many of the interesting questions that arise when readers, listeners, users and experiencers morph into publishers and distributors.<sup>39</sup> Finally, personal use is a realm where even the most rapacious copyright owners have always agreed that there are some uses are lawful even though they are neither exempted or privileged in the copyright statute nor recognized as legal by any judicial decision.<sup>40</sup>

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<sup>35</sup> See Mitch Bainwol, Building a Brighter Future: Making and Selling Great Music, National Association of Recording Merchandisers Convention, Aug. 12 2005, at URL: <http://www.narm.com/2005Convention/Bainwol.pdf>.

<sup>36</sup> See ALA v. FCC, 406 F3d 689 (D.C. Cir. 2005); *Broadcast and Audio Flag: Hearing Before the Senate Commerce committee*, 109<sup>th</sup> Cong., 2d Sess. (Jan. 24, 2006), at URL: <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1704>; EFF, Broadcast Flag, <http://www.eff.org/broadcastflag/> (visited Aug. 25, 2006).

<sup>37</sup> See generally *The Audio and Video Flags: Can Content Protection and Technological Innovation Coexist?* Hearing Before the House Commerce Committee, 102d Cong., 2d Sess. (Jun 27, 2006), at URL: <http://energycommerce.house.gov/108/Hearings/06272006hearing1960/hearing.htm>; *The Analog Hole: Can Congress Protect Copyright and Promote Innovation*, Hearing Before the Senate Judiciary Comm., 102d Cong., 2d Sess. (June 21, 2006), at URL: <http://judiciary.senate.gov/hearing.cfm?id=1956>.

<sup>38</sup> See, e.g., Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 980 (1990).

<sup>39</sup> For some of my insights on those questions, see Jessica Litman, *Sharing and Stealing*, 37 Hastings Comm/Ent 1 (2004).

<sup>40</sup> See Marci Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 Vand. J. Transnat'l L. 613 (1996); *infra* text accompanying note 99 - 122.

In part II of this paper, I urge that people's reading, listening, viewing, watching, playing and using copyrighted works is at the core of the copyright system. In part III, I revisit copyright cases that have attracted criticism for their stingy construction of copyright owners' property rights, and suggest that the narrow reading of copyright rights was motivated, at least in part, by courts' solicitude for the interests of readers and listeners. These courts sought to evaluate whether accused uses were more akin to reading and listening than to publishing and distributing, and they examined the potential impact of their decisions on readers and listeners as well as authors and publishers. When a broad literal reading of statutory language would have significantly burdened reading, listening and viewing, these courts resisted that interpretation of the statute. In part IV, I articulate a definition of personal use. Armed with that definition, in part V, I look at the range of personal uses that are uncontroversially non-infringing under current law. I focus in particular on personal uses that seem to fall within the literal terms of copyright owners' exclusive rights, and seem to be excused by no statutory limitation, but which are nonetheless generally considered to be lawful. I proceed in section VI to offer an alternative test for assessing the lawfulness of personal uses. Finally, in section VII, I return to the conventional paradigm of copyright statutory interpretation, under which all unlicensed uses are infringing unless excused. I suggest that that rubric is not only inaccurate, but potentially destructive of copyright's historic liberties.

## II. What is copyright law for?

The copyright law ... makes reward to the owner a secondary consideration.

--*United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948 )

We sometimes talk and write about copyright law as if encouraging the creation and dissemination of works of authorship were the ultimate goal, with nothing further required to "promote the Progress of Science."<sup>41</sup> We have focused so narrowly on the production half of the copyright equation that we have seemed to think that the "Progress of Science" is nothing more than a giant warehouse filled with works of authorship. When we do this, we miss or forget an essential step. In order for the creation and dissemination of a work of authorship to mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program, build and inhabit the architecture.

This insight seems so obvious that it is surprising that it shows up so rarely in the copyright laws, the legislative efforts to enact them, or the scholarship that critiques them. The copyright interests of the readers, viewers, listeners, watchers, builders and inhabitants may get short shrift in Congressional hearings because they have so few paid representatives beyond members of Congress themselves. Their absence until very recently from copyright scholarship is more difficult to account

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<sup>41</sup> Art. I, § 8, cl. 8.

for. The notion that copyright law's primary purpose is to benefit the public has been commonplace for many years.<sup>42</sup> The understanding that its mechanism was to enable works of authorship to enrich the people who read, listened to, and viewed them has appeared in many copyright cases.<sup>43</sup> Yet copyright scholarship's recent preoccupation with law and economics has translated those pronouncements into assertions that the public will benefit when authors and distributors have robust incentives to create and market works.<sup>44</sup> So long as people buy books and CDs, who cares if they read or listen to them? Outlier scholars have published books and articles seeking to argue that copyright law, properly understood, places readers, listeners and viewers at its center.<sup>45</sup> Those arguments, though, have for the most part been poorly received even by copyright skeptics, who have viewed them as extreme.<sup>46</sup>

Copyright law is intended to create a legal ecology that encourages the creation and dissemination of works of authorship, and thereby "promote the Progress of Science." As James Boyle has reminded us, ecologies are complex and interdependent systems.<sup>47</sup> If we build shopping centers and housing tracts on all of the marshes and frog ponds, we will eventually find ourselves overrun with mosquitoes. In the same way, laws that discourage book reading end up being bad for book authors. Thus, it isn't difficult to frame an argument that copyright law cannot properly encourage authors to create new works if it imposes undue burdens on readers. Such arguments are more palatable to fans of strong copyright than arguments urging the primacy of reading, and much of the scholarship urging limited copyright, my own included,<sup>48</sup> has relied on them.<sup>49</sup> Those arguments, though, have been vulnerable to the assertion that if strong copyright laws prove unfavorable to

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<sup>42</sup> See, e.g., 1 PAUL GOLDSTEIN, COPYRIGHT 3-9 (1989); ROBERT GORMAN, COPYRIGHT LAW 1 (1991).

<sup>43</sup> See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *USA v. Paramount Pictures*, 334 US 131 (1948).

<sup>44</sup> See JESSICA LITMAN, DIGITAL COPYRIGHT 79-80 (2001).

<sup>45</sup> See, e.g., L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991); Glynn Lunney, *supra* note 28; Raymond Shih Ray Ku, *The Creative Destruction of Copyright*, 69 U. Chi. L. Rev. 263 (2002).

<sup>46</sup> See, e.g., Cohen, *supra* note 29, at \_\_\_. Copyright true believers have been even less receptive. For a strident and not entirely coherent argument that users have and should have no rights whatsoever under copyright laws, see David R. Johnstone, *Debunking Fair Use Rights and Copy Duty Under US Copyright Law*, 52 J. Copyright Soc'y USA 345, 357-58 (2005) ("No 'Users' Rights" Exist (Explicitly or Implicitly)").

<sup>47</sup> James Boyle had the insight that intellectual property laws created an information ecology. See James Boyle, *An Environmentalism for the Net*, 47 Duke L. Rev. 87 (1997); James Boyle, *The Second Enclosure Movement*, 66 L. & Contemp. Probs. 33 (2003); *Symposium: Cultural Environmentalism @ 10*, L. & Contemp. Probs. (forthcoming 2006).

<sup>48</sup> See Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 1018-19 (1990).

<sup>49</sup> See, e.g., LAWRENCE LESSIG, FREE CULTURE (2004); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (forthcoming 2007); James Boyle, *The Second Enclosure Movement*, 66 L. & Contemp. Probs. 44-49 (2003).

authors because of the burdens they impose on readers, authors can always exercise their options to waive some of their rights, or license them on easy and generous terms.<sup>50</sup> Recent rejoinders have focused on the difficulties attending licensing.<sup>51</sup> I want to resist the temptation to advance an argument that personal use requires protection for the sake of authors. Rather, I want to insist that copyright law encourages authorship at least as much for the benefit of the people who will read, view, listen to and experience the works that authors create, as for the advantage of those authors and their distributors.

For most of the history of copyright, the law left reading, listening, and viewing unconstrained. The copyright statutes on the books neither mentioned personal uses expressly, nor needed to. The exclusive rights granted by copyright were narrow, and the law aimed its proscriptions at commercial and institutional entities. Thus the opportunities of members of the public to engage in unfettered reading, listening to, and looking at works protected by copyright received little explicit attention. They nonetheless functioned as historic copyright liberties,<sup>52</sup> implicit in the copyright statutory scheme and essential to its purpose. Where copyright claims posed serious threats to these liberties, courts often responded by reading the scope of copyright's exclusive rights narrowly.

### III. Revisiting older cases

[T]he copyright statute accords the proprietor of a copyright a number of exclusive rights. But unlike the patentee, the copyright owner does not enjoy the exclusive right to "use" his copyrighted work."

---Alan Latman, 1955<sup>53</sup>

U.S. copyright law initially limited itself to securing the author's right to "print, reprint, publish or vend."<sup>54</sup> In 1856, Congress added a public performance right, limited to dramatic compositions. In 1870, it added dramatization and

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<sup>50</sup> See, e.g., I. Trotter Hardy, *Copyright and "New-Use" Technologies*, 23 Nova S.E. Univ. L. Rev. 657, 697 (1999).

<sup>51</sup> See Lessig, *supra* note 49, at \_\_; Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case Western Reserve L. Rev. 673 (2003); Katie Dean, Copyright Reform to Free Orphans, WIRED News, April 12, 2005.

<sup>52</sup> See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stanford L. Rev. 1343 (1989).

<sup>53</sup> *Fair Use of Copyrighted Works*, study number 14, at 5, 2 Arthur Fisher Memorial Edition at 783.

<sup>54</sup> An Act for the Encouragement of Learning, 1 Stat. 124 (1790).

translation rights. In 1897, it extended the public performance right to musical compositions. The standard account of 19<sup>th</sup> and early 20<sup>th</sup> century copyright in the United States tells us that Congress defined the scope of the copyright grant narrowly and courts construed it stingily.<sup>55</sup> Looking back at early copyright law from the vantage point of the 21<sup>st</sup> century, when copyright rights are broad, deep and very long,<sup>56</sup> the scope of early copyright laws can seem startlingly constrained. Focusing on the relative narrowness of early copyright's exclusive rights, though, can obscure some of the reasons informing courts' interpretations. The language of some of the most notorious decisions limiting the scope of copyright advanced the interests of readers, listeners and viewers. Courts confronting novel claims of infringement sought to locate the allegedly infringing behavior on the continuum between exploitation and enjoyment, in order to preserve copyright owners' control over exploitation while denying them control over individual reading, listening, playing and viewing.<sup>57</sup>

In *Stowe v. Thomas*,<sup>58</sup> for example, Harriet Beecher Stowe sued to enjoin the publication of an unauthorized German translation of *Uncle Tom's Cabin*, and lost. The court held that her copyright in the book did not extend so far:

An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise.<sup>59</sup>

Eaton Drone's 1879 copyright treatise described the decision in *Stowe v. Thomas* as "clearly wrong, unjust and absurd,"<sup>60</sup> and it has long been traditional to cite the

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<sup>55</sup> See ARTHUR R. MILLER & MICHAEL H. DAVID, INTELLECTUAL PROPERTY IN A NUTSHELL 326-27 (2000); Netanel, *supra* note 49, at \_\_; Edward Samuels, *The Idea/Expression Dichotomy in Copyright Law*, 56 Tenn. L. Rev. 321, 325-47 (1989).

<sup>56</sup> See *Eldred v. Ashcroft*, 537 US 186 (2002).

<sup>57</sup> The late Ray Patterson, in an important article published two decades ago, articulated this distinction as the difference between using the copyright and using the work. See L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 Vanderbilt L. Rev. 1, 11-12 (1987).

<sup>58</sup> 23 F. Cas. 201 (1853)

<sup>59</sup> *Id.* at 206

<sup>60</sup> EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 454n.4 (1879)

case as an example of the extraordinary stinginess of 19<sup>th</sup> century US copyright.<sup>61</sup> What we miss, though, when we look only at how narrowly the court construed the author's rights, is its focus on the rights of readers. The court struck a balance between authors' property interests and readers' "common property" interests, in which the author's exclusive right yielded to her readers' right to communicate the author's conception. The translator and publisher of the German edition were, in this analysis, simply readers of Stowe's book, exercising the liberties that copyright law afforded them.

A century later, in a pair of copyright cases challenging cable television system's unlicensed transmission of broadcast signals, the Supreme Court held that the cable operators were not performing the signals they transmitted within the meaning of the statute, but should be deemed akin to viewers.<sup>62</sup> Similarly, when composers sued the owner of a small Pittsburgh restaurant who entertained his customers by playing radio programs in the dining area, the Court held that the restaurant could not be held liable for publicly performing the music for profit. What it was doing when it played the radio for its customers, the Court insisted, was not performing, but listening.<sup>63</sup> The Court predicated its construction of the

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<sup>61</sup> See, e.g., Litman, *supra* note 38, at 979; Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 *Berkeley Tech. L.J.* 777, 824 (2000); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 *Brooklyn L. Rev.* 1213, 1233-34 (1997).

<sup>62</sup> In *Fortnightly v. United Artists Television*, 392 U.S. 390 (1968), a motion picture studio that had licensed its programming to television for broadcast sued the operator of cable television systems that had, without a license, transmitted the programming to customers in nearby areas who had poor television reception because of the hilly terrain. The studio claimed that Fortnightly was performing its motion pictures for profit. The Supreme Court disagreed. The Court continued:

Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

*Id.* at 399. Six years later, the Court was invited to reexamine the line between broadcaster and viewer in a copyright infringement case against a cable television company that imported television broadcast signals from geographically remote areas. See *Teleprompter v. CBS*, 415 U.S. 394 (1974). The Court refused to find copyright liability.

<sup>63</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 160-61, 163-64 (1975): .

To hold in this case that the respondent Aiken "performed" the petitioners' copyrighted works would ... result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.

public performance right in part on its concern for the restaurant owner's interest in listening to the radio.

None of these cases targeted individual personal users directly;<sup>64</sup> all were suits against intermediaries who facilitated reading, listening and viewing. The courts resolved them in defendants' favor, though, by treating the intermediaries' activities as on the readers' listeners' or viewers' side of the line between copyright owner exploitation and reader, listener or viewer enjoyment of copyrighted works. In other cases, courts explicitly addressed the intermediaries' role, but considered the potential impact of prohibiting the use on reader, listener or viewer liberties as an important and possibly determinative consideration.

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The practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises -- bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins -- to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.

And a ruling that a radio listener "performs" every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else. Secondly, to hold that all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1(e):

"The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests." H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

Id. at 163-64.

<sup>64</sup> Until the recent flood of peer-to-peer file sharing lawsuits, copyright infringement suits against individuals were so rare as to be almost unthinkable. When Universal Studios included a nominal claim against individual Betamax owner William Griffiths in its 1976 lawsuit against Sony, that fact inspired a host of editorial cartoons, despite the fact that Mr. Griffiths was a client of the firm representing Universal and had consented to be sued. See James Lardner, *Fast Forward* 17-19 (2002).

*Williams & Wilkins Co. v. United States*<sup>65</sup> has the distinction of having been dubbed the “Dred Scott” case of copyright law.<sup>66</sup> Williams & Wilkins, a publisher of 37 medical journals, sued the National Library of Medicine, claiming that photocopying journal articles to meet requests for interlibrary loans infringed its copyrights. The Court of Claims held the photocopying to be fair use. The court began its analysis with the observation that the statutory right to “‘copy’ is not to be taken in its full literal sweep.”

The court-created doctrine of “fair use” ... is alone enough to demonstrate that Section 1 does not cover all copying (in the literal sense). Some forms of copying, at the very least of portions of a work, are universally deemed immune from liability, although the very words are reproduced in more than *de minimis* quantity. Furthermore, it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use....<sup>67</sup>

Judge Davis’s opinion relied on “years of accepted practice” of copying entire poems, songs, illustrations, articles, and judicial opinions for personal use to support the proposition that copyright law permits unlicensed copying in a host of situations,<sup>68</sup> and then focused on the burden to individual medical researchers of deeming the Library’s copying to be infringing:

If photocopying were forbidden, the researchers, instead of subscribing to more journals or trying to obtain or buy back-issues or reprints (usually unavailable), might expend extra time in note-taking or waiting their turn for the library’s copies of the original issues -- or they might very well cut down their reading and do without much of the information they now get through NLM’s and NIH’s copying system. The record shows that each of the individual requesters in this case already subscribed, personally, to a number of medical journals, and it is very questionable how many more, if any, they would add. The great problems with reprints and back-issues have already been noted. In the absence of photocopying, the financial, timewasting, and other difficulties of obtaining the material could well lead, if human experience is a guide, to a simple but drastic reduction in the use of the many articles (now sought and read) which are not absolutely crucial to the individual’s work but are merely stimulating or helpful. The probable effect on scientific progress goes without saying....<sup>69</sup>

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<sup>65</sup> 487 F.2d 1345 (1973), aff’d by an equally divided court, U.S. .

<sup>66</sup> See 487 F. 2d at 1387 (Nichols, J. dissenting) (“We are making the *Dred Scott* decision of copyright law.”); *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963, *Universal City Studios v. Sony*, (“*Williams & Wilkins Co.*, which has been appropriately regarded as the “Dred Scott decision of copyright law” ... is clearly not binding in this circuit, and, in any event, we find its underlying rationale singularly unpersuasive.”); rev’d, 464 U.S. 417 (1984)..

<sup>67</sup> Id. at 1350.

<sup>68</sup> Id. at 1353.

<sup>69</sup> Id. at 1358.

In the aggregate, the Library's photocopying was massive. The court nonetheless concluded it was non-infringing because of the personal use interests of each of the many individual researchers for whom the copies were made.

In *Sony v. Universal Studios*,<sup>70</sup> copyright owners sued the producer of the videocassette recorder, claiming that it should be liable for the massive copyright infringement of the millions of consumers who used its VCR to record broadcast programming off the air. The Supreme Court held that recording a program to enable its later viewing, while technically an unauthorized copy, was fair use and therefore not actionable.<sup>71</sup> "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home..."<sup>72</sup>

Other opinions famous for their stingy constructions of copyright owners' control also advanced the interests of readers, listeners and viewers. *White Smith v. Apollo*,<sup>73</sup> for example, stands in the copyright lexicon for the illogical narrowness of the copyright law of its era.<sup>74</sup> In *White-Smith*, a music publisher sued to enjoin the manufacture of piano rolls designed to cause player pianos to play songs protected by the publisher's copyright. The Court held that piano rolls were not "copies" within the meaning of the statute, and that they therefore did not infringe: "When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood."<sup>75</sup> The effect of *White-Smith* was to allow non-musicians

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<sup>70</sup> 464 U.S. 417 (1984).

<sup>71</sup> Id. at . See Jessica Litman, *The Story of Sony, Mary Poppins Meets the Boston Strangler*, in JANE C. GINSBURG AND ROCHELLE COOPER DREYFUSS, *INTELLECTUAL PROPERTY STORIES* (2005).

<sup>72</sup> 464 U.S. at 456. The interests of television viewer had more influence on the result in *Sony* than the ultimate opinion reveals. Justice Stevens who authored the majority opinion, focused primarily on the rights of homeowners using VCRs from the first Supreme Court deliberations on the case. Indeed, an early draft of the majority opinion characterized the lawsuit as an effort to "control the way William Griffiths watches television..."

<sup>73</sup> 209 U.S. 1 (1908).

<sup>74</sup> See, e.g., Deborah Tussey, *Technology Matters: The Court, Media Neutrality and New Technologies*, 12 J. Intell. Prop. L. 427, 427 (2005); Craig Joyce et. al., *Copyright Law* 70, 76 (6<sup>th</sup> Ed. 2003). For a different analysis that seeks to rehabilitate the *White-Smith v. Apollo* opinion, see Kenneth M. Alfano, *Copyright in Exile: Restoring the Original Parameters of Exclusive Reproduction*, 11 J. Tech. L. & Policy \_\_ (forthcoming 2006) (manuscript on file with author).

<sup>75</sup> 209 U.S. at 17:

It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally

who would otherwise have been unable to play the copyrighted songs to enjoy listening to them in their homes.

Looked at from the vantage point of a copyright owner seeking enforcement of its rights, these opinions have seemed unreasonably conservative, and have been criticized accordingly.<sup>76</sup> Viewed from the perspective of readers, listeners, and viewers, though, the decisions vindicate their continuing importance in the copyright formula. *Stowe v. Thomas* recognized the rights of Stowe's readers; *White-Smith v. Apollo* and *George Aiken* advanced the interests of listeners; *Sony* and the cable television cases upheld the rights of viewers. *Williams & Wilkins* suggested that copyright law has always excused strictly personal copying. If copyright law is designed to encourage reading, viewing, listening and experiencing works of authorship as well as creating and distributing them, then courts' reluctance to read the copyright grant too expansively can be seen as an effort to preserve that equilibrium.<sup>77</sup> Cases that are conventionally painted as the most notorious examples of courts' crabbed construction of copyright may be more usefully understood as defenses of the central place of readers, listeners and players in the copyright scheme.

More recently, some courts have given copyright a similarly constrained reading in cases involving computer technology. In *Nintendo of America v. Lewis Galoob Toys*,<sup>78</sup> Nintendo sued the maker of the Game Genie, which allowed consumers to modify the way a Nintendo game played. Nintendo argued that the Game Genie caused consumers to create unauthorized derivative works by varying the Nintendo games' audiovisual display. The trial court noted that "The alleged infringer in this case is not a commercial licensee, but rather a consumer utilizing the Game Genie for noncommercial, private enjoyment. Such use neither

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understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which other can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

Id. at 17. See also *Stern v. Rosey*, 17 App. D.C. 562 (D.C. Ct. App. 1901) (phonograph records not "copies").

<sup>76</sup> See, e.g., Jane C. Ginsburg, "the Exclusive Right to Their Writings": Copyright and Control in the Digital Age, 54 Me. L. Rev. 495 (2002).

<sup>77</sup> To put this another way, courts seem to have interpreted the scope of copyright rights in light of a conviction that Congress had carefully weighed the rights of readers and listeners against the rights of authors and publishers to arrive at the appropriate, carefully calibrated balance, and that Congress did not and would not have abridged the rights of readers and listeners significantly without saying so in a clear, ringing voice.

<sup>78</sup> 780 F. Supp. 1283 (N.D. Cal. 1991), aff'd 964 F.2d 965 (9<sup>th</sup> Cir. 1992).

generates a fixed transferable copy of the work, nor exhibits or performs the work for commercial gain.” The consumer, the court concluded, did not infringe Nintendo’s copyright by using a Game Genie to alter the game play of Nintendo games:

Both parties agree that it is acceptable, under the copyright laws, for a noncopyright holder to publish a book of instructions on how to modify the rules and/or method of play of a copyrighted game. Once having purchased, for example, a copyrighted board game, a consumer is free to take the board home and modify the game in any way the consumer chooses, whether or not the method used comports with the copyright holder's intent. The copyright holder, having received expected value, has no further control over the consumer's private enjoyment of that game.

Because of the technology involved, owners of video games are less able to experiment with or change the method of play, absent an electronic accessory such as the Game Genie. This should not mean that holders of copyrighted video games are entitled to broader protections or monopoly rights than holders of other types of copyrighted games, simply because a more sophisticated technology is involved. Having paid Nintendo a fair return, the consumer may experiment with the product and create new variations of play, for personal enjoyment, without creating a derivative work.<sup>79</sup>

It followed that Galoob did not infringe by selling the device that enabled the consumers’ use. The Court of Appeals affirmed.<sup>80</sup> Neither the trial court nor the Court of Appeals were able to ground their interpretation in the literal language of section 106(2) of the copyright statute; instead, they gave the language a narrowing gloss because they were persuaded of the importance of the consumers’ interest in playing games they had purchased in the ways they desired to.

In *Lotus Development Corporation v. Borland International*,<sup>81</sup> Lotus sued Borland for copying the words and arrangement of the menu command hierarchy of the Lotus 1-2-3 spreadsheet program, which Lotus insisted embodied the program’s “look and feel.” The Court of Appeals for the First Circuit concluded that whether or not the menu command hierarchy resulted from expressive choices, it was uncopyrightable as a “method of operation” under section 102(b) of the copyright statute.<sup>82</sup> Judge Boudin, concurring, expressed some discomfort with the majority’s rationale. In his view, the interests of Lotus’s customers, who

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<sup>79</sup> 780 F. Supp. at 1291.

<sup>80</sup> 954 F.2d 965 (9<sup>th</sup> Cir. 1992).

<sup>81</sup> 49 F.3d 807 (1<sup>st</sup> Cir. 1995), aff’d by an equally divided court, 516 U.S. 233 (1996).

<sup>82</sup> 17 U.S.C. § 102(b):

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

had invested time learning Lotus's commands and devising their own macros required a judgment for Borland. The difficulty was finding an appropriate rationale to support it:

If Lotus is granted a monopoly on this pattern, users who have learned the command structure of Lotus 1-2-3 or devised their own macros are locked into Lotus, just as a typist who has learned the QWERTY keyboard would be the captive of anyone who had a monopoly on the production of such a keyboard. Apparently, for a period Lotus 1-2-3 has had such sway in the market that it has represented the de facto standard for electronic spreadsheet commands. So long as Lotus is the superior spreadsheet--either in quality or in price--there may be nothing wrong with this advantage.

But if a better spreadsheet comes along, it is hard to see why customers who have learned the Lotus menu and devised macros for it should remain captives of Lotus because of an investment in learning made by the users and not by Lotus. Lotus has already reaped a substantial reward for being first; assuming that the Borland program is now better, good reasons exist for freeing it to attract old Lotus customers: to enable the old customers to take advantage of a new advance, and to reward Borland in turn for making a better product. If Borland has not made a better product, then customers will remain with Lotus anyway.

Thus, for me the question is not whether Borland should prevail but on what basis.<sup>83</sup>

In *Recording Industry Association of America v. Diamond Multimedia Systems*,<sup>84</sup> the recording industry brought suit to enjoin the sale of the first portable MP3 player under the Audio Home Recording Act. The recording industry argued that, in return for shielding consumers from liability for noncommercial copying of recorded music, the law required digital audio recording devices to incorporate copy-protection technology and pay copyright royalties to compensate rights holders for the presumed copies made by individuals. Since Diamond neither paid the statutory royalties nor included serial copy management technology in the device's design, the RIAA argued, its manufacture and sale of the device was illegal. The court of appeals for the 9<sup>th</sup> Circuit ruled that portable MP3 players were not subject to the copy-protection and royalty payment requirements of the Audio Home Recording Act. Moreover, it continued:

The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. ...Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.<sup>85</sup>

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<sup>83</sup> 49 F.2d at 821 (Boudin, J., concurring).

<sup>84</sup> 189 F.3d 1072 (9<sup>th</sup> Cir. 1979).

<sup>85</sup> Id. at 1072 (citing *Sony v. Universal Studios*, 464 U.S. 417, 455 (1984)).

The court's language reflects a conviction that noncommercial personal use was lawful, and that marketing devices that facilitated it, therefore, could not engender liability.

The line of authority reading copyright rights narrowly to preserve the liberties of readers, listeners or viewers is by no means undisputed. For every case in which a copyright defendant persuaded a court to read statutory exclusive rights narrowly, there is at least one in which the court mechanically applied the literal language of the statute to find infringement without much attention to the effects of the ruling on readers, listeners or viewers.<sup>86</sup> In *A&M Records v. Napster*, for example, defendant sought to rely on *Sony* and *RIAA v. Diamond* to argue that users of its software engaged in lawful personal copying.<sup>87</sup> The Court of Appeals for the 9<sup>th</sup> Circuit found that argument too hard to swallow. Judge Beezer's opinion rejected Napster's argument that downloading music from other individuals might be excused either by the Audio Home Recording Act or by the fair use doctrine. Indeed, appalled by the vast scale, in the aggregate, of millions of individuals' copying music from each other's hard drives, Judge Beezer declared the consumer copying to be commercial.<sup>88</sup> In *Grokster*, the Supreme Court predicated its opinion on the assumption – uncontested by defendants – that the vast majority of consumer file sharing over peer-to-peer networks was blatantly illegal.<sup>89</sup> Not all courts consider the impact of their rulings on personal uses, and not all personal uses strike courts as legitimate. The strongest inference the case law supports is that reader, listener and viewer interests have influenced many courts' reading of the scope of copyright, and that that influence dates back to the earliest copyright cases.

At least some courts, then, have long treated reading, listening, viewing and using as essential copyright liberties. When copyright owners' claims have trod on them too heavily, courts have read copyright's exclusive rights narrowly to preserve those liberties from copyright-owner control. Reading, listening, viewing, and their modern cousins watching, playing, running, and building, are central to the copyright scheme. We knew that once, but forgot it sometime within the past generation as the rhetoric of copyright increasingly characterized personal uses as piracy and theft. If we think about personal use as a guilty pleasure that is probably morally wrong, we're going to lose it. If we recall that encouraging personal use is an objective that's crucial to the copyright system, we may find the will to defend it against increasingly forceful encroachment.

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<sup>86</sup> See, e.g., *MAI v. Peak Computer*, 991 F.2d 511 (9<sup>th</sup> Cir. 1993); *Red Baron-Franklin Park v. Taito Corp.*, 883 F.2d 275(4<sup>th</sup> Cir.); *Worlds of Wonder v. Veritel Learning Systems*, 658 F. Supp. 351 (N.D. Tex. 1986).

<sup>87</sup> 239 F.3d 1004 (9<sup>th</sup> Cir. 2001).

<sup>88</sup> *Id.* at 1015 ("Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.").

<sup>89</sup> *MGM v. Grokster*, \_\_\_ U.S. at \_\_\_.

#### IV. What is “personal use?”

“It would plainly be unconstitutional to prohibit a person from singing a copyrighted song in the shower or jotting down a copyrighted poem he hears on the radio.”

--Justice John Paul Stevens, 1983<sup>90</sup>

In order to sidestep extant debates about what counts as “private use,” “noncommercial use,” or “use by a consumer,” in which advocates for various results have taken hardened positions,<sup>91</sup> I’d like to avoid previously contested vocabulary. I want to start with a definition of “personal use.” I offer the definition on the assumption that some subset of personal use will be lawful, some subset will be infringing, and that the legality of some personal uses will be controversial. With that disclaimer, I propose to define “personal use” as a use that an individual makes for herself, her family, or her close friends.<sup>92</sup> So defined, personal use can take place at home or at work, on the street or in the store. It may happen with or without a commercial purpose. It may or may not compete with copyright owners’ planned exploitation of their works. It may occur within a statutory exemption. It may be either permitted or prohibited by a license. Figuring out which personal uses are lawful and which are not will give us a chance to examine the place of personal use in the copyright scheme.

In the spirit of rhetorical experiment, and as part of my strategy for sidestepping existing controversies, I propose to refer to the individuals who make

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<sup>90</sup> 1<sup>st</sup> draft, Memorandum of Justice Stevens, *Sony v. Universal Studios* (No.81-1687) (circulated June 13, 1983), at 17-18. See Jessica Litman, *The Sony Paradox*, 55 Case Western L. Rev. 917, 930-34 (2005).

<sup>91</sup> See *Music on the Internet: Is There an Up Side to Downloading?: Hearing Before the Senate Comm. On the Judiciary*, 106<sup>th</sup> Cong., 2d Sess. (July 11, 2000) at URL: <http://judiciary.senate.gov/hearing.cfm?id=195>; MusicUnited.org, The Law, URL: [http://www.musicunited.org/2\\_theLaw.html](http://www.musicunited.org/2_theLaw.html) (visited August 13, 2006); University of Georgia, Regents’ Guide to Understanding Copyright and Fair Use, URL: <http://www.usg.edu/legal/copyright/#part3d3b> (visited August 13, 2006); Lutheran-Hymnal.com, Permission and Copyright and URL: [http://www.lutheran-hymnal.com/about\\_us/permission\\_and\\_copyright.html](http://www.lutheran-hymnal.com/about_us/permission_and_copyright.html) (visited August 13, 2006).

<sup>92</sup> For a somewhat broader definition see Deborah Tussey, *From Fan Sites To Filesharing: Personal Use In Cyberspace*, 35 Ga. L. Rev. 1129, 1134 (2001) (“‘Personal use,’ in the broad sense, means consumption or adaptation of intellectual properties by individual users for their own purposes, including uncompensated sharing of those works with others.”) For a narrower definition see Lutheran Hymnal Online, Permission and Copyright URL: [http://www.lutheran-hymnal.com/about\\_us/permission\\_and\\_copyright.html](http://www.lutheran-hymnal.com/about_us/permission_and_copyright.html) (visited August 13, 2006) (“Personal private use is that which occurs within you [sic] immediate biological family”).

personal use as “persons,” “people,” or “individuals” rather than “consumers,”<sup>93</sup> “users,”<sup>94</sup> or “fans.”<sup>95</sup>

## V. What personal uses are lawful?

“anyone may copy copyrighted materials for the purpose  
of private study and review”

--Saul Cohen, 1955<sup>96</sup>

With a definition of personal use to work with, we can start to map out which personal uses are lawful and which infringe. A standard paradigm for construing the copyright law holds that any unlicensed use that falls within the literal terms of section 106, which gives copyright owners control over fixed reproductions, adaptations, distributions to the public, public performance and public displays,<sup>97</sup> violates the copyright law unless it comes within the terms of an express statutory exemption.<sup>98</sup> As I will explore in detail below, I believe that rubric is at best misleading, but it will give us a place to begin. Even if the standard paradigm accurately describes the law, there is a large class of personal uses that are simply outside of the scope of the current copyright statute. That zone, smaller than it used to be, includes all private performances and displays.<sup>99</sup> It includes all private distributions, since the copyright owner’s distribution right is limited to distributions “to the public.”<sup>100</sup> Copyright owners have no copyright rights that would allow them to control private performances, displays and distributions. Nor have copyright owners any right to prohibit people from making unfixed reproductions of copyrighted works.<sup>101</sup>

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<sup>93</sup> See, e.g., Liu, *supra* note 28.

<sup>94</sup> See, e.g., Cohen, *supra* note 29.

<sup>95</sup> See, e.g., Fred Von Lohmann, Is Suing Your Customers A Good Idea, Law.com (Sept. 29, 2004), at URL: <<http://www.law.com/jsp/article.jsp?id=1095434496352>>. See also Justin Hughes, “Recoding” Intellectual Property and Overlooked Audience Interests, 77 Tex. L. Rev. 923(1999)(“non-owners”).

<sup>96</sup> Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT LAW SYMPOSIUM 43, 58 (1955).

<sup>97</sup> 17 U.S.C. § 106.

<sup>98</sup> See, e.g., MusicUnited.org, The Law, URL: [http://www.musicunited.org/2\\_theLaw.html](http://www.musicunited.org/2_theLaw.html) (visited August 13, 2006); Brad Templeton, 10 Myths About Copyright Explained, URL: <http://www.templetons.com/brad/copymyths.html> (October 2004).

<sup>99</sup> 17 U.S.C. § 106(4), 106(5)

<sup>100</sup> 17 U.S.C. § 106(3): “to distribute copies or phonorecords to the work to the public by sale or other transfer of ownership or by rental lease or lending.” This limitation has attracted almost no attention in the 30 years since the enactment of the 1976 Act, presumably because few unauthorized private distributions of copies or phonorecords have attracted litigation.

<sup>101</sup> 17 U.S.C. §§ 101, 106(1)

A number of other personal uses are permitted because of statutory exemptions and privileges. The first sale doctrine in section 109 allows distribution and display to the public of owned, lawfully made copies and phonorecords. Section 109(e) permits the public performance of video games on coin-operated machines. Section 110(5) allows people to listen to and watch radio and television broadcasts in public places, so long as they use the sort of equipment commonly found in private homes. Section 110(11) allows private households to use software to hide objectionable scenes in motion pictures they are viewing.<sup>102</sup> Section 117 permits people to modify and make backup copies of the computer programs on their computers. Section 120 allows homeowners to renovate and photograph their homes, notwithstanding the architects' reproduction and adaptation rights. Section 602 permits people to import copies or phonorecords of copyrighted works for use (as distinguished from sale) as part of their personal luggage. Section 1008 prohibits copyright infringement suits against consumers who make noncommercial copies of recorded music (at least so long as they use analog or digital audio recording devices or media.)

In addition, the statute includes specific exemptions for intermediaries to reproduce, adapt, distribute, perform or display works for the benefit of people making exempt personal uses. Section 110(11) allows software companies to create and market programs designed to assist individuals who wish to censor offensive scenes in motion picture broadcasts or DVDs. Section 111 allows the proprietors of hotels and apartment buildings to transmit broadcast programs to individual apartments and hotel rooms so that the occupants can perform them privately. Section 117 permits computer repair services authorized by people who own computers to run the copyrighted computer programs installed on individuals' machines as part of the repair process. Section 121 allows non-profit groups to reproduce copyrighted books and magazines in a format that allows blind and disabled people to read or listen to them.

Finally, some personal uses that qualify for no express statutory exemption have been held to be privileged by courts. *Sony v. Universal Studios* classified home video-recording of broadcast television signals for time shifting purposes as fair use, and the manufacture and sale of devices to accomplish it as non-infringing.<sup>103</sup> *Recording Industry Association v. Diamond Multimedia* held that the consumer copying of digital music recordings to a portable MP3 player was non-infringing personal use,<sup>104</sup> and that the manufacture and sale of devices to facilitate it was not actionable.

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<sup>102</sup> Family Movie Act of 2005, Public L. No. 109-9, title II (2005), codified at 17 U.S.C. § 110(11).

<sup>103</sup> 464 U.S. 417 (1984).

<sup>104</sup> *RIAA v. Diamond Multimedia*, 180 F. 3d 1072, 1079 (1999). The court's basis for this conclusion is ambiguous. It isn't clear whether the court intended to hold that such copying came within the shelter of 17 USC § 1008 or was excused on some other ground, such as fair use. See *A&M v. Napster*, (9<sup>th</sup> Cir. 2001). In a recent Copyright Office filing, a coalition of copyright

Before moving into more controversial territory, let's pause for reflection. All of us make personal uses of copyrighted works that don't seem to fall within any of the exclusions I outlined above.<sup>105</sup> I back up my hard disk every week, even though I know that I am making archival copies of material that is not a computer program and therefore is not within the scope of the privilege in section 117. Indeed, chastened by the repeated meltdown of a shiny new iMac G5 two years ago, I back it up to three different locations. My son collects comic books and manga, and practices drawing manga characters that look as much as possible like the drawings he uses as models. My husband has purchased two computer programs that allow him to record, scan, manipulate, transpose, revise and generate sheet music or audio files for musical compositions. He uses them on songs from Broadway musicals to create versions easy for our son to sing. My sister's family has a Tivo. They like it so much that they bought one as a birthday present for our mother. My friend Ann cannot be discouraged from forwarding me email messages that she thinks I'll enjoy. My neighbor across the street has triplets to whom she frequently reads aloud. Because of her firm ideas about what's appropriate literature for her children, she commonly edits language, gender and important plot points as she reads, on the fly. My neighbors down the block are college students who party loudly on summer weekends, playing their CDs through powerful speakers; if they open their windows, their sound of music reaches the entire neighborhood.

The conventional analysis would tell us that when those uses involve a fixed reproduction, an adaptation, or a public distribution, performance or display, then they infringe copyright unless they are excused by the fair use privilege codified in section 107. My hard disk backups, my son's drawing, my mother's TiVo and and my friend's email messages all involve unauthorized fixed reproduction. My neighbor's reading aloud generates unauthorized adaptations. My husband's software permits him to do both. My neighbors down the block are engaged in unauthorized public performance. If the conventional analysis is right, then either our uses are fair under the multi-factor statutory test, or we are routinely breaking the law.

The tools we have developed to evaluate a claim of fair use, though, seem ill-fitted to assess the lawfulness of these or other common personal uses. The statute, as interpreted by the courts, would have us ask whether the purpose of use

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owners insisted that such copying was lawful only to the extent that copyright owners had implicitly authorized it. See U.S. Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control technologies, Docket Number RM 2005-11, [http://www.copyright.gov/1201/2006/reply/11metalitz\\_AAP.pdf](http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf) (filed Feb. 2, 2006), at 22-23 & n.46.

<sup>105</sup> See *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

is commercial or noncommercial, whether it is transformative or duplicative, whether the work we are using is primarily factual or occupies the core of protected copyrightable expression, whether we use a only a small part of the work or a large part, or even the entire thing, and whether our uses threaten to substitute for authorized, licensed uses in the marketplace.<sup>106</sup> Whether the use is commercial seems as if it might be important, as does whether it usurps the market for or competes with the copyright owner's exploitation. The other fair use factors, though, don't seem apposite.<sup>107</sup> Two of the weightiest considerations in a conventional fair use analysis are whether the use is transformative and how much of the work is being used. Neither seems to illuminate whether a given personal use should be lawful. Nor is the nature of the work being used likely to make a big difference. We care about the nature of a work when we are asking whether it makes sense to allow someone to make the work available to the public in either transformed or unchanged form. Where the use is personal, though, it's hard to see how the nature of the work would matter. If copyright law is designed to encourage the creation and dissemination of works of that nature, it should also welcome their consumption.

Thus, if we analyze my multiple backups of my hard disk, it's difficult to conclude that I am making a fair use unless we put a thumb on the scales. The purpose of the use is duplicative and archival, something that cut against a finding of fair use in *American Geophysical Union v. Texaco*.<sup>108</sup> Moreover, many of the files on my hard drive are files I use for projects, like my trademarks casebook,<sup>109</sup> that I pursue primarily for commercial gain. The nature of the works that I copy is mixed, but at least some of the works are of the sort that courts locate at the core of copyright protection. I have, for example, more than ten gigabytes of music on my hard drive. All of it got there legitimately in the first instance, but that doesn't give me the right to make three different copies of entire songs every week, nor to transmit one of those copies over the Internet to a remote location. Some of the files on my hard disk, such as early drafts of student papers and other people's scholarship, further, are unpublished works. Other files represent copies that infringe other people's copyrights. The amount of these works that I copy is entire works, and I copy them, in their entirety, many times. Finally, we come to the effect of my promiscuous copying on the copyright owner's potential market.

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<sup>106</sup> 17 U.S.C. § 107. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *American Geophysical Union v. Texaco*, 37 F.3d 881 (1994).

<sup>107</sup> Indeed, it's interesting that *Sony*, the sole Supreme Court case to try to assess personal use under the fair use rubric, was widely criticized for its analysis of the fair use factors, and particularly for giving only nominal consideration to factors other than whether the use was commercial and whether it was likely to harm the copyright owner's market. See, e.g., Lloyd Weinreb, *Fair's Fair*, 103 Harv. L. Rev. 1137, 1153; Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell. L. Rev. 857, 897-898 (1987); sources cited in Litman, *supra* note 19, at 350n.11.

<sup>108</sup> 60 F.3d 913 (2d Cir. 1995).

<sup>109</sup> Jane C. Ginsburg, Jessica Litman, and Mary L. Kevlin, *Trademarks and Unfair Competition: Cases and Materials* (3d ed. 2001 & 2006 Supp.).

There is currently no market for licensing backup copies. Copyright owners' release of copy-protected copies of their works that permit purchasers to make a small number of copies, however, suggest that such a market may be beginning to emerge. If I, and people like me, may make multiple archival copies without a license, then that nascent market could be damaged.<sup>110</sup>

Less fancifully, consider my sister's Tivo. Let's imagine that she sets it to copy every first-run episode of ABC's hit series, *Lost*, which airs in her community at a time when she is otherwise occupied. The purpose of her copying is duplicative rather than transformative. She's motivated solely by considerations of convenience. The nature of the work is highly creative, and subject to copyright's strongest protection. She's copying entire programs, and her copies allow her to avoid paying \$1.99 per episode for downloadable copies through the friendly neighborhood Apple iTunes online music store.<sup>111</sup> That last fact has been enough in some cases to persuade a court to characterize a use as commercial, since one is getting for free something one would otherwise have to pay for.<sup>112</sup>

My sister doesn't do a lot of business travel, but my mother does. Let's imagine that, next year, one of mom's tech-savvy children buys her a Slingbox<sup>113</sup> to hook up to that Tivo she got from my sister. A Slingbox is a small and clever electronic device that connects to the source of one's television signal and to one's home network. The Slingbox will then allow one to "place shift" one's television signal. That is, the Slingbox-equipped are able to watch whatever is currently playing on their home televisions on remote computers over the Internet. My mother isn't much for *Lost*, but she likes to watch games being played by her local Pittsburgh sports teams, and she likes to watch them live. She subscribes to whatever tier of cable service allows her to see all of the Pittsburgh sporting events. Last winter, she came to visit us in Michigan. As delightful as she found our company, she was upset to be missing a University of Pittsburgh basketball game that was going on at the time but not being broadcast nationally. If she had just stayed home, she could have watched the game. If she had had a Slingbox, though, she could have visited us and watched the game. Any of her children could buy one at the local Circuit City and hook it up for her, but would using it be legal? The Slingbox makes no copies, unless you count RAM copies,

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<sup>110</sup> Cf. *American Geophysical Union v. Texaco*, 37 F. 3d 881 (1994) (finding copying of scientific articles for researcher unfair in part because it might undermine nascent market for photocopy licenses).

<sup>111</sup> See Apple - iTunes - Videos at URL: <<http://www.apple.com/itunes/videos/>>.

<sup>112</sup> See, e.g., *A&M v. Napster*, 114 F. Supp. 2d 896 (C. D. Cal. 2000) ("Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use"), aff'd in part, rev'd in part, 239 F. 3d 1004 (9<sup>th</sup> Cir. 2001).

<sup>113</sup> See <http://www.slingmedia.com>.

but many courts do.<sup>114</sup> It also is transmitting a television signal over the Internet, in what may not be a private (and therefore exempt) performance. If we have to apply the fair use factors to allow her to view material she has subscribed to and paid for in my home rather than her own, her chances don't look too good. Mom's purpose is consumptive rather than transformative. The material she's copying and transmitting, at least in this instance, is a televised sporting event. While sportscasts don't reflect the sort of authorship that we think of as at the core of copyright, they are among the most valuable broadcasts that copyright protects. She's copying and transmitting entire programs, and her doing so undercuts the market for online and mobile phone products that the copyright owner targets to viewers like her.<sup>115</sup>

We could rerun the four-factor fair use analysis on all of the personal uses I described earlier. The conclusion that emerges from the analysis is that some personal uses are and should be legal, others aren't and shouldn't be, and the rest occupy a murky middle ground. The statutory fair use test, though, is remarkably unhelpful in identifying which uses are, or should be, legal.

The inaptness of the fair use factors shouldn't surprise us. They derive from an era when copyright covered only the rights to print, reprint, publish and vend, and most personal uses required no excuse to be lawful.<sup>116</sup> When seeking language in which to codify the fair use privilege, the drafters of the 1976 Copyright Act looked back to *Folsom v. Marsh*, an 1841 case involving an allegedly infringing biography of George Washington.<sup>117</sup> The application of the fair use privilege to personal use received almost no attention during the 25 year process that led to the enactment of the 1976 Act.<sup>118</sup> When the topic came up, witnesses invariably pointed out that reported fair use decisions involved public, commercial uses.<sup>119</sup> Although witnesses disagreed then, as they undoubtedly would now, as to whether the paucity of judicial decisions on the lawfulness of personal use derived from the legitimacy of the uses or the litigation costs that

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<sup>114</sup> See, e.g., *MAI v. Peake*, 991 F.2d 511 (9<sup>th</sup> Cir. 1993). For a discussion of why reproductions in RAM should not be deemed "copies" under the copyright statute, see Pamela Samuelson, *The Copyright Grab*, *Wired*, Jan. 1996, at 134; Joseph Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 *Wm & Mary L. Rev.* 1245, 1255-78 (2001).

<sup>115</sup> See <http://msn.foxsports.com> (visited Aug. 25, 2006).

<sup>116</sup> See R. Anthony Reese, *The Story of Folsom v Marsh: Distinguishing Between Infringing and Legitimate Uses*, in JANE C. GINSBURG & ROCHELLE COOPER DREYFUSS, *INTELLECTUAL PROPERTY LAW STORIES* 253, 286-88 (forthcoming 2005); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 *B.U. L. Rev.* 975, 997-98 (2002).

<sup>117</sup> *Folsom v. Marsh*, 9 Fed Cas. 342 (CCD Ma 1841).

<sup>118</sup> See Litman, *supra* note 19, at \_\_\_\_.

<sup>119</sup> See Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 *Cornell. L. Rev.* 857, 883-88, 897-898 (1987).

might make suits against individuals unappetizing,<sup>120</sup> it seems clear that fair use cases, then as now, have overwhelmingly concerned uses that were public, commercial, or both. For that reason, the fair use factors are designed to address whether and when it is appropriate to make a public and often commercial use without permission. They were not devised to evaluate the legitimacy of personal uses.

Fair use is a poor tool for assessing the lawfulness of particular personal uses for another reason: it is not realistically available to the people who most need to use it. Fair use in its current form is notoriously fact-specific, requiring a hideously expensive trial on the merits to determine.<sup>121</sup> If a person seeking to determine whether a given personal use is lawful needs to go to court, each time, to find out, then the tool is of almost no practical assistance.

To recap, there is a zone of personal use that is uncontroversially non-infringing. That zone includes personal uses that are outside the scope of copyright law, uses that come within express statutory exemptions and privileges, and uses that have been found non-infringing by courts. The zone also includes a bunch of other uses. Conventional analysis dictates that those other uses are either infringing or fair use under section 107. If personal uses like the ones I've listed can be described as "infringing," though, they are infringing only in the most nominal sense. If some copyright owner sued me, my family, my friend or my neighbor over those uses, the copyright owner would lose. Copyright lawyers may disagree about on what theory the copyright owner should lose, but not about the ultimate result.<sup>122</sup> If that means that all of the personal uses must be fair use, though, then that is possible only by construing fair use to cover any use that is nominally but not enforceably infringing, regardless of its purpose, the work's nature, the amount taken and the effect on the market. The minute we insist on applying fair use responsibly, the situation becomes even more unstable. My neighbor's censored read-alouds are perhaps transformative; my hard disk backups are, on the other hand, profoundly duplicative.

If fair use analysis doesn't resolve the lawfulness of personal use, then the conventional story is misleading, at best. It is also, potentially, a dangerous story, because it invites us to conclude that lawful personal uses that don't fit the fair use rubric may be legal, but they shouldn't be. Rather, we can see them as unprincipled exceptions that should not be allowed to spread. We are in danger of obliterating lawful personal use because we've been pretending that it isn't there.

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<sup>120</sup> See 1965 House Hearings before Subcomm # 3 at 1498-99 (Statement of Ralph H Dwan, on behalf of 3M); *id.* at 1514-16 (Statement of Lyle Lodwick, Williams & Wilkins).

<sup>121</sup> See Mark Lemley, *Dealing with Overlapping Copyrights in the Internet*, 22 *Dayton L. Rev.* (1997); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 *Dayton L. Rev.* 587, 611-13 (1997)

<sup>122</sup> *Cf. Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

## VI. A geography of personal use

....I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.

--*Jack Valenti, 1982*<sup>123</sup>

The fair use factors seem like a clumsy and unhelpful test for ascertaining whether a particular personal use is lawful. If personal use has value in the copyright system because it facilitates reading, listening, viewing and playing, moreover, evaluating personal uses under the fair use test is likely to cause us to miss important distinctions between personal uses we should encourage and personal uses that we should be eager to prohibit. It also makes it easy to mistake the degree to which current law permits or prohibits specific activity. Mapping out the contours of lawful personal use is, thus, useful for two reasons. First, we will be better able to assess whether the encroachment on personal use is a good thing or a bad one if we have a more accurate picture of what is legal and illegal today. Second, any normative proposals on how we ought to treat personal use will be more effective if they start with a more truthful picture of current law.

If the analysis derived from section 107 is not helpful in assessing the lawfulness of particular personal uses, can we derive a better test? Our starting point should be the recognition that copyright law is intended to encourage reading as well as writing. We can appropriate some useful insights from older cases that sought to parse the statute to advance both. Those courts focused on whether the allegedly infringing uses were more akin to exploiting the copyrighted works or enjoying them. In making this determination, some courts sought to evaluate the impact of the accused activity on individuals' opportunities to read, listen and view as well as on authors and publishers' incentives to write, compose, publish and perform. I suggest that when we look at the lawfulness of personal uses, we need to situate particular personal uses on the continuum between exploitation and enjoyment. As part of that inquiry, we should evaluate both their potential to undermine core copyright incentives and their potential to enhance essential copyright liberties of reading, viewing, listening and their kin.

### A. The continuum between exploitation and enjoyment

Once upon a time, disseminating works of authorship entailed significant capital investment, and discerning the difference between publishers and readers,

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<sup>123</sup> *Home Recording of Copyrighted Works Works: Hearings on H.R. 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 before The Subcomm. on Courts, Civil Liberties, and The Administration Of Justice of the House Comm. on the Judiciary, 97<sup>th</sup> Cong. (1982) (testimony of Jack Valenti, MPAA)*

record labels and listeners was difficult only at the margins, where intermediaries sought to facilitate the reading or listening experience without a license.<sup>124</sup> The rapid growth of networked digital technology, though, has put cheap mass dissemination within the reach of individuals.<sup>125</sup> At the same time, consumers have access to software tools that permit them to alter and combine copies of copyrighted works in ways that until recently were reserved to commercial businesses.<sup>126</sup> Individuals' new abilities to engage in acts once the exclusive province of publishers, record labels, film studios, and television broadcasters have blurred the line between conventional exploitation of works of authorship and digitally enhanced enjoyment.

If we are grounding the analysis of lawfulness in part on the extent to which a personal use is best understood as reading, listening, and their cousins, then we need to reflect on what sorts of reading, listening, looking at, using, running, playing and building copyright seeks to encourage. How broadly does copyright need its liberties to be drawn? We want people to be able to interact with texts as well as absorb them. Clapping hands, humming along, or playing a song on the piano all, technically, create unlicensed derivative works, as do reading aloud, playacting, and imagining a story's ending differently. They are nonetheless lawful by long tradition; they're precisely the sorts of interaction with copyrighted works that promote the Progress of Science. Nor does it make any copyright sense to limit readers, listeners and lookers to the reading and listening behaviors that were customary in 1790. Just as technology spurs evolution in the creation and marketing of works of authorship, it causes parallel evolution in the modes of interaction with those works. We don't want to limit copyright owners to the traditional marketing outlets of bookstore and sheet music sales. Similarly, it makes no sense to limit readers, listeners, and players to pianos or analog cassette tapes.

If the distinction between reading, listening and viewing on one hand and publishing, distributing and broadcasting on the other is more of a continuum, can we even draw a useful distinction between enjoyment and exploitation? There will be difficult cases at the margin, but most personal uses, which I defined earlier as uses made by individuals for themselves, their families, or their close friends, will fall on the enjoyment side of the line. That, without more, does not mean that we should presume them to be lawful. It does, however, suggest that we deem them unlawful only at some cost to the fabric and purposes of copyright law. We should think carefully about whether the impact of such uses on core copyright owner incentives is sufficiently substantial to be worth chipping away at important copyright liberties.

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<sup>124</sup> See Sony; Teleprompter;

<sup>125</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); Litman, *supra* note 39.

<sup>126</sup> See Rebecca Tushnet, *Payment in Credit*, Symposium: Cultural Environmentalism @ 10, \_\_ L. & Contemp. Probs. \_\_ (forthcoming 2006).

## **B. The impact of the use on copyright incentives and liberties**

In order to evaluate whether particular personal uses should, as a normative matter, be lawful, it is useful to look at the likely effects of the use on copyright incentives, and the degree the use is likely to enhance what I have called historic copyright liberties. Some personal uses will significantly undermine copyright incentives without enhancing reading, viewing or listening. Those uses, it seems to me, are uses we should feel comfortable in deeming infringing. Some uses will pose little threat to copyright incentives while greatly enhancing copyright liberties, and those uses should almost always be deemed legal, whether they line up with conventional fair use analysis or not. Personal uses that neither contribute to the exercise of copyright liberties nor undermine core copyright incentives are more problematic to classify, but little turns on whether we get the answer wrong. Uses that both enhance reading, listening, using, running and playing, and also threaten to significantly undermine copyright incentives are, and should be, the most difficult uses to resolve, and may require sensitive and careful balancing. In works and markets for which copyright owner incentives are abundant, the core purposes of copyright should counsel permitting uses that advance copyright liberties.

The only doctrinal tool in copyright law for evaluating the plausible impact of a use on copyright incentives is the fair use test, which is problematic in this context for all of the reasons I discussed in the last section. Some of the questions the fair use test addresses are nonetheless useful questions to ask in connection with the lawfulness of personal uses.

Of the fair use factors, the one that seems most salient in evaluating personal uses is whether that use is commercial. There seems to be a strong social consensus in the United States that copyright owners should be able to control the commercial exploitation of their works.<sup>127</sup> The commercial nature of a use seems to capture something important about the public's impression of the nature of the copyright bargain. If a use is intended for commercial gain, it seems reasonable to share some portion of that gain with the copyright owner; moreover, if a use involves commercial exploitation of a work, it seems more likely to collide with the copyright owner's exploitation. Thus, a commercial use is more likely than a non-commercial one to interfere with the incentives promised by the copyright act. Recent analyses of the commercial nature of personal uses, however, have seen unprincipled expansion of the meaning of the term.<sup>128</sup> In *A&M v. Napster*,

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<sup>127</sup> See OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 145-47, 163-65 (1989); The Policy Planning Group, Yankelovich, Skelly & White, Inc., *Public Perceptions of the "Intellectual Property Rights" Issue* (1985) (OTA Contractor Report).

<sup>128</sup> See Michael Meurer, Too Many Markets or Too Few? Copyright Policy Towards Shared Works, 77 S. Cal. L. Rev. 903, 952 (2004); John Tehranian, Et Tu Fair Use? The Triumph of

for example, the 9<sup>th</sup> Circuit held that people who used the Napster file sharing software made commercial use of copyrighted works because “repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.”<sup>129</sup> In *Arista Records v. MP3Board.com*, the court concluded that individuals who used an Internet search engine to find online sources for music files were making commercial use of the files they searched for because they “profit[ed] from the exploitation of the copyrighted work without paying the customary prices.”<sup>130</sup> If any use that allows a person to get for free something she would otherwise need to pay for is a commercial one, though, then most lawful unlicensed uses would be commercial. Defining commercial use so broadly makes it useless as a sorting tool. In order to help us distinguish permissible from impermissible uses, we need to define commercial use narrowly enough to capture direct financial gain and exclude more indirect benefit.

What seems to have distracted courts<sup>131</sup> in the online context into a violent expansion of the meaning of commercial is the perception that multiple, individual noncommercial online uses can combine to make something that seems commercial in scale and threatens to undermine copyright owners’ opportunities to exploit their works commercially. In the context of a fair use inquiry, though, that observation implicates the fourth fair use factor, which asks what effect the use might have on the effect on the market for the copyrighted work. Using it to transform noncommercial personal uses into commercial ones under the first fair use factor and then noting its effect on the market in considering the fourth factor is double-counting.

Whether a use might compete with uses licensed by the copyright owner, though, is a factor that has been important to a number of courts in evaluating the lawfulness of personal uses.<sup>132</sup> That’s appropriate: a use that competes with a copyright owner’s program of exploitation has the potential to undermine the copyright owners’ incentives significantly. At the same time, we don’t want to presume that every time a copyright owner devises a new license, that fact

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Natural Law Copyright, 38 U.C. Davis L. Rev. 465, 502-03 (2005).

<sup>129</sup> *A&M v. Napster*, 239 F. 3d 1004, 1015 (9<sup>th</sup> Cir. 2001). See also *A&M v. Napster*, 114 F. Supp. 2d 896 (C. D. Cal. 2000) (“Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use”), *aff’d in part, rev’d in part*, 239 F. 3d 1004 (9<sup>th</sup> Cir. 2001).

<sup>130</sup> *Arista Records v. MP3Board.com*, 2002 U.S. Dist. LEXIS 16165; Copy. L. Rep. (CCH) P28,483 (SDNY 2002) (quoting *Harper & Row v. Nation Enterprises*, 471 U.S. at 562).

<sup>131</sup> Arguably, Congress is guilty of something analogous in connection with criminal copyright infringement. See No Electronic Theft Act, Pub. L. No. 105-147 (1995), codified at 17 U.S.C. § 506 and 18 U.S.C. § 2319. See generally Geraldine Szott Moohr, *Defining Overcriminalization through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783 (2005).

<sup>132</sup> See, e.g., *Sony*, 464 U.S. at \_\_\_\_.

without more transforms historical lawful uses into unlawful ones. Apple's iTunes store's sale of downloadable *Desperate Housewives* episodes did not make the users of videocassette recorders into infringers, nor should it have. We need to give the analysis of competitive uses more serious attention than simply accepting assertions that any time a person gets for free something that she might otherwise buy, she has damaged the copyright owner's market by displacing a sale. As Glyn Lunney has pointed out, we've assumed the unlawfulness of much personal use without trial or rigorous analysis, because we've been too ready to equate free goods with displaced sales.<sup>133</sup>

Unless we assume that the optimum incentive for copyright owners is boundless, the fact that a use of a work could be monetized if making it without a license were made illegal shouldn't without more persuade us that we need to give the use into copyright owners' control. On the other hand, where a personal use competes with commercial uses at the heart of the copyright owner's exploitation of its works, the use's potential to undermine important copyright incentives should be a cause for concern.

The commercial and potentially competitive nature of specific personal uses seem relevant to an assessment of the use's likely effects on copyright incentives. Neither aspect, though, tells us much about the use's potential to enhance copyright liberties. In order to compare the use's impact on copyright, we need to look at other considerations.

Some of these considerations are intuitively as appealing as the commercial or competitive nature of the use. For example, one important question is whether the specific use is private. The statute expressly exempts private distributions, performances and displays, but not private copies or adaptations. The same considerations that have so far discouraged Congress from making private distributions, performances and displays actionable often accompany private copies and adaptations. So long as a person's use is private, its impact on the copyright owner's exploitation of her work is likely to be limited, while its contribution to the person's reading, listening or viewing may be significant.

In addition, permitting private uses advances important copyright and non-copyright interests. Julie Cohen has written several articles exploring the idea of "intellectual privacy."<sup>134</sup> Intellectual privacy advances liberty by giving us freedom to think without surveillance, and is a crucial aspect of any liberty worth

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<sup>133</sup> See Lunney, *supra* note 28, at \_\_\_. See also *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 936-39 (1994)(Jacobs, J, dissenting); Sam Hughes, *The Piracy Calculator*, at URL: <http://qntm.org/owe> ("What's your illegal hoard worth? What's the street value of all your pirated MP3s and movies? How much would the RI/MPAA demand - minimum - if they sued you? Find out.").

<sup>134</sup> See Julie E. Cohen, *DRM & Privacy*, ; Julie E. Cohen, Comment: Copyright's Public-Private Distinction, 55 *Case Western L. Rev.* 963 (2005); Cohen *supra* note 22.

having. The ability to read works without surveillance may, for some works and some readers, be key to being able to read them at all.<sup>135</sup>

Another consideration that is intuitively appealing is whether the use is incidental to some other use, and, if so, whether that primary use is permissible, either because it is exempt or because it is licensed. Incidental uses occupy the core of the sort of personal use that copyright law should encourage. If one purpose of copyright law is to encourage creation and dissemination of works of authorship, and another goal is to advance reading, listening, viewing and playing of those works, uses that facilitate authorized reading, listening and viewing have a very strong claim for copyright's solicitude. Because incidental uses are secondary to uses that are either excluded from the copyright owner's bundle of rights or already otherwise licensed, they pose little threat of undermining copyright incentives.

For much of copyright law's history, it was conventional to treat many incidental uses as impliedly licensed.<sup>136</sup> Music publishers first exploited their public performance right by licensing public performance with the sale of copies. The initial justification for what became the jukebox exemption was that the public performance of music on coin-operated devices was purely promotional, for the purpose of selling copies of sheet music.<sup>137</sup> Radio and later television broadcasters commonly made temporary copies of licensed material to facilitate broadcasts, on the assumption that such copies were within the scope of the license.<sup>138</sup>

In the digital realm, the results have been different. When MP3.com purchased and copied CDs to facilitate licensed streaming of the musical works recorded on them, it was held liable for willful infringement.<sup>139</sup> MP3.com argued that its purchase of a performing rights license carried with it an implied license to reproduce the works insofar as necessary to perform them. The court disagreed. MP3.com's licensors had no authority to grant an implied reproduction license, and therefore could not have done so:

Performance" and "reproduction" are clearly and unambiguously separate rights under the Copyright Act of 1976. Here, the performing rights licenses themselves,

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<sup>135</sup> [Make Jonathan Cohen's humming vs. downloading point here.]

<sup>136</sup> See David Nimmer, *Brains And Other Paraphernalia Of The Digital Age*, 10 Harv. J. Law & Tec 1 (1996).

<sup>137</sup> See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENTERTAINMENT L. J. 337 (2002).

<sup>138</sup> See Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the US Copyright Law: 1965 Revision Bill 44-47(1965). Congress later incorporated an express ephemeral recording privilege for licensed broadcasters in the 1976 Copyright Act. See 17 U.S.C. § 112.

<sup>139</sup> See *Country Road Music v. MP3.com*, 209 F. Supp. 2d 325 (SDNY 2003)

as their name implies, explicitly authorize public performance only, do not purport to grant a reproduction right in musical compositions, and, in at least one case, expressly disclaim such a grant. Moreover, the performing rights societies themselves do not, and do not purport to have, the authority to grant such a right.<sup>140</sup>

More generally, a person licensed to make a licensed use of a copyrighted work can no longer rely on that license to make other uses that are incidental to or necessary for the use covered by the license. Since copyrights are infinitely divisible, and rights are commonly divided and separately controlled, there's no reason to think that the licensor of the licensed right has the authority to license the incidental use, impliedly or otherwise.

The chaos wrought by divisible copyright is impeding licensing of online content even for businesses well-supplied with copyright lawyers.<sup>141</sup> While courts might once have inferred permission for activity incidental to a licensed use, they now face the obstacle that the owner of the licensed right may not own the right to authorize the incidental use. Exacerbating the problem is the copyright fashion to claim that any digital use of a work necessarily implicates multiple distinct copyright rights, each of which may be separately owned.<sup>142</sup> The need to secure several licenses for a single use of any given work has stymied efforts to launch licensed online businesses and driven unlicensed start-ups into bankruptcy. Negotiations to amend the copyright law to solve this set of problems, though, have stalled as competing copyright owners try to ensure they get the largest slices of pie.<sup>143</sup>

We can leave them to sort it out among themselves. For the purposes of personal use, we should avail ourselves of a simplifying solution. Since treating copyrights as if they were plots of real estate, subject to subdivision and separate exploitation, has caused the problem, we can look to basic property law for its way out of the problem. The property law solution to this sort of mess is the easement by implication. If Abel carves Blackacre up into teeny tiny plots so that

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<sup>140</sup> Id. at 327-28 (footnotes omitted). Similar considerations seemed to be at work in the *Fortnightly* and *Sony* decisions, discussed earlier. In both cases, the Court emphasized that defendant merely facilitated consumers' watching programming that they were entitled to view. *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 399-400 (1968); *Sony v. Universal Studios*, 464 U.S. 417 (1984). See also *Teleprompter v. CBS*, 415 U.S. 394 (1974).

<sup>141</sup> See generally Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case Western Reserve L. Rev. 673 (2003); Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. on the Judiciary, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 12, 2005) (statement of MaryBeth Peters, Register of Copyrights).

<sup>142</sup> See Jessica Litman, *Sharing and Stealing*, 37 Hastings Comm/Ent 1 (2004); Loren, *supra* note 141.

<sup>143</sup> Podcast of FMC panel with Mary Beth Peters, Sept. 12, 2005.

Baker can build a mess of ticky tacky houses, but draws the lines so that half the houses have no access to the road, the law implies an easement to enable the purchasers of the remote lots to reach the highway, because road access is a necessary incident to enjoyment of the land ownership. Without road access, how could purchasers move into their ticky tacky houses? Copyrights are unitary before they are divided. If the author or her assignee chooses to convey the reproduction, adaptation, public distribution, public performance and public display rights to separate entities, it makes sense to presume that she conveys with each distinct exclusive right the power to engage in uses incidental to that right, even if they implicate other exclusive rights.

In particular, we should deem non-infringing any personal uses that are merely incidental to the exercise of historic copyright liberties to read, listen, or look at. Thus, even if one concurs with the line of cases that holds that any appearance of a work in a computer's random access memory is a fixed and therefore infringing reproduction,<sup>144</sup> RAM copies made in the course of reading an ebook, watching a DVD, or listening to a CD should not infringe, whether or not the copies come within an express exemption in sections 107, 117 or 1008.

### **The lawfulness of personal uses**

When we analyze the lawfulness of personal uses, we should pay attention to the extent to which they advance essential copyright liberties of reading listening, and viewing, as well as the extent to which they undermine copyright incentives. The degree to which personal uses are commercial, competitive, private, or incidental to other lawful uses reveals their tendency to do both of these things.

That is not to say, however, that we should revise the fair use test to incorporate these considerations as supplementary factors. Several legal scholars have proposed expanding or rethinking fair use in ways that might accommodate an enhanced personal use exemption.<sup>145</sup> Their analyses would stretch or reformulate fair use to clarify its application to customary personal uses. I suggest that we need to take a different approach. In my view, the problem is not that fair use has grown too narrow, but that our conception of the exclusive rights granted in section 106 has grown too broad.

A healthy copyright system requires an equilibrium between copyright owners' rights to exploit works and individuals' liberties to enjoy them. The realm of personal use is where the need for balance between those interests is most acute. Personal uses that are public, that are commercial, or that compete

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<sup>144</sup> See *MAI Systems v. Peak Computer*, 991 F.2d 511 (9th Cir. 1993); *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting*, 421 F.3d 1307 (fed Cir 2005); *Triad Systems v. Southeastern Express*, 64 F.3d 1330 (9th Cir. 1995); *Intellectual Reserve v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290 (D. Utah 1999); sources cited supra note 114.

<sup>145</sup> See, e.g., Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 *Cardozo Arts & Entertainment L.J.* 391 (2005).

with copyright owner exploitation seem like attractive candidates to bring within the realm of copyright owner control, while personal uses that are private, noncommercial, or incidental to uses that are either licensed or require no license seem like uses that should be treated as beyond the scope of copyright owner control. If we construe the language of section 106 to reflect the distinction between copyright owner exploitation and reader, listener, and viewer liberties, then it becomes clear that many personal uses should not be deemed reproductions, adaptations, or public distributions, performances or displays within the meaning of the statute. Because Congress and copyright lobbyists alike assumed that copyright law reflected that distinction, nobody thought it necessary to enact express privileges for personal use of the sort included in the laws of other jurisdictions. Indeed, when pressed, more recently, to consider explicit exemptions for personal use, members of Congress expressed incredulity that copyright law would be interpreted to constrain reading, listening, or other personal uses. Technological progress has made the difference between exploitation and enjoyment more difficult to draw. That difficulty is threatening for copyright owners, since they see technology's potential to undermine their opportunities to exploit the works they create. Copyright owners' loud voices on this subject have allowed many of us to overlook the same difficulty's potential to undermine copyright liberties to read, listen, view and play. If reading is as central to copyright as writing, though, narrowing copyright liberties will be as destructive to the overall fabric of copyright law as undermining copyright incentives.

## VII. "All rights reserved"

The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.

-- *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908)

In *Sony v. Universal Studios*, Justice Blackmun argued in his memoranda to the other Justices that the 1976 Copyright Act gave copyright owners the exclusive right to reproduce their works and that any reproduction not otherwise permitted by an explicit statutory exemption was therefore infringing. Justice Blackmun looked at the history of Supreme Court cases interpreting the scope of copyright narrowly, and argued that Congress had intended, in enacting the 1976 Act, to dissuade courts from constrained readings of copyright rights. There were no implicit copyright privileges or exemptions, Justice Blackmun argued, which meant that unauthorized uses that did not fall within an express statutory

provision were unlawful unless they were fair use. Fair use, further, was a narrow privilege limited to productive uses; as a general matter, copyright owners should not be forced to subsidize ordinary uses.<sup>146</sup> Justice Blackmun lost that argument and went on to write the dissent in *Sony*. Copyright scholars, however, have by and large adopted Justice Blackmun's analysis of the meaning and structure of the 1976 Act. The statute is so long and so detailed that we deny the existence of implied privileges or exemptions.<sup>147</sup> Any reproduction or adaptation, any public distribution, performance or display is a *prima facie* infringement unless it is covered by a specific exemption or limitation or privileged by fair use.<sup>148</sup>

That's not true, of course, unless one believes in a generous and expansive version of fair use that it would be hard to find in any recent judicial opinions. We all routinely engage in activity that would be unlawful under such an understanding. We back up our hard disks; we forward emails to friends. We read aloud to our children using funny voices for different characters; we play CDs on our car stereos with our windows open.

What does that matter, given that nobody is likely to file suit over personal uses? The recent lawsuits against thousands of individuals caught using peer-to-peer file trading software might warn against relying too much on the seeming unthinkability of individual lawsuits over personal use. Assuming, however, that personal use lawsuits are hugely unlikely, what harm does it do to frame the statutory interpretation question that way?<sup>149</sup>

One significant harm that flows from conceptualizing the statute in that way is that, if it's inaccurate, it warps our thinking. It encourages copyright owners to expect too much, and copyright scholars to demand too little. It snookers judges into reinterpreting the language of the statute to give effect to the perceived intent of Congress, expanding copies to include RAM copies,<sup>150</sup> and commercial uses to include any use a copyright owner might otherwise charge for.<sup>151</sup> It shortchanges the readers, listeners, viewers, watchers, players and builders at the heart of the copyright system.

Nothing in the legislative history of the 1976 Act suggests that members of Congress intended to transform copyright from a grant of limited exclusive rights into an expansive monopoly over all uses of copyrighted works. As

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<sup>146</sup> See Jessica Litman, *The Sony Paradox*, 55 Case Western L. Rev. 917 (2005).

<sup>147</sup> See Jessica Litman, *Copyright Legislation and Technological Change*, 68 Oregon L. Rev. 275 (1989).

<sup>148</sup> See, e.g., SHELDON HALPERN, DAVID E. SHIPLEY, & HOWARD B. ABRAMS, COPYRIGHT: CASES AND MATERIALS 201 (1992)

<sup>149</sup> See *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

<sup>150</sup> See *MAI Systems v. Peake Computer*, 991 F.2d 511 (9th Cir. 1993).

<sup>151</sup> See *A&M v. Napster*.

recently as ten years ago, a suggestion that a literal reading of the statute in light of recent cases might give copyright owners control over reading, listening and other personal uses seemed outlandish. Today, it increasingly seems to be inevitable, even though the underlying statutory language hasn't changed. Part of the blame belongs at our own doors. When scholars insisted that uses are unlawful unless expressly exempted, lawyers and courts may have believed us; we may have believed ourselves.