REFORMING THE REPRODUCTION RIGHT: THE CASE FOR PERSONAL USE COPIES

Ashley M. Pavel[†]

ABSTRACT

The new realities of the digital age have rendered the 1976 Copyright Act inadequate for protecting reasonable personal copying and have created incentives for copyright holders to implement objectionable strategies to protect their rights.

The Note explains that the only current shield to litigation for consumers is the fair use defense, which is inadequate due to the difficulty in proving that a personal copy is transformative. High costs of litigating, coupled with potentially ruinous penalties for losing, leaves little incentive for consumers not to settle even when the personal copy is clearly a fair use.

The Note then explains that the Copyright Act also fails to protect copyright holders due to its focus on "copying" as the proxy for infringement. This is ineffective to prevent filesharing as it is hard to prove that "copying" has occurred, and it forces the holder to invade consumers' privacy by using programs that track their activities. This also incentivizes holders to litigate out of existence developing technologies that aid consumers in making personal copies in direct contravention of the constitutional purpose of copyright.

The Note concludes that to better protect the rights of copyright holders in the digital age, legislation should be enacted that changes the proxy for infringement from "copying," to communicating works to the public, and that grants the copyright holder the exclusive right to authorize such communication. Furthermore, legislation that demarcates private use as non-

† Associate, O'Melveny & Myers LLP. I would like to thank Pamela Samuelson and the participants of the 2008 copyright reform seminar at the University of California, Berkeley, School of Law (Boalt Hall) for their comments on an earlier draft of this note. The views expressed in this note are those of the author, and do not reflect those of O'Melveny & Myers LLP.

infringement will ensure that private use copies for productive use and sharing between friends and family is protected.

TABLE OF CONTENTS

I. INTRODUCTION

Many of the greatest innovations in consumer electronics, from the personal computer to TiVo to the iPod, derive much of their marketability from the presumption that personal use copies do not violate the Copyright Act of 1976. These technologies implicate varying levels of intent to copy

without permission from the copyright owner. At one extreme is the user whose enjoyment of a piece of copyrighted software necessitates the creation of an iterative copy in the computer's Random Access Memory (RAM)—a process of which many computer users are completely unaware. At the other end is the so-called "pirate" who consciously stocks his iPod with hundreds of copyrighted songs he illegally downloaded. Common sense holds that the illegal download is copyright infringement but the RAM copy is not.

Few today would argue with this proposition, although it is far from clear where this consensus finds support in the 1976 Act. This shortcoming is particularly evident when a technology is new, such as when a federal court found RAM copies to be copyright infringement in 1993,[1] or when content industries are threatened by a technological advancement that facilitates or improves personal use copying, such as the Videocassette Recorder (VCR) or Digital Audio Tape.[2]

Most of this difficulty arises because the fair use doctrine[3] is ill-suited to evaluate non-transformative personal use copies. Consequently, judicial application of the fair use factors to personal use technologies is difficult for innovators and users to predict ex ante. An Office of Technology Assessment study found that one's perceived familiarity with copyright law did not correlate with copying habits.[4] This result is unsurprising given the unpredictability of a judicial fair use determination and the Byzantine array of statutory sui generis regulations for specific technologies and uses within the Copyright Act.

Despite this legal uncertainty, public opinion is clear. The same Office of Technology Assessment survey found that most members of the public, whether they engage in the practice or not, believe that personal use copying is acceptable as long as the copies are not sold.[5] With the proliferation of peer-to-peer (P2P) file sharing and illegal BitTorrent downloading sites such as the Pirate Bay, the public may now consider both sale and widespread unauthorized distribution to be unacceptable. The core belief, however, that

1. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

2. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–1010 (2006)).

3. *See* 17 U.S.C. § 107 (2006).

4. OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 163 (1989).

5. *Id.* at 3.

strictly private personal uses of a purchased copy are "none of the copyright owner's business" still exists.[6]

To remedy the 1976 Act's uncertainty and disconnect from popular norms, this Note proposes that Congress adopt a general personal use exemption to infringement liability for the courts to interpret through the standard common law process. This Note further proposes that, because the copy itself is not the locus of injury in the digital era, Congress should offer the copyright industry a distribution right more suited to digital technology in exchange for its acceptance of the user's right to make personal copies.

Part II presents an overview and critique of the current state of the reproduction right. Part III argues that the 1976 Act regime does not adequately accommodate personal use copies. Finally, Part IV proposes a reform to the Copyright Act that would clearly allow personal use copies and include a more effective distribution right.

II. CURRENT STATE OF THE REPRODUCTION RIGHT

The 1976 Act was enacted pursuant to Article I, Section 8, Clause 8 of the U.S. Constitution, which delegates to Congress the power to grant authors the exclusive right to their "Writings" for "limited times" in order "to promote the Progress of Science and useful Arts."[7] Copyright fulfills this constitutional purpose by motivating authors' creative efforts and ultimately enhancing public access to creative works. This congressionally-granted monopoly is not exclusively or even primarily intended to foster a private commercial benefit to individual authors or copyright industries.[8] Rather, copyright is an incentive given to authors as a means of enhancing public access to creative works and promoting progress in the arts and sciences.[9] The Supreme Court summarized copyright's purpose:

> The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of the authors. It is said that

6. COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS IN THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL: THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 129, 134 (2000) [hereinafter THE DIGITAL DILEMMA] ("Many members of the general public appear to believe that all or virtually all private, noncommercial copying of copyrighted works is lawful.").

7. U.S. CONST. art. I, § 8, cl. 8. Note, what constitutes "limited" is left to Congress to decide. Eldred v. Ashcroft, 537 U.S. 186, 187 (2002).

8. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

9. *Id.*

> reward to the author or artist serves to induce release to the public of the products of his creative genius.[10]

Thus, when examining the aggressive enforcement practices of the content industries, it is important to remember that the goal of a copyright regime is to facilitate a rich and expansive creative commons, not to protect or benefit any particular commercial interest.[11]

This Section presents an overview of the current status of the reproduction right. Section II.A presents a basic explanation of the reproduction right granted by the 1976 Act. Section II.B explains the fair use exemption.

A. REPRODUCTION RIGHT UNDER THE 1976 COPYRIGHT ACT

Under the 1976 Act, the copyright holder has the exclusive right "to reproduce the copyrighted work in copies or phonorecords."[12] The 1976 Act defines "copies" as

> material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.[13]

A work is "fixed" when "its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[14]

Within this statutory framework, the act of copying is "essential to, and constitutes the very essence of all copyright infringement."[15] For a copy to be infringing, it must be (1) embodied in a material object, or "tangible"; (2) "fixed" such that it may be perceived for more than a "transitory duration"; and (3) "intelligible"—meaning that it must be perceivable directly or with the aid of a machine.[16] Notably, in this system, where reproduction is

---

10. *Id.* at 429 (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)) (internal quotation marks omitted).

11. *See id.* at 427.

12. 17 U.S.C. § 106(1) (2006).

13. 17 U.S.C. § 101 (2006).

14. *Id.*

15. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02[A] (2009).

16. 17 U.S.C. §§ 101, 106(1) (2006); 2 NIMMER & NIMMER, *supra* note 15 § 8.02[B][1]-[B][3] (2009) (categorizing and articulating the three requirements for violation of the reproduction right embodied in Title 17).

the crux of infringement, distribution need not take place to give rise to a suit for infringement.[17]

Consequently, personal use copies, even if never shared or even consciously made, technically constitute copyright infringement.[18] These uses, regardless of the normative consensus as to their legitimacy, or the social utility they generate, are only excused if they can pass a fairly strict fair use test.[19]

B. THE FAIR USE EXCEPTION

Notwithstanding the expansive rights enumerated in the Copyright Act, § 107 exempts from infringement liability certain uses that Congress has deemed socially valuable.[20] The fair use doctrine is a safety valve that allows courts to avoid rigid application of the 1976 Act when doing so would "stifle the very creativity which that law is designed to foster."[21]

Section 107 states that copies made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" are fair uses.[22] This list serves as a non-exhaustive guideline.[23] The factors courts consider to determine whether a particular case is a fair use are:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) the nature of the copyrighted work;

---

17. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv., Co., 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

18. *See* John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–48 (2007) (analyzing the breadth of commonplace actions that infringe copyright).

19. 17 U.S.C. § 106(1) (2006) (providing an exclusive right of reproduction); 17 U.S.C. § 107 (2006) (stating the fair use test); *see also* Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 830 (2008). *But see* 17 U.S.C. § 108 (2006) (exempting libraries); 17 U.S.C. § 110 (2006) (exempting certain performances); 17 U.S.C. § 111 (2006) (exempting secondary transmissions).

20. 17 U.S.C. § 107 (2006).

21. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); *see also* Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977) ("The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information . . . .").

22. 17 U.S.C. § 107.

23. *See id.* ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* . . . .") (emphasis added).

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work.[24]

Courts do not consider these factors in isolation, but weigh all of the factors together to determine, on balance, if a particular act constitutes fair use.[25] Furthermore, the four factors allow courts to conduct flexible case-by-case analysis, rather than adhere to a bright line rule.[26]

The fair use analysis is reasonably well adapted to handle "transformative" uses such as parody, even where a copyrighted work is appropriated for profit.[27] The fair use doctrine, however, is less suited to non-transformative uses with little to no commercial impact.[28]

Although noncommercial uses are presumptively fair,[29] it is far from certain that "consumptive" private use copying can survive the four-factor fair use analysis.[30] The ongoing debate as to whether fair use is a defense to copyright infringement or an affirmative user's right[31] is indicative of this problem.

III. THE PROBLEM WITH THE 1976 ACT

As it stands today, the reproduction right under the 1976 Act also fails both copyright consumers and copyright producers. Personal use copies fall through the cracks of the 1976 Act regime in three principal ways. The 1976 Act fails consumers because a fair use defense is an almost pathetic shield against even unjustified copyright infringement claims. The 1976 Act fails copyright producers because, where personal use copies are involved, the

---

24. *Id.*

25. *Campbell*, 510 U.S. at 578.

26. *Id.* at 577.

27. *See, e.g., id.* at 594 (finding rap group's parody to be fair use despite its commercial nature and substantial appropriation of copyright holder's song). *But see* Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997) (finding that, unlike parody, satire has a "diminished" claim to fairness in borrowing from a copyrighted work).

28. *See* 17 U.S.C. § 107 (2006).

29. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (finding that recording copyrighted video content for "time shifting" purposes was noncommercial and presumptively fair).

30. THE DIGITAL DILEMMA, *supra* note 6, at 134.

31. *See* THE DIGITAL DILEMMA, *supra* note 6, at 134 (discussing the debate). *Compare Campbell*, 510 U.S. at 590 ("[F]air use is an affirmative defense . . . .") *with* Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) ("Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976.").

Act's focus on copying as the proxy for injury leads to ineffective and expensive litigation strategies. Finally, the current regime stifles innovation because it allows and encourages content owners to sue out of existence small ventures that are developing new technologies. This, in turn, harms consumers because it limits competition in new consumption technologies to the few large technology companies who have leverage with the content industries and who can afford to litigate expensive fair use claims. The following Sections address these problems by examining the evolution of the courts' treatment of personal use copies under the fair use doctrine and by arguing that fair use is not an adequate framework to evaluate consumptive copying for private use.

A. FAIR USE: THE NOT-SO-SAFE HARBOR

Mounting a fair use defense is always a risky bet for a copyright defendant. A fair use defense is expensive,[32] unpredictable,[33] and subject to the economic savvy of the implicated content industries.[34] All of these problems are compounded where personal use copies are involved because defendants are typically individuals with modest means and their copying is not transformative. Moreover, with the advent of new technologies, commoditization of personal use copies may now be possible, tipping the fourth fair use factor, market harm, away from the private use defendant for the first time.

1. The Procedural Mechanics of Fair Use Encourage Meritless Litigation

The fact-specific nature of the fair use inquiry coupled with the uncertainty of its outcome makes fair use an arduous and cost-intensive defense.[35] Adding to the cost is the fact that the defendant bears the burden of proving that a fair use "limitation" on the exclusive rights of the copyright owner applies to the particular circumstances.[36]

The unpredictability of a judicial fair use determination[37] is aptly illustrated by the fact that every fair use case to reach the Supreme Court was

---

32. *See infra* Section III.A.1.

33. *See infra* Section III.A.2 (examining this unpredictability through the narrow lens of the transformative test).

34. *See infra* Section III.A.3.

35. *See, e.g.*, David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 16 (2006) ("[N]obody can know what fair use is until the full process of litigation has run its course.").

36. *See Campbell*, 510 U.S. at 590 ("fair use is an affirmative defense"); 17 U.S.C. § 107 (2006).

37. For a more detailed examination of the unpredictability of the fair use doctrine, *see* Section III.A.2.

overturned at each level of review.[38] Section 107's failure to produce clear and consistent results has led to outright contempt from preeminent copyright scholars. For example, David Nimmer wrote that "[b]asically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same."[39]

Furthermore, the disproportionate statutory damage awards authorized by the Copyright Act make the costs of a fair use loss enormous, particularly for an individual defendant. A copyright holder can forego proving actual damages and elect to collect statutory damages.[40] The damages range from $750 to $30,000 per work infringed, "as the court considers just."[41] Furthermore, if a court finds willful infringement, it can increase damages up to $150,000 per work.[42] If a court finds that a defendant was unaware that his acts were infringing, the court may only reduce statutory damages to $200 per work.[43] These statutory damages awards are particularly egregious in light of recent file sharing litigation. Under this framework, a file sharing defendant would have to pay, at minimum, $200 per song or TV show obtained from a P2P server, whereas the content industry's actual damage is limited to their share of the profits of the approximately $0.69 to $1.29 the defendant would have paid for a digital copy from a vendor like iTunes.[44]

When facing an uncertain defense strategy and a financially ruinous penalty for losing, most copyright defendants have little incentive to invoke the fair use doctrine, even if, in the abstract, it seems as if the defendant's conduct was clearly fair use.[45] Overly-aggressive copyright litigation has run rampant because individuals frequently lack the incentive or the means to

38. *See* Nimmer, *supra* note 35, at 16; *Campbell*, 510 U.S. 569 (unanimous finding of fair use); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (split opinion); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (split opinion).

39. David Nimmer, *"Fairest of them All" and other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003).

40. 17 U.S.C. § 504(c)(1) (2006).

41. *Id.*

42. 17 U.S.C. § 504(c)(2) (2006).

43. *Id.*

44. *See* 17 U.S.C. § 504(c)(2) (2006) ("the court in its discretion may reduce the award of statutory damages to a sum of not less than $200"); Greg Sandoval, *Will Consumers Determine iTunes Prices?*, CNET NEWS.COM, Apr. 7, 2009, http://news.cnet.com/will-consumers-determine-itunes-prices/.

45. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) ("[M]ost defendants lack incentives to defend novel fair use interpretations.").

defend themselves rather than settle.[46] One particularly salient example is a recording industry representative's suggestion that students drop out of college to pay their copyright infringement settlements.[47]

Although P2P file sharers are not the most sympathetic defendants, this skewed incentive structure also emboldens the copyright holders to use copyright as a sword to attempt to sue scathing critics into silence[48] and what they perceive to be threatening technological innovation[49] out of existence.[50] Content industries have used the courts to try to eradicate such technologies as the DVR,[51] digital music players,[52] and P2P software.[53] Although content industries are threatened by these technologies, they promote progress in the arts and sciences by making copyrighted content more accessible and useful to the consumer and thus growing demand for the works.[54] Far from being a safety valve for the freedom of expression, the sheer magnitude of the fair use doctrine's flaws allows content producers to use their copyrights to deliberately circumvent copyright's constitutional purpose. Unfortunately, it appears that "fair use in America simply means the right to hire a lawyer."[55]

2. *The Fair Use Focus on Transformativeness Unreasonably Disfavors Personal Use Copying*

In addition to its unpredictability, the fair use analysis's increasing focus on whether a particular work is "transformative" disadvantages personal use

---

46. *See, e.g.*, ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FOUR YEARS LATER (2007), http://w2.eff.org/IP/P2P/riaa_at_four.pdf [hereinafter FOUR YEARS LATER].

47. Cassi Hunt, *Run Over by the RIAA: Don't Tap the Glass*, THE TECH, Apr. 4, 2006, at 9, *available at* http://tech.mit.edu/V126/N15/RIAA1506.html ("[An RIAA representative] even had the audacity to say, 'In fact, the RIAA has been known to suggest that students drop out of college or go to community college in order to be able to afford settlements.' ").

48. *See, e.g.*, Doe v. Gellar, 533 F. Supp. 2d 996 (N.D. Cal. 2008) (using a DMCA claim to try to remove a YouTube video debunking Uri Geller's "psychic" abilities); Savage v. Council on American-Islamic Relations, 2008 U.S. Dist. LEXIS 60545 (N.D. Cal. 2008) (using a copyright infringement claim to attempt to stop the defendant from reposting Savage's remarks concerning the defendant on its website along with its response).

49. *See, e.g.*, FOUR YEARS LATER, *supra* note 46.

50. *See, e.g., id.*; Benny Evangelista, *Reining in Tech; Learning from the Napster Case, the Entertainment Industry is Trying to Block New Technology Before it Takes Off*, S.F. CHRON., Aug. 30, 2004, at C1; see also infra Section III.A.2.b) (discussing how studios sued RePlayTV out of existence).

51. Paramount Pictures Corp. v. RePlayTV, 298 F. Supp. 2d 921 (C.D. Cal. 2004).

52. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999).

53. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

54. *See* U.S. CONST. art. I, § 8, cl. 8.

55. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004).

copying.[56] The effect of this is that personal use copies, which should usually be fair uses because of their similarity to the exceptions granted to other instances of iterative copying that also have a negligible market impact,[57] are often held to be acts of copyright infringement.[58] This Section documents courts' focus on "transformativeness" as nearly determinative of the fair use question, and then demonstrates how this approach causes difficulty for consumptive personal uses.

a) The Fair Use Test's Focus on "Transformativeness"

A finding that a particular use of a copyrighted work is "transformative," although not absolutely necessary, substantially shifts the analysis in favor of a finding of fair use.[59] For example, in *Campbell v. Acuff-Rose Music*, the Court found that 2 Live Crew's parody rap song of Roy Orbison's "Oh, Pretty Woman" was "transformative" of the original and therefore a fair use, despite the parody's commerciality and potential harm to the market for Orbison's original work.[60] The Court emphasized that transformativeness is "at the heart" of the fair use analysis,[61] and that the permissibility of iterative copies for classroom use was a "statutory exemption" to this rule.[62]

The Court's heavy-handed emphasis on transformativeness as nearly determinative of the fair use question helps to explain some lower courts' almost nonsensical fair use determinations.[63] In what is perhaps the seminal example of how fair use can be a grossly inept safety valve for new technologies, the Ninth Circuit ruled that unauthorized RAM copies of a

---

56. *See, e.g.*, Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555–56 (2004).

57. *See, e.g.*, 17 U.S.C. § 107 (2006) (exempting copies made for teaching, scholarship, or research); 17 U.S.C. § 108 (2006) (exempting libraries).

58. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (finding that internal research copies of copyrighted journals were not fair use because whole articles were copied as part of a commercial enterprise).

59. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). The Court stated:

> Although . . . transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.

Id. (internal citations omitted).

60. *Id.* at 569.

61. *Id.* at 579.

62. *Id.* at 579 n.11.

63. *See* Tushnet, *supra* note 56, at 555.

software program constituted copyright infringement.[64] This decision has since been superseded by statute.[65] Nonetheless, video game giant Blizzard Entertainment prevailed in a copyright infringement suit against the makers of a "bot," an add-on program that allowed a user's computer to automatically progress through Blizzard's video game.[66] Because automating game-play violates Blizzard's End User License Agreement and Terms of Service, Blizzard argued that RAM copies made by users of the program were unauthorized and therefore copyright infringement.[67]

In this climate where powerful and litigious copyright interests aggressively pursue personal use copies, courts find it increasingly necessary to squeeze even ill-fitting consumptive uses into the "transformative" category in order to declare the use fair.[68] For example, in *Perfect 10, Inc. v. Amazon.com, Inc.* the Ninth Circuit held that thumbnail previews of the plaintiff's copyrighted photos were "transformative" just because the exact copies were smaller and of a lower resolution to support its fair use determination.[69] The court went on to state that "a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work."[70]

This "new use" conception is a stretch from the transformativeness standard that the Supreme Court set out in *Campbell*, when it held that transformative works do not "merely supersede the objects of the original," but instead "add[] something new, with a further purpose or different

64. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (finding that RAM copies, made by a third party while using a licensed, copyrighted software program, were outside the scope of the license, and therefore constituted infringement).

65. Computer Maintenance Competition Assurance Act of 1997, Pub. L. No. 105-304, § 301, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 117 (2006)) (ensuring that independent computer maintenance service providers could conduct business without being hampered by need to license software on customer machines or risk infringement liability).

66. MDY Indus., LLC v. Blizzard Entm't, Inc., 2009 U.S. Dist. Lexis 24151 (D. Ariz. Mar. 10, 2009) (granting permanent injunction for tortuous interference with contract, contributory and vicarious copyright infringement, and violation of the DMCA, but staying the copyright and DMCA injunction pending appeal); Ben Kuchera, *Blizzard Attempt to Kill WoW Bot Bad News for Copyright Law*, ARS TECHNICA, May 7, 2008, http://arstechnica.com/news.ars/post/20080507-blizzard-attempt-to-kill-wow-bot-bad-news-for-copyright-law.html.

67. *Id.*

68. *See* Tushnet, *supra* note 56, at 556 ("Nonetheless, courts apparently believe that a finding of transformation is necessary for fair use, and they therefore strain to find transformation where they conclude that a defendant ought to prevail.").

69. 508 F.3d 1146, 1165 (9th Cir. 2007).

70. *Id.*

character, altering the first with new expression, meaning, or message."[71] It seems entirely plausible that a large sector of Perfect 10's market, particularly the market for Perfect 10's sized-down images for cell phone downloads, was completely superseded by the low-resolution thumbnail copies provided by search engines. The court's insistence on calling the defendant's wholly iterative scaled down copies "transformative" likely reflects the court's hesitance to shut down a powerful and popular search tool, rather than the belief that thumbnail images are "transformative" in the traditional sense. Moreover, the idea that a use need only have a new function or purpose to be "transformative," and thus constitute a fair use, does not explain contrary determinations regarding technologies like digital music lockers that enable new personal uses such as "space shifting."[72]

b) Many Consumptive Personal Use Copies Should Be "Fair" but Are Not "Transformative"

The fair use doctrine's shift toward a focus on transformativeness has rendered the doctrine particularly ineffective when courts evaluate personal use copies. This Section first examines fair use and research copies, and then examines fair use and consumer electronics.

i) Personal Use Copies for Research

Private copies made for research purposes are explicitly enumerated in § 107's preamble as an example of fair use.[73] This fits squarely within copyright's purpose of promoting progress in the arts and science because research, regardless of its setting, presumably advances knowledge.[74]

Nevertheless, in what is perhaps one of the most puzzling cases dealing with personal use copies, a court found that making personal use copies of a scholarly article obtained under paid license was copyright infringement.[75] In *Texaco*, one of the defendant's employees made photocopies of articles from the *Journal of Catalysis*—to which Texaco had three subscriptions—that the employee felt would facilitate his research, though he did not use all of them immediately.[76] The Copyright Act specifically enumerates copies made for

71. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

72. *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding that recording television broadcasts to "time shift," or watch at a later time, was fair use) *with* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (finding that copying CDs into a digital source locker to make them available from other locations, a practice later characterized as "space shifting," was not fair use).

73. 17 U.S.C. § 107 (2006).

74. *See* U.S. CONST. art. I, § 8, cl. 8.

75. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

76. *Id.* at 915–16.

"purposes such as . . . research" as an example of a fair use.[77] The *Texaco* court nonetheless found that the employee's copying was not fair use.[78] The court held that Texaco's copies were not "for purposes of research" because they were not used in the employee's published research, but were merely an "intermediate step" that might aid the employee's research.[79] This separation of the personal use copy from its use casts serious doubt as to whether a court would approve any personal use research copy, § 107 notwithstanding. Additionally, the court found that the district court did not over-emphasize the transformative test because,

> [t]o the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby *providing limited justification for a finding of fair use.*[80]

Finally, the court found that Texaco's copies were not transformative because they did not add anything new under *Campbell* and because all transformation incident to the photocopy was limited to the "*material object* embodying the intangible article that is the copyrighted individual work."[81] Therefore, the court held that Texaco was liable for copyright infringement.[82] Interestingly, under this standard, where research as part of a commercial enterprise is virtually presumptively unfair, attorneys, in their routine practice, would be considered rampant copyright infringers.[83]

Furthermore, *Texaco* casts doubt on whether even research universities, which often profit from their scientific advances through patent licensing, could make fair use copies for research purposes. In light of *Texaco*, scholars have expressed doubt that the fair use exception for research copies would even protect academics as the sweeping *Texaco* holding leaves little room to distinguish academic from commercial research.[84] In fact, *Texaco* casts doubt

77. 17 U.S.C. § 107 (2006).

78. *Am. Geophysical Union*, 60 F.3d 913.

79. *Id.* at 920 n.7.

80. *Id.* at 923 (emphasis added).

81. *Id.* (emphasis in original).

82. *Id.* at 931.

83. *See generally* Steven D. Smit, *"Make a Copy for the File . . .": Copyright Infringement by Attorneys*, 46 BAYLOR L. REV. 1 (1994).

84. Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 CORNELL J. L. & PUB. POL'Y 541, 566–67 (1999).

as to whether any personal use copies made for research purposes would not be infringing, notwithstanding § 107.

By way of example, imagine a graduate student working on her dissertation. During the course of her research, she may make a photocopy of an article from her supervising professor's personal collection.[85] Although this graduate student would be a sympathetic defendant, her actions are infringing under *Texaco*. First, because *Texaco* separates the physical act of copying from its contextual purpose, the graduate student's copies would also be an "intermediate step" and thus would not be for research purposes under the statute. Second, the graduate student's photocopies would not be transformative because any content she adds in the course of writing her dissertation would not be considered. The photocopy, not the dissertation, is the act of infringement. Thus, if copyright owners strictly enforced the *Texaco* rule, virtually no research copies would constitute fair use, although this result is plainly contrary to congressional intent.[86]

More generally, stripping acts of copying from their larger contexts and conflating transformativeness with fair use are both impractical and inconsistent with the purposes of copyright law. In *Texaco*, the disputed copies were clearly not transformative in the way that a parody would be transformative—but they should have been fair use nonetheless. The copies were not distributed outside a small intimate circle, and they were made for purposes of research, which undoubtedly promotes progress in the sciences and arts.[87]

ii) Personal Use Copies as Content for Consumer Electronics

Historically, the copyright consumer has felt that her purchased copy was "hers" and that she was entitled to make personal use copies to maximize the portability and accessibility of her purchase.[88] With advances in technology, customers increasingly demand the ability to make personal use copies to "time shift" and "space shift" their media.[89] These personal use copies

85. This example was deliberately crafted so as to avoid the library exception under 17 U.S.C. § 108 (2006).

86. *See* Tehranian, *supra* note 18, at 544 n.33. Concededly, if the *Texaco* analysis was vigorously enforced, the conflict with section 107 would become glaringly apparent, and the courts would reverse the rule. The fact that copyright owners are unable or unwilling to push the law to its limits does not excuse bad law.

87. *See* U.S. CONST. art. I, § 8, cl. 8.

88. *See, e.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 163.

89. *See, e.g.*, Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1 (outlining new digital distribution trends in television content); *see also*, Wikipedia, Total iPod Sales Chart, http://en.wikipedia.org/wiki/File:Ipod_sales.svg (last

should be permitted and encouraged under copyright law because they provide start-up capital that drives technological innovation in consumer electronics.[90] For example, without the belief that a consumer could lawfully copy his CD collection into his new iPod, or could legally record his favorite TV show transmissions into his TiVo, the early market for these devices would probably have been much more limited.[91]

The content industries, however, tend to be hostile to the idea of providing start-up capital to the consumer electronics industry. First, large content industry companies frequently flex their market power to try to squash new personal use copy-enabling technologies before they ever reach the consumer.[92] If this approach fails, content companies frequently sue technology companies under a theory of secondary liability for facilitating the end-user's alleged copyright infringement.[93] Despite the Supreme Court's ruling that personal use copies for purposes of "time shifting" as enabled by the VTR were fair use,[94] many distributors of newer technologies allowing analogous uses have been found to be infringing[95] or sued out of existence.[96] This Section will examine the fair use doctrine's inability to protect personal use copies within the context of the television and motion picture industry.[97]

Until very recently, the motion picture and television industries have been overwhelmingly hostile to technologies that enable consumers to make personal use copies of their content.[98] In *Sony v. Universal City Studios*—a

visited Nov. 8, 2009) (summarizing proliferation of the iPod, which is used to time and space shift media).

90. *See generally* von Lohmann, *supra* note 19, at 836–37 (arguing that many successful technological innovations such as the iPod and TiVo relied on personal use copies as startup capital).

91. *See id.*

92. *Reining in Tech*, *supra* note 50.

93. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (VTRs); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999) (digital music players).

94. *Sony*, 464 U.S. 417.

95. *See, e.g.*, UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

96. *See* Paramount Pictures Corp. v. RePlayTV, 298 F. Supp. 2d 921 (C.D. Cal. 2004) (explaining in subsequent motion hearing that RePlayTV creator SONICblue filed for bankruptcy, and that the plaintiffs settled with the purchaser of SONICblue's assets).

97. The music industry, with its prominent use of Digital Rights Management and the infamous file sharing lawsuits brought by the Recording Industry Association of America (RIAA) also provides an example of particularly voracious copyright enforcement against personal use copies. This paper uses television as an example because *Sony* provides a particularly shocking backdrop for fair use's failure.

98. *See, e.g.*, *Sony*, 464 U.S. 417 (VTRs); Complaint, Paramount Pictures Corp. v. RePlayTV, Inc., 298 F. Supp. 2d 921 (C.D. Cal 2004) (No. CV 01-9358 FMC(Ex)); *cf.* Stelter,

foundational case for both the treatment of personal use copies and secondary liability under the 1976 Act—two copyright industry giants, Universal City Studios and Walt Disney Productions, sued Sony, the manufacturer of Betamax VTRs, for copyright infringement.[99] The studios claimed that consumers who used the Betamax to make copies of broadcast television programs were engaging in copyright infringement, and that Sony, as the manufacturer of the device facilitating this infringement, was secondarily liable.[100]

The Court, however, found that the consumers' personal copying was largely for purposes of "time shifting" broadcast television programs for viewing at a later date.[101] The Court found this "time shifting" to be fair use, and thus concluded that Sony was not secondarily liable.[102]

Furthermore, the Court explicitly disclaimed the idea, which lower courts nevertheless later embraced,[103] that a use needs to be transformative or "productive" to be fair:

> Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative.[104]

Unfortunately, *Sony* has been relatively unhelpful for subsequent technological innovators who do not develop their products with the blessing of content industries.[105] For example, SonicBlue developed RePlayTV, a digital age version of the VCR, that made digital copies of

---

supra note 89 (describing recent trends by studios to allow time and space shifting of their content through online services such as Hulu and licensing personal use copies through Apple's iTunes store).

99. *Sony*, 464 U.S. at 420.

100. *Id.*

101. *Id.* at 455.

102. *Id.* The staple article of commerce doctrine as a defense to secondary liability is outside the scope of this Note.

103. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (finding that scaled-down iterative copies of photos were transformative, and thus fair use); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (holding that research copies were not fair use, largely because they were not transformative); *see infra* Section III.A.2.a).

104. *Sony*, 464 U.S. at 455.

105. *Compare Reining in Tech*, *supra* note 50 (reporting that the industry sued the makers of RePlayTV, a DVR which allowed for easy commercial skipping, into bankruptcy) *with* Sandeep Junnarkar, *TiVo Casts NBC Exec as President*, CNET NEWS.COM, Apr. 30, 2003, http://news.cnet.com/TiVo-casts-NBC-exec-as-president/2100-1041_3-998937.html (describing TiVo's hiring of an executive vice president at NBC to develop partnerships between the DVR service and television networks).

television programming and allowed users to automatically skip commercials.[106] Even though roughly twenty years earlier the Supreme Court clearly held that making personal use copies of broadcast television programming to time shift was fair use, the television industry went into attack mode. Turner Broadcasting executive Jamie Kellner stated that, although the industry begrudgingly tolerates viewers leaving the room during commercials, using technology to avoid watching them was theft.[107] This bold declaration led *The San Jose Mercury News* to ask sarcastically whether going to the bathroom during a commercial break was copyright infringement.[108] But perhaps most importantly, the VTR, a recording device the Supreme Court specifically approved just two decades earlier, also allows users to skip commercials with a remote control.[109] The seemingly clear *Sony* precedent notwithstanding, the incredibly fact-specific fair use defense proved too expensive to litigate for the small Silicon Valley startup, and the industry successfully sued the innovator into bankruptcy.[110]

The industry then partnered with TiVo to create a nearly identical product with heavy industry involvement.[111] A TiVo digital video recorder (DVR) does not incorporate an auto-skip feature, and among other industry-friendly features, displays advertisements when a viewer fast forwards through a commercial.[112]

There is no real harm to consumers in the DVR example, as consumers can make time-shifting copies as easily with TiVo as they could have with RePlayTV. What is troubling as a matter of policy is that conceivably, if the industry had not been interested in making a suitable alternative, the technology never would have been distributed at all.[113] Additionally, this

106. Paramount Pictures Corp. v. RePlayTV, 298 F. Supp. 2d 921, 923 (C.D. Cal. 2004).

107. Benny Evangelista, *Hot Button Issue; TV Moguls Are Threatened by DVRs that Zip Past the Ads*, S.F. CHRON., May 27, 2002, at E1 ("It's theft . . . Your contract with the network when you get the show is you're going to watch the spots . . . I guess there's a certain amount of tolerance for going to the bathroom.").

108. Editorial, *Watch Commercials, Hollywood Screams; Litigation was Used to Harass Silicon Valley Company*, SAN JOSE MERCURY NEWS, Mar. 28, 2003, at 8C.

109. *Hot Button Issue*, *supra* note 107 ("The idea that someone would not be allowed to fast forward or skip commercials is a pretty outlandish concept to a country that has gotten used to 20 years of VCR ownership.") (comments of Fred von Lohmann).

110. *RePlayTV*, 298 F. Supp. 2d 921; *Watch Commercials*, *supra* note 108.

111. *See, e.g.*, Junnarkar, *supra* note 105.

112. Richard Shim, *TiVo Tests Pop-up-style Ads*, CNET NEWS.COM, Mar. 28, 2005, http://news.cnet.com/TiVo-tests-pop-up-style-ads/2100-1041_3-5644197.html?tag=mncol.

113. Von Lohmann, *supra* note 19, at 841. As the *Sony* litigation makes clear, the content industries are unable to discern innovations which enhance the value of their content from those that devalue it ex ante. Today, the home video and DVD markets, enabled by Sony's

dynamic harms the competitive market for consumer electronics. Because of the prospect of dubious yet expensive copyright claims, small companies who have no clout with content industries or the money to afford the fair use fight are completely boxed out of the market. In the case of RePlayTV, the small startup was squeezed out of the market for a technology it invented.

This ability of the copyright industry to use infringement lawsuits to block innovation is in direct contravention of the constitutional purpose of copyright.[114] The RePlayTV saga powerfully demonstrates that the fair use doctrine cannot adequately protect socially valuable personal use copies, even when Supreme Court authority clearly states that a particular use is fair.

If technological innovation affecting the copyright industries is to thrive, the copyright regime needs to be reformed to make clear that personal use copies do not infringe, such that a defendant can have a chance of having lawsuits dismissed on summary judgment rather than be forced into an expensive trial while gambling on fair use.[115]

3. *Content Industries Can Indirectly Delineate the Border Between Fair Use and Infringement*

The fair use doctrine is also particularly ill-suited to personal use copying because, in large part, the content industries can manipulate ex ante the fourth fair use factor, market impact, thereby intentionally shrinking the scope of fair use. The content industries reap an unjust benefit from fair use's unpredictability through a perverse cycle that James Gibson dubs "Copyright's Feedback Loop."[116] The cycle works as follows: first, it is almost impossible to determine ex ante whether a court would find that a particular use is fair or needs to be licensed;[117] second, the severe penalties a user would incur for wrongly deciding that a particular use is fair creates an overwhelming incentive to secure a license, even in cases where it should not be needed;[118] third, copyright owners are then able to show that what was previously seen as a "fair use" generates a significant licensing revenue stream, which tips the fourth fair use factor in its favor.[119] In cases where

---

allegedly infringing technology, account for a greater share of studio revenue than the box office.

114. *See* U.S. CONST. art. I, § 8, cl. 8.

115. *See infra* Part IV; *see also* von Lohmann, *supra* note 19, at 859.

116. James Gibson, *Risk Aversion and Rights Accretion in Intellection Property Law*, 116 YALE L.J. 882, 887–907 (2007).

117. *Id.* at 884.

118. *Id.* ("Better safe than sued.").

119. *Id.*; *see* 17 U.S.C. § 107 (2006).

iterative copies have been made, the fourth fair use factor is "undoubtedly the single most important element of fair use."[120] Therefore,

> the practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use. Over time, public privilege recedes, and the reach of copyright expands . . . .[121]

If unchecked, the copyright feedback loop's effect on personal use copies could have several unfortunate consequences. With the advance of technology, personal use copies are no longer beyond the reach of copyright owners. For example, until January of 2009, songs purchased through Apple's popular iTunes service contained Digital Rights Management (DRM) encryption that allowed them to be played on only five user-authorized machines and to be burned onto storage media only seven times.[122] By creating a licensing scheme that is priced to a specific number of personal use copies, Apple and the music labels have extended the beginnings of the copyright feedback loop into the realm of personal use copies. Therefore, absent a strong legislative statement that personal use copies should be beyond the reach of copyright liability, it is only a matter of time before the fair use feedback loop consumes personal use copying, and extends the prying eyes of copyright enforcers into the privacy of the user's home.[123]

B. THE REPRODUCTION RIGHT'S FLAWS AS AN ENFORCEMENT MECHANISM FOR COPYRIGHT HOLDERS

The content industries should equally favor an expansive reform of the reproduction right. The current copyright regime as an enforcement mechanism is ill-suited to the realities of digital technology. Copyright

120. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); *cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590–92 (1994) (stating that in the case of transformative parody, the fourth factor takes diminished importance).

121. Gibson, *supra* note 116, at 884.

122. iTunes Store Terms of Service §§ 9(b), 10(b), http://www.apple.com/legal/itunes/us/service.html (last visited Nov. 8, 2009). Apple now offers some selections in DRM-free formats for a higher price—but only from those labels that have agreed to the change. *See, e.g.*, Greg Sandoval, *Sources: Apple to Expand DRM-free Music, Pricing*, CNET NEWS.COM, Jan. 5, 2009, http://news.cnet.com/8301-1023_3-10131761-93.html (noting that EMI had authorized DRM-free tracks, but that EMI accounted for only 10% of the iTunes library); Greg Sandoval, *Upgrading to a DRM-free iTunes Library Will Cost You*, CNET NEWS.COM, Jan. 6, 2009, http://news.cnet.com/8301-13579_3-10132759-37.html?tag=mncol;txt (explaining that stripping DRM from already owned tracks could be done for a fee, but that not all tracks were available DRM-free because of licensing issues).

123. For an examination of the privacy implications of digital copyright enforcement, *see generally* Megan L. Richardson, *Downloading Music off the Internet: Copyright and Privacy in Conflict?*, 13 J. L. & INFO. SCI. 90 (2002), *available at* http://ssrn.com/abstract=597362.

enforcement under the 1976 Act focuses on the act of "copying" as the infringement.[124] The purpose of the Copyright Act is not to prevent copying of original works of authorship but to create an incentive structure to encourage authors to enhance the public domain with their creative works.[125] The prevention of unauthorized copying in and of itself is thus not the goal, but a means to an end.[126] Policing physical copies once served as an efficient means to that end, because copies were a prerequisite for distribution, and personal use copies, which did not lead to distribution, were virtually undetectable.[127] These realities do not hold in the digital environment.

In the digital age, economic harm to the copyright holder no longer correlates to the number of unauthorized reproductions. While the courts are divided as to whether making copyrighted works available on a file sharing server violates copyright in the absence of proof of downloading,[128] common sense informs us that uploading a single copy to Kazaa represents a greater economic harm to the copyright owner than a home user burning her iTunes purchase onto fourteen different mix-CDs.[129] Faced with the reality of P2P file sharing, copyright owners are in need of an enforcement mechanism that addresses the actual harms that copyright law is meant to protect.

Most importantly, however, is that use in the digital age often *requires* copying.[130] For example, a computer must make a copy of a copyrighted software program in its RAM for the user to enjoy the program she purchased.[131] This enforcement problem has created an environment where copyright holders can prevent scientists from making lab copies[132] but cannot collect damages from those who make copies of copyrighted music available to anyone with an Internet connection if they cannot prove actual copies

124. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv., Co., 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

125. *See* U.S. CONST. art. I, § 8, cl. 8; THE DIGITAL DILEMMA, *supra* note 6, at 140.

126. THE DIGITAL DILEMMA, *supra* note 6, at 140.

127. *Id.* at 142.

128. *Compare* Elektra Entm't Group v. Barker, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (making a file available on a P2P distribution network is copyright infringement) *with* London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153 (D. Mass. 2008) (making a file available on a P2P distribution network is not copyright infringement).

129. *See supra* Section III.A.3 (demonstrating the privacy implications of new DRM technologies).

130. THE DIGITAL DILEMMA, *supra* note 6, at 142.

131. *Id.* Note that early cases held that such copies constituted copyright infringement. *See, e.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

132. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

were made.[133] From a constitutional standpoint, copying scientific research to allow further breakthroughs actually spurs science forward and promotes progress, whereas mass unauthorized distribution of copyrighted music destroys its market value and vastly undercuts the record company's incentive to promote and distribute new music. Therefore, though current copyright law holds that making copies available on the Internet is acceptable, while making private research copies is not, the intellectual property clause of the U.S. Constitution mandates the exact opposite result.[134]

Given these realities, copyright holders are in equal need of comprehensive reform. The content industries' financial interests would be satisfied by a new system that protected the making of private research copies and prohibited the distribution of files over the Internet. As such, content industries should favor the comprehensive reform proposed in the next Section.

IV. THE REFORM

The current copyright regime is ill-suited to the needs of both copyright consumers and copyright producers. Section IV.A argues that, in light of the problems discussed in Part III, both users and copyright holders would benefit from comprehensive copyright reform.

To create a copyright enforcement mechanism more attuned to digital realities, Section IV.B proposes a commercial appropriation right that would identify unauthorized distribution, not copying, as the locus of economic injury. To promote and protect the social benefits of personal use copies, Section IV.C proposes that a specific personal use exemption, similar to that codified in Swiss Law, be incorporated into Title 17.

A. THE NEED FOR REFORM

As stated above, the purpose of copyright protection in U.S. law is to expand the public domain by promoting progress in the arts and sciences.[135] An intellectual property regime that does not achieve its constitutional goal should be amended. The 1976 Act's focus on exclusive reproduction rights as a means of controlling economic incentives to create served its constitutional purpose before the advent of digital storage media, but it has

133. *London-Sire Records*, 542 F. Supp. 2d 153 (making a file available on a P2P distribution network is not copyright infringement).

134. *See* U.S. CONST. art. I, § 8, cl. 8.

135. *See id.*

since become antiquated.[136] With the advent of digital storage, the Internet, and file sharing technologies, a single digital copy offered to the public can be infinitely more damaging to the copyright incentive structure than a dozen physical personal use copies.[137] The current regime under the 1976 Act focuses too much on the physical copy, while denying sufficient recovery for unauthorized digital communications.[138] It cannot effectively preserve artists' incentives to create, and it encourages invasion of privacy as a means of copyright enforcement. For example, if a user were making files available on public P2P file sharing networks, a copyright holder would have to prove that downloads had actually taken place.[139] Such a burden of proof, however, would encourage record companies to monitor the private activities of users.[140]

In this sense, the 1976 Act has also become inadequate for users. Before digital technologies, a robust personal use exception to copyright liability was not particularly important. Personal use copies in the "analog" era were virtually undetectable by copyright owners and thus unenforceable through direct infringement lawsuits.[141] In the digital age, however, content owners can and do track personal use copies.[142] The content owners' perceived right to police personal use copies could have disastrous consequences for users' privacy.[143]

Although Apple's previous DRM restrictions on personal use copies, discussed above, seem relatively innocuous, other content providers have introduced more nefarious tracking. For example, in 2005, Sony BMG, quietly introduced two controversial software programs, MediaMax and Extended Copy Protection (XCP), on its CDs.[144] These programs installed

136. *See* THE DIGITAL DILEMMA, *supra* note 6, at 142.

137. *See supra* Section III.B (discussing the nature of the reproduction right, and the uncertainty as to whether "making available" a copyrighted work over the internet is even actionable infringement).

138. *See supra* Section III.B (discussing the "making available" controversy).

139. London-Sire Records, Inc. v. Doe, 542 F. Supp. 2d 153 (D. Mass. 2008).

140. *See, e.g.*, Electronic Frontier Foundation, Sony BMG Litigation Info, http://www.eff.org/cases/sony-bmg-litigation-info (last visited Nov. 8, 2009) (explaining the Sony rootkit scandal, where Sony music CDs installed use-monitoring software on computers without customer knowledge or permission).

141. *See* THE DIGITAL DILEMMA, *supra* note 6, at 142; *supra* Section III.A.2.b)ii) (explaining *Sony* and other third party liability litigation).

142. Section III.A.3 (explaining Apple's ability to track personal use copies in its iTunes program).

143. *See generally* Richardson, *supra* note 123.

144. *See* Electronic Frontier Foundation, *supra* note 140.

hidden files onto the user's computer and monitored CD usage.[145] Additionally, MediaMax transmitted the user's listening habits back to SunnComm, which created a security vulnerability that exposed the user's computer to malicious attacks by third parties.[146] The security vulnerabilities raised public ire, and Sony agreed to a settlement.[147] Had Sony better hidden its behavior, the surveillance of its customers likely would have continued.

This ability and willingness of content owners to track all personal use copies and aggregate usage data in real time is a particularly intrusive and unnecessary invasion of privacy. To address this problem, some scholars have suggested that privacy law should be used to deter copyright holders' overuse of invasive protection efforts.[148] A privacy law solution, however, would likely require a privacy notice that users would not read or have the bargaining power necessary to contest.[149] Without addressing the copyright holders' underlying motivation to monitor consumer copying, the law would be perpetually playing catch-up with ever-enterprising copyright holders armed with engineers and lawyers intent on circumventing any privacy regulation.

In contrast, if copyright law made clear that personal use copies do not constitute actionable infringement and that making a work available to the public does,[150] then copyright holders would have little incentive to monitor private individual uses and a greater incentive to focus on public communications. Society should not sacrifice effective protection of personal privacy merely to preserve the antiquated idea that the physical "copy" is the locus of copyright infringement. Clear statutory protection for private personal use copies could push back against future surveillance efforts by content owners.

Most importantly, from a constitutional standpoint, the 1976 Act's insufficient protection for personal use copies hinders the development of new technologies that actually increase the economic value of copyrighted material.[151] A myriad of technologies from the VTR to the iPod have relied

145. Class Action Complaint at 2, Melcon v. Sony BMG Music Entm't, No. C 05-5084 MHP (N.D. Cal. Dec. 8, 2005), *available at* http://w2.eff.org/IP/DRM/Sony-BMG/ND_cal_complaint.pdf (last visited Nov. 8, 2009).

146. Electronic Frontier Foundation, *supra* note 140.

147. *Id.*

148. *See, e.g.*, Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003).

149. *See generally* Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINN. L. REV. 1219 (2002) (explaining the ineffectiveness of the Gramm-Leach-Bliley Act's imposition of a privacy notice requirement in the financial sector).

150. *See infra* Sections IV.B and IV.C.

151. *See generally* von Lohmann, *supra* note 19.

on the understanding that personal use copies are fair use, and their development has launched other technological innovations as well.[152] If the copyright feedback loop were to continue, content owners would have even more opportunities to sue manufacturers of threatening technologies out of existence,[153] thereby depriving the public of the very progress the intellectual property clause seeks to promote.[154] It is tempting to leave the determination of what innovations will enhance the value of copyrighted works to copyright industries that already have a vested interest in maximizing the value of their works. However, because of risk aversion and growth seeking dynamics within large businesses, such as film studios or record labels, copyright industry players are notoriously unable to determine ex ante which personal-use-capitalizing innovations will increase or decrease the value of their copyrighted works.[155]

Therefore, it is unquestionably in the best interest of the copyright holder, the consumer, and the public at large to create a new overarching copyright principle that protects copyrighted works from online piracy, discourages copyright holders from violating user privacy to find possible infringement, and creates a healthy environment that fosters innovation in copyright-consuming technologies. The following Sections propose such a system.

B. COMMUNICATION TO THE PUBLIC AS THE PROXY FOR INFRINGEMENT

The World Intellectual Property Organization Copyright Treaty (WCT), negotiated in 1996, provides a much better starting point to create an infringement enforcement mechanism compatible with the realities of the digital era. Article 8 of the WCT provides that

> authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access

152. *See generally id.*

153. *See generally* Paramount Pictures Corp. v. RePlayTV, 298 F. Supp. 2d 921 (C.D. Cal. 2004); *Reining in Tech*, *supra* note 50; *cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding that recording television broadcasts to "time shift" was fair use).

154. U.S. CONST. art. I, § 8, cl. 8.

155. *See* von Lohmann, *supra* note 19, at 854–55.

> these works from a place and at a time individually chosen by them.[156]

With the exception of the derivative work right, all of the exclusive rights listed in § 106 can be classified as specific categorizations of the author's overarching right to control the communication of her work to the public.[157] At their core, the rights of reproduction, distribution, public performance, and public display are simply different means of preserving the author's incentive to create by granting the author control over the communication of her work to the public. This is particularly evidenced by the fact that private performances and displays are not protected by the 1976 Act.[158]

Collapsing these separate exclusive rights into a single overarching right of communication would simplify the Copyright Act and make it more accessible to the public. This would aid copyright holders in their efforts to educate the public about copyright infringement.[159] Currently, under § 106, where all copies, no matter how private or commercially insignificant, are technically infringement, the public determines for itself which personal use copies are acceptable and which are not.[160] The public consensus has been that copying is acceptable as long as the copy is not sold.[161] This normative line of demarcation is unacceptable in light of P2P file sharing, where one copy that is not sold is obtainable by thousands of potential customers free of charge. Although the copyright industries have embarked on large-scale

156. World Intellectual Property Organization Copyright Treaty, art. 8, Dec. 20, 1996, 112 Stat. 2860, 2186 U.N.T.S. 152, *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

157. *See* 17 U.S.C. § 106(1) (2006) (reproduction right); § 106(3) (distribution right); § 106(4), (6) (public performance rights); § 106(5) (public display right).

158. *See* 17 U.S.C. § 106(4)–(6) (2006); *see, e.g.*, *In re* Application of Cellco P'ship, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (finding that ASCAP was not entitled to royalties from cell phone ringtone plays because the ringtones did not constitute a "public" performance).

159. Education is one of the main strategies that the content industries use to combat widespread digital piracy by the public at large. *See, e.g.*, Recording Industry Association of America, Piracy: Online and on the Street, http://www.riaa.com/physicalpiracy.php (last visited Nov. 8, 2009) [hereinafter Piracy: Online and on the Street]; Motion Picture Association of America, Respect Copyrights, http://www.respectcopyrights.org/ (last visited Nov. 17, 2009).

160. For an overview of just how far the reproduction right extends, *see generally* Tehranian, *supra* note 18.

161. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 3.

education campaigns to combat this problem,[162] the sheer complexity of the 1976 Act stands as a formidable obstacle.[163]

A simplified and streamlined right of communication to the public maps much more logically onto digital file sharing realities and increases public comprehension and acceptance. Although many would disagree with the idea that a record label is entitled to royalties every time you make a CD for your car or a music mix for a friend,[164] the public, particularly in light of the advent of P2P file sharing, would likely understand and agree with the proposition that public dissemination of copies should be the sole prerogative of the copyright holder. Under this regime, because acts such as including the original text in an email reply unquestionably would not be copyright infringement,[165] copyright law would become more credible and compliance with it would likely increase.[166]

Furthermore, a broad public communication right would make § 106 more easily adaptable to new technologies, thereby avoiding much of the folly of the 1976 Act's enforcement in the current digital era.[167] Therefore, the WCT obligation should be adapted to U.S. copyright law as follows:

> § 106 Exclusive Rights in Copyrighted Works:
>
> Subject to sections 107 though 122, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) any communication to the public of their works by any means, including a public performance, a public display, or the making available to the public of their works in such a way that members of the public may access these works from a place and time individually chosen by them;

---

162. *See, e.g.*, Piracy: Online and on the Street, *supra* note 159; Respect Copyrights, *supra* note 159.

163. *See, e.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 163 (finding that a consumer's perceived familiarity with copyright law had no effect on home taping habits).

164. *See id.* at 3, 12, 157 (1989) (finding that the most common use of personal copies was shifting to a different playback device, and that most thought giving a copy to a friend was acceptable); THE DIGITAL DILEMMA, *supra* note 6, at 134 (explaining the sentiment of private use advocates that what a consumer did with his own copy in his own home was none of the copyright holder's business).

165. *Cf.* Tehranian, *supra* note 18, at 543, 547 (listing forwarding an email as an example of an unexpected act of infringement).

166. *See* THE DIGITAL DILEMMA, *supra* note 6, at 212–13 ("When popular attitudes and practices are out of synch with laws, the enforcement of laws becomes more difficult. . . . There are also political dangers associated with criminalizing generally accepted behavior.").

167. *Cf.* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (finding that RAM copies were infringing).

(2) to prepare derivative works[168] based on the copyrighted work.

The precise boundary between what is "public" and what is "private" will be discussed in the next Section.

C. A ROBUST PERSONAL USE EXEMPTION TO DEFINE WHAT IS NOT PUBLIC

Much of what makes a public communication right ideally suited to the technological age is its adaptability. To function properly, however, a public communication right under U.S. law, unlike the WCT provision, must define what is meant by "the public."[169] Instead of attempting to determine precisely what is and is not public, a more feasible alternative is to follow the example of other countries and define what is "private" and therefore not actionable.[170]

U.S. copyright law should delineate the scope of what is a public communication by codifying a clear personal use right, naming very specifically what are not "public communications," and leaving the "gray areas" between what is obviously public and obviously private to the ordinary common law process. This safe harbor for personal uses would also foster innovation in copyright consumptive technologies, which have the potential to increase the value of copyrighted content, which in turn increases the incentives for authors to create.[171]

The personal use exemption in Swiss copyright law provides a suitable starting point. Article 19 of the Swiss copyright law, in pertinent part, holds that:

> 1. Published works may be used for private purposes. Private use shall mean:
>
> a. any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends;
>
> b. any use of a work by a teacher for teaching in class;

168. An examination of digital technology's implications on the derivative work right is beyond the scope of this Note.

169. Guido Westkamp, *Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law*, 36 GEO. WASH. INT'L L. REV. 1057, 1083 (2004) (explaining that because public communication is an obscure concept "the right stands and falls depending only on an interpretation of 'the public' ").

170. *See id.* at 1081 (explaining that the U.K. focuses on what is "private" to define what is "public").

171. *See generally* von Lohmann, *supra* note 19 (arguing that fair use incentivizes investment in technologies that are complementary goods to copyrighted works).

> c. the reproduction of copies of a work in enterprises, public administrations, institutes, commissions and similar bodies for internal information or documentation.[172]

Section 1.a. is easily adaptable to the U.S. legal regime and provides a logical basis for determining what uses are private and thus noninfringing. However, the remaining sections, which exempt from liability copies made for teaching in both academic and corporate settings, are more problematic in an age where businesses are multinational conglomerates and universities include several campuses of tens of thousands of faculty and students.[173] Exempting all copies made within these very large spheres from any sort of remuneration to the copyright owner could harm the incentive structure the Copyright Act seeks to create. At the same time, subjecting instructional copies made in business and educational institutions, entities that create much of the progress in arts and sciences, to statutory damages penalties[174] would not serve the purpose of copyright law.

Therefore, copies made within businesses and educational institutions for commercialized purposes, such as creating course readers for purchase by students,[175] or for purposes of securing a commercialized patent, or for product development, should be subject to a compulsory licensing scheme similar to that contained in § 115.[176] The licensing fee would be set by the Register of Copyrights at a sufficiently low level as to allow unfettered use of material in course readers without allowing entire works to be used and commercially distributed without the copyright holder's permission. The compulsory license would serve as the maximum that a copyright owner could demand from a research institution. It would in no way bar publishers, particularly university publishers, from authorizing free use of their materials. Fees for orphan works would be held in trust by the Register of Copyrights, should the author be located at a later date.[177]

---

172. Loi fédérale sur le droit d'auteur et les droits voisin, [Federal Law on Copyright and Neighboring Rights], Oct. 9, 1992, RS 101, art. 19 (Switz.).

173. The University of California, for example, has ten university campuses which collectively enroll more than 220,000 students. University of California Home Page, http://www.universityofcalifornia.edu/campuses/welcome.html (last visited Nov. 8, 2009).

174. *See* 17 U.S.C. § 504(c) (2006).

175. *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (en banc) (finding liability where copyrighted material was used to create commercially sold course packs).

176. 17 U.S.C. § 115 (2006).

177. The logistics of how to deal with the orphan works problem, particularly the question as to how long the Register of Copyrights should be required to hold any royalties paid, is beyond the scope of this Note.

Because this proposed personal use exemption is not a definition per se, but an exemption meant to serve as a guideline as to what uses are "public," this section should be codified as § 107A, to follow fair use. The section should be as follows:

> § 107A Personal Use Exemption:
> Notwithstanding the provisions of sections 106 and 106A,
> (1) private uses of works protected under this title shall not give rise to any cause of action. Private uses are to include any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends. Third parties who enable such private uses are not subject to liability under this title;
> (2) unauthorized internal uses of works protected under this title within a single business or educational institution shall be permitted upon payment to the author of a fee to be fixed by the register of copyrights. In instances where a good faith search does not determine the author of a protected work, the register of copyrights shall collect the fee to hold in trust for the unnamed author.

V. CONCLUSION

At the intersection of the entertainment and consumer electronics industries, the 1976 Act fails to fulfill its constitutional purpose to promote progress. Instead, the Act actually disincentivizes the creation of personal-use-enabling technologies through the threat of contributory infringement liability, encourages content producers to waste money by suing consumers, and leaves ordinary citizens, who often do not see their conduct as infringement, open to lawsuits for which they are unprepared. To combat this problem, the reproduction right should be amended as follows:

> SECTION 102. RIGHT OF COMMUNICATION TO THE PUBLIC
> Section 106 of title 17, United States Code is amended to read as follows:
> "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) any communication to the public of their works by any means, including a public performance, a public display, or the making available to the public of their works in such a way that members of the public may access these works from a place and time individually chosen by them; and
> (2) to prepare derivative works based on the copyrighted work."

SECTION 103. PERSONAL USE COPIES

The following is added to title 17 of the United States Code as Section 107A:

"Notwithstanding the provisions of sections 106 and 106A,

(1) private uses of works protected under this title shall not give rise to any cause of action. Private uses are to include any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends. Third parties who enable such private uses are not subject to liability under this title;

(2) unauthorized internal uses of works protected under this title within a single business or educational institution shall be permitted upon payment to the author of a fee to be fixed by the register of copyrights. In instances where a good faith search does not determine the author of a protected work, the register of copyrights shall collect the fee to hold in trust for the unnamed author."