

Justifications for Copyright Limitations & Exceptions

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I. Introduction

Modern copyright laws grant authors a broad set of rights to control exploitations of their works.¹ Typically tempering the reach of these broad rights are a series of limitations and exceptions (L&Es) adopted by legislatures or developed by courts through common law adjudication.² L&Es uniformly result in free uses of protected works under U.S. copyright law, although in other countries, some L&Es may be subject to equitable remuneration obligations.³ L&E provisions in national copyright laws often seem a hodgepodge of special purpose provisions whose policy justifications are sometimes difficult to discern.⁴

This essay discusses ten types of justifications for L&Es and considers the relative utilities of specific and open-ended L&Es. Its principal focus will be on U.S. law, although it will provide numerous examples of L&Es embodied in other national copyright laws or authorized by international treaties.⁵

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¹ See, e.g., 17 U.S.C. § 106.

² See, e.g., 17 U.S.C. §§107-122. The distinction between “limitations” and “exceptions” is somewhat murky and the two terms are often used interchangeably. “Exceptions” are probably best understood as outright exemptions from copyright liability. “Limitations” is a term that include compulsory or statutory licenses creating a liability rule, so that acts are permissible but subject to an obligation to pay for the use. Whether L&Es should be understood as creating defenses to infringement claims or legal rights to engage in specified conduct is contested. See, e.g., NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000).

³ See, e.g., Jane C. Ginsburg, *Fair Use for Free, or Permitted-But-Paid*, 29 BERKELEY TECH. L.J. (forthcoming 2014) (recommending permitted-but-paid L&Es for many “redistributive” uses that American courts have ruled are fair, and pointing to foreign L&Es that permit uses but with remuneration). Some European scholars have proposed a model copyright law for the EU that includes some L&Es that would be subject to remuneration. See THE WITTEM PROJECT: EUROPEAN COPYRIGHT CODE, Art. 5 (April 2010), available at www.copyrightcode.eu (hereinafter WITTEM PROJECT).

⁴ See, e.g., 17 U.S.C. §§107-122; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, L 167/10 O.J. 22.6.2001, Art. 5 (setting forth permissible L&Es in the EU) (cited hereinafter as InfoSoc Directive). See also P. Bernt Hugenholtz, *Fierce Creatures: Copyright Exemptions: Toward Extinction?*, Keynote Talk at 2 (noting the “bewildering variety” of L&Es in national copyright laws), IFLA/IMPRIAMATUR conference on “Rights, Limitations and Exceptions: Striking a Proper Balance,” 30-31 October 1997, available at <http://www.ivir.nl/staff/hughholtz.html>.

⁵ For information about permitted and mandatory L&Es in international treaties, see P. BERNT HUGENHOLTZ & RUTH OKEDIJI, *CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT* 51-55 (March 6, 2008). Although some laws external to copyright—such as freedom of expression, competition, and consumer protection laws—may limit the reach of copyright, *id.* at 29-34, this essay concentrates on L&Es recognized inside of national copyright laws.

Part II traces the historical development of L&Es in U.S. copyright law. For the first hundred years of the nation's existence, there were no L&Es in its copyright law, in part because rights were fewer in number and narrower in scope than they became over time. In the late 19th and early 20th centuries, courts invented the exhaustion of rights and fair use doctrines as limits on copyright's scope. The exhaustion doctrine was first codified in the Copyright Act of 1909 and fair use in the Copyright Act of 1976 ("1976 Act"),⁶ although these doctrines have continued to evolve in the nearly four decades after their enactment.⁷ Less visible, although quite important to those whom they affect, are dozens of other L&Es codified in the 1976 Act.

Part III considers nine justifications for the existence of these L&Es. One set promotes ongoing authorship. A second recognizes both authorial and broader public interests in dissemination of news, freedom of expression, and access to information. A third protects privacy, personal autonomy, and ownership interests of consumers. A fourth aims to fulfill certain cultural and social policy goals. A fifth enables public institutions, such as courts and legislatures, to function more effectively. A sixth fosters competition and ongoing innovation. A seventh exempts incidental uses lacking in economic significance. An eighth addresses market failure problems. A ninth encompasses L&Es adopted for politically expedient reasons.

Part III discusses a tenth type of L&E, those designed to enable copyright law to be flexible and adaptable over time. The fair use doctrine accomplishes this goal in the U.S., although there are other ways to build flexibility into copyright laws. Especially in an era of rapid social, economic, and technological change, flexible exceptions such as fair use have some advantages over specific L&Es.

The essay concludes that the optimal policy for L&Es may well be to have specific exceptions for categories of justified uses that are relatively stable over time and for which predictability is more important than flexibility and to have an open-ended exception such as fair use to allow the law to adapt to new uses not contemplated by the legislature.

II. The Evolution of Copyright L&Es in U.S. Law

Until the early 20th century, copyright laws typically granted authors a fairly narrow set of exclusive rights and those exclusive rights were, in general, narrowly construed. When rights were narrow, it was unnecessary to create exceptions to limit those rights. As legislatures expanded authorial rights to cover a broader array of activities, the need to create limits on the exclusive rights became apparent.

Shortly after the U.S. was founded, Congress passed the Copyright Act of 1790.⁸ It granted to authors of books, maps, and charts a set of four exclusive rights that were conditioned on compliance with a set of formalities aimed at giving notice of their copyright claims. The rights

⁶ 17 U.S.C. §27 (repealed); 17 U.S.C. §§107, 109(a).

⁷ Parts III and IV will discuss some of this evolution.

⁸ Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

were to “print, reprint, publish or vend” those works.⁹ Failure to comply with the required formalities caused the work to attain public domain status and be free for all manner of unlicensed uses.¹⁰

During the 19th century, the exclusive rights initially conferred in the 1790 Act continued to serve as the main legal protections for copyrighted works. Yet, some new exclusive rights were created. When Congress extended copyright protection to dramatic works in 1856, it granted their authors the right to control public performances.¹¹ When extending protection to works of art for the first time in 1870, Congress similarly granted artists new exclusive rights to control the “completing, copying, executing, [and] finishing” them.¹² Authors of books got two new rights in 1870, one to control translations of their works, and a second to dramatize non-dramatic works.¹³ Congress added musical compositions to copyright subject matter in 1831,¹⁴ but did not grant composers a right to control public performances of their works until 1897.¹⁵

Through the mid-19th century, copyright’s exclusive rights were generally interpreted rather narrowly.¹⁶ Fair abridgements,¹⁷ dramatizations,¹⁸ making improved versions of older works,¹⁹

⁹ *Id.* § 1 at 124.

¹⁰ *Id.* § 3 at 125.

¹¹ Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138–39 (repealed 1870).

¹² Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909).

¹³ *Id.*

¹⁴ Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870). Before this, however, musical compositions were allowed to be registered in some instances within the broadly construed “books” category. See R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 136 (2007).

¹⁵ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82. Under that act, only for-profit performances could be infringements.

¹⁶ See, e.g., Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L. J. 186 (2008); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1380–87 (2011) (tracing this view back to the Statute of Anne, 1710, 8 Ann. c. 19 (Eng.), and cases and treatises from the 18th century).

¹⁷ See, e.g., *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 490 (Ch.) (“[A]bridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is [shown] in them....”).

¹⁸ See *Stewart v. Abend*, 495 U.S. 207, 245–46 (1990) (Stevens, J., dissenting) (citing *Stowe v. Thomas*, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (No. 13,514)). See also AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 155–56 (1899) (discussing the omission of unauthorized dramatizations of novels as infringements in English copyright law).

¹⁹ See, e.g., *Matthewson v. Stockdale*, (1806) 33 Eng. Rep. 103 (Ch.) 105; 12 Ves. Jun. 270, 275 (noting that an improvement on an original is noninfringing); *Sayre v. Moore*, (1785) (holding that the reuse of elements of a navigation map was noninfringing because of defendant’s improvements), cited in *Cary v. Longman*, (1801) 120 Eng. Rep. 138 (K.B.) 139 n.b; 1 East 358, 361 n.b.

and translations²⁰ were generally regarded as non-infringing. For the most part, only exact or near-exact copying of protected works was deemed an infringement.²¹

The fair abridgement doctrine was curtailed significantly after 1841 due to the influential decision in *Folsom v. Marsh*.²² In *Folsom*, Justice Story ruled that a biographer's unauthorized excerpting of 353 pages of George Washington's letters from a twelve volume biography was an infringement because so much was taken that it risked supplanting demand for the original.²³

Even though a few late 19th century decisions mention fair use, those cases involved weak and unconvincing infringement claims.²⁴ Fair use did not become a meaningful limitation on the scope of copyright until the early 20th century. The 1903 case of *Bloom & Hamlin v. Nixon* invoked fair use in the more modern sense of the term as a defense to infringement for the use of small parts of a song in a parody.²⁵

The "first sale" or exhaustion of rights limit on copyright was, like fair use, the product of a common law process. The 1908 Supreme Court decision in *Bobbs-Merrill Co. v. Straus* was the first to recognize this limit on copyright's exclusive right to control the sale of copies of protected works.²⁶ The publisher of a novel set the price at \$1 per copy. It sought to enforce that price through a notice that "[n]o dealer is licensed to sell [the book] at a less price, and a sale at a less price will be treated as an infringement of the copyright."²⁷ After Straus bought many copies of the book and started selling them for 89 cents, Bobbs-Merrill sued for infringement.

The Supreme Court ruled that Straus' resales were not infringements. The first authorized sale of copies to Straus had exhausted Bobbs-Merrill's right to control sales of those copies. The Court explained: "To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its

²⁰ See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that an unauthorized German translation of *Uncle Tom's Cabin* did not infringe). This ruling was legislatively overturned in 1870. See *supra* note 12 and accompanying text.

²¹ In addition to caselaw, *supra* notes 17-19, early copyright treatises endorsed this view. See ROBERT MAUGHAM, A TREATISE ON THE LAWS OF LITERARY PROPERTY 126 (1828); RICHARD GODSON, A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT 215(1823).

²² 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

²³ *Id.* at 349.

²⁴ See, e.g., *Simms v. Stanton*, 75 F. 6, 10 (C.C.N.D. Cal. 1896) (mentioning fair use in considering infringement claim based on similarities in books on physiognomy).

²⁵ 125 F. 977 (C.C.E.D. Pa. 1903). For a history of fair use prior to its codification, see ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 8-14 (Comm. Print 1960) [hereinafter LATMAN STUDY].

²⁶ 210 U.S. 339 (1908).

²⁷ *Id.* at 341.

meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.”²⁸ This was an important endorsement of copyright law’s first sale doctrine.²⁹

A year after the *Bobbs-Merrill* decision, Congress passed the Copyright Act of 1909. The 1909 Act represented an interesting effort to match exclusive rights with specific subject matters. Authors of literary works were, for example, given a translation right, authors of nondramatic works a right to dramatize them, authors of dramatic works a right to convert them to novels, and authors of musical works the right to arrange or adapt their works.³⁰ Other exclusive rights were carefully cabined so that only some types of works qualified for them and only for-profit performances could infringe rights in musical compositions.³¹

The 1909 Act was the first U.S. copyright statute to have L&E provisions. One was a codification of the first sale exception to the vending right.³² A second limited the newly created right of composers to control mechanical reproductions of their music in sound recordings by subjecting their works to a compulsory license.³³ Once a copyrighted song had been recorded once, anyone could re-record the song as long as they paid the license fee set forth in the statute.³⁴ A third exempted coin-operated music machines unless their owners charged for admission to the premises.³⁵

As the 20th century wore on, the uncodified fair use doctrine became the main common law limit on copyright’s exclusive rights. Cases typically involved parodies and burlesques, scholarly quotations, critical commentary, and news reporting, although not all of the defenses prevailed.³⁶

²⁸ *Id.* at 351.

²⁹ Some cases before *Bobbs-Merrill* recognized limits on copyright owner rights to control repairs and renewals of copies of protected works. *See, e.g.,* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 912-13 (2011).

³⁰ *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1, 35 Stat. 1075, 1075–76 (repealed 1976).

³¹ *See id.*, § 1(c) (lecture, sermon, address, or similar), § 1(e) (musical composition). Only dramatic works had a public performance right without regard to profit. *Id.*, § 1(d).

³² *Id.* §41. In 1947, the provisions of the 1909 Act were renumbered, and the exhaustion doctrine became §27.

³³ *Id.*, §1(e). The rationale for this compulsory license is discussed *infra* Part II.H.

³⁴ The intent of Congress in adopting this compulsory license was not so much to allow “covers” of songs to be made by unlicensed artists (although that has become one of its primary side benefits), but to enable more than one sound recording company to be able to record the music. *See infra* Part III.H for a discussion of the origins of this license.

³⁵ *Id.* This came to be known as the “jukebox” exception because of the industry that later grew up around it. The exception was originally intended to limit liability for coin-operated music machines perceived to have little economic significance. By 1961, however, the annual gross revenue of the jukebox industry was half a billion dollars, and the Register was determined to repeal the exemption, even though repeated efforts to repeal it had previously failed. *See* H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 31-32 (Comm. Print 1961) [hereinafter REGISTER’S 1961 REPORT]. The “jukebox” exception is discussed further *infra* notes xx and accompanying text.

³⁶ *See, e.g.,* LATMAN STUDY, *supra* note 25, at 8-12 (discussing cases).

Some exhaustion cases were litigated as well.³⁷ Congress did not, however, create any new copyright exceptions through the first half of the 20th century.³⁸

By the mid-1950s, a general revision of U.S. copyright law was in contemplation, and the Copyright Office commissioned a series of studies to inform the revision agenda.³⁹ In 1961, the Register of Copyrights issued a report to Congress that, among other things, sought to simplify and generalize the exclusive rights provisions to these four: to make and publish copies, make new versions, publicly perform, and make recordings.⁴⁰

The 1961 Report recommended adoption of only two exceptions to these exclusive rights: one for fair use and one to allow libraries to make single copies of journal articles for their patrons' research uses.⁴¹ It proposed to repeal the compulsory license for mechanical reproductions of musical compositions and to either repeal the jukebox exemption or replace it with a new compulsory license.⁴² The 1961 Report would, however, have retained the "for profit" limit on the public performance right as to literary and musical works.⁴³

By 1965, when the Register issued a supplementary report to accompany redrafted legislation,⁴⁴ many changes were evident. Under the new revision bills,⁴⁵ for instance, authors would have five exclusive rights applicable to all works: a reproduction right, a derivative work right, a distribution to the public right, a public performance right and a public exhibition right.⁴⁶ These are virtually identical to the rights enacted in 1976.

³⁷ See, e.g., *Fawcett Publ'ns v. Elliot Publ'g Co.*, 46 F. Supp. 717 (S.D.N.Y. 1942) (not infringement to combine and rebind sets of comic books); *Bureau of Nat'l Literature v. Sells*, 211 F. 379 (W.D. Wash. 1914) (not infringement to overhaul and reconstruct secondhand sets of copyrighted books).

³⁸ Previous bills to repeal the jukebox exception did not pass. See REGISTER'S 1961 REPORT, *supra* note 35, at 31.

³⁹ *Id.* at ix. Five of the 34 studies concerned L&Es: one on fair use, one on photoduplication of copyrighted materials by libraries, one on limitations on performing rights, and two on compulsory license issues. These studies can be found at <http://www.copyright.gov/history/studies.html>.

⁴⁰ REGISTER'S 1961 REPORT, *supra* note 35, at 21-24.

⁴¹ *Id.* at 24-26 (recommending codification of fair use and a library photocopying provision). The report did not mention exhaustion, but the proposed change in exclusive rights might have made this exception seem unnecessary.

⁴² *Id.* at 31-36.

⁴³ *Id.* at 28. However, the Register thought that motion pictures and choreographic works should have a public performance right without regard to the profit or nonprofit status of the use or user. *Id.*

⁴⁴ H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL (Comm. Print 1965) [hereinafter REGISTER'S SUPPLEMENTARY REPORT]. There was an intermediate draft between 1961 and 1965 that contained a preliminary draft of legislation and commentary. See HOUSE COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (Comm. Print 1964). In the interest of keeping a very long story shorter than it would otherwise be, I have chosen to focus on the 1961 and 1965 reports which set the main parameters for the substantive revision of his law.

⁴⁵ H.R. 4347, 89th Cong., 2d Sess. (1965) and S. 1006, 89th Cong., 2d Sess. (1965).

⁴⁶ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 15. Although the 1909 Act had included a public exhibition right, it applied only to motion pictures. The 1965 Report would have made a public exhibition right applicable to a broader set of works and would have treated the exhibition of motion pictures under the public performance

These exclusive rights would, as before, be subject to fair use and exhaustion limitations.⁴⁷ However, because of certain proposed expansions in subject matter and in rights, the Register in 1965 recommended four new exemptions for nonprofit activities and several others to address industry-specific uses. The Register had, however, changed his mind about a special exception for library copying.

The need for some exemptions for nonprofit activities arose because the 1965 exclusive rights provision dropped the for-profit limit on the public performance right, expanded the public performance right to all types of works, and created a new public exhibition right.

The Register recommended four exemptions from the public performances and exhibition rights that would affect nonprofit uses and users: one for face-to-face classroom teaching; a second for closed circuit educational broadcasting of literary and musical works; a third for performances of literary and musical works during religious services; a fourth for other nonprofit educational, religious, or charitable events under certain conditions.⁴⁸ He also recommended an exemption for merely receiving broadcast programming in a public place.⁴⁹ With some modifications, these exemptions ended up in the 1976 Act.⁵⁰

One of the 1965 Report's industry-specific exemptions would have shielded operators of broadcast signal "booster" technologies from liability (although the Register thought cable retransmissions of broadcast signals should fall within the new public performance right).⁵¹ A second would allow broadcasters to make ephemeral copies of programs essential to their business operations.⁵² In addition, the Register proposed an L&E to clarify that the scope of

right). REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 15. The public exhibition right later became the public display right. 17 U.S.C. § 106(5).

⁴⁷ 17 U.S.C. §§ 107-108.

⁴⁸ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 31-40. As the House Report later explained, "[t]he approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exceptions for educational and other nonprofit uses." H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. (1976) at 62, reprinted at 1976 U.S.S.C.A.N. 5659 [hereinafter H. Rep. No. 94-1476].

⁴⁹ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 44. The Register sought to legislatively overturn *Buck v. Jewell LaSalle Realty Co.*, 283 U.S. 193 (1931) which had held a hotel proprietor liable for copyright infringement for having the radio playing in the hotel. A modified version of this provision is now codified at 17 U.S.C. § 110(5)(A).

⁵⁰ 17 U.S.C. §§ 110(1)-(4). By 1976, the closed circuit educational broadcasting exception was changed to a more technology-neutral and more general instructional use provision. *Id.*, § 110(2). The charitable use exceptions is conditioned on a lack of payment to the performers, the event being held either without admission charges or with any surplus from the admission charge being used exclusively for educational, religious, or charitable uses; advance notice must be given to the copyright owner about the intended use, so he or she could object. *Id.*, § 110(4). This requirement was added so that copyright owners would not be forced to "donate" to charities they did not support. See BILLS FOR THE GENERAL REVISION OF THE COPYRIGHT LAW, TITLE 17 OF THE UNITED STATES CODE, AND FOR OTHER PURPOSES, HEARINGS ON H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 BEFORE SUBCOMM. NO. 3 OF THE H. COMM. ON THE JUDICIARY, 89th Cong., 1st Sess. (1966), Part 2 at 1130.

⁵¹ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 40-43. Eventually, the broadcast and cable industries negotiated a compromise provision, now embodied in 17 U.S.C. § 111, that provides a compulsory license for cable retransmission of copyrighted programs. This compromise is discussed in Part III.H.

⁵² REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 44-47. This exemption is now codified at 17 U.S.C. § 112.

copyright in pictorial, graphic, and sculptural (PGS) works did not extend to any useful article depicted therein.⁵³ The 1976 Act adopted the ephemeral copy and PGS limits, but eventually adopted a complex new provision enabling cable systems to retransmit broadcast signals subject to a compulsory license.⁵⁴

Five exceptions recommended in the 1965 report would affect the music industry. Although now endorsing copyright protection for sound recordings,⁵⁵ the Register perceived the need for some limits on the rights accorded to their owners.⁵⁶ The report proposed one exception to preclude a public performance right to sound recordings, and a second to restrict the scope of the reproduction right so that imitating another's recording would not infringe.⁵⁷ A third would retain, with some modifications, the compulsory license that had long allowed sound recordings to be made of music for a set fee.⁵⁸ The Register was still in favor of imposing liability on jukebox operators, but proposed a one year moratorium so that they and music copyright owners could come to some understanding.⁵⁹ The Register also recommended an exemption for small businesses for turning on radio or television sets with consumer-grade equipment.⁶⁰ With some refinements (and eventually a compulsory license for jukeboxes), these rules ended up in the 1976 Act.⁶¹

The 1965 Report backed away from the Register's earlier proposal to create an exemption so that libraries could make single copies of articles and the like for patrons engaged in research. This recommendation had initially seemed non-controversial for it was akin to the hand-copying that had conventionally been thought non-infringing. It was, moreover, consistent with the 1935 "gentlemen's agreement" under which publishers had accepted that libraries, archives, and museums could make single copies for researchers.⁶²

The change of heart came about because the 1961 proposal had met with strenuous opposition from all sides. Authors and publishers thought it went too far, and librarians and educators thought it did not go far enough.⁶³ In the 1965 report, the Register acknowledged that rights holders had legitimate concerns that a library copying exception would threaten the markets for

⁵³ *Id.* at 47-49. Case law supported this limit on copyright scope. *See, e.g., Fulmer v. United States*, 103 F. Supp. 1021 (Ct. Cl. 1952) (copyright in drawing did not extend to parachute design depicted therein).

⁵⁴ The ephemeral copy exception was codified as 17 U.S.C. §112 and PGS exception as 17 U.S.C. § 113(b).

⁵⁵ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 5.

⁵⁶ *Id.* at 49-52.

⁵⁷ *Id.* at 51-53. Part III.I discusses the rationale for denying public performance rights to sound recordings.

⁵⁸ *Id.* at 53. He did recommend some adjustments to the license. *Id.* at 53-59.

⁵⁹ *Id.* at 59-61.

⁶⁰ *Id.* at 44.

⁶¹ *See* 17 U.S.C. §§ 114(a), 114(b), 115(a), 116, 110(5)(B).

⁶² *See* Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y U.S.A. 545, 546 (2005).

⁶³ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 26-27.

their works.⁶⁴ The Register suggested that library copying should be dealt with through the fair use doctrine.⁶⁵

While the library copying issue was being debated in the halls of Congress, Williams & Wilkins, a publisher of medical research journals, decided to test library copying in court. It filed suit against the U.S. government to challenge the policy of the National Institutes of Health (NIH) whose staff regularly made photocopies of individual journal articles for researcher patrons of the library. In a split decision the Court of Claims ruled that this practice was fair use, and an evenly divided Supreme Court affirmed that ruling.⁶⁶

Notwithstanding the NIH's success in that litigation, library representatives wanted greater reassurances than this decision provided. Ultimately, they persuaded the Register and Congress to support an exception to cover many common library activities, including an exemption for photocopying of single articles for research patrons.⁶⁷

By 1965, educational use copying had become even more contentious than library photocopying.⁶⁸ Educators wanted a general exception for educational use copying, but publisher and author groups strongly objected. The 1965 Supplementary Report recommended that educational use copying be dealt with under the fair use doctrine, as Congress eventually did in the 1976 Act.⁶⁹

Educators were, however, able to influence the contours of the fair use provision in four ways: first, by successfully defending the inclusion of teaching, scholarship, and research as three of the six favored uses; second, by persuading Congress to insert “(including multiple copies for classroom use)” after “teaching” in the list of favored uses; third, by supporting language directing courts to consider “whether [the] use is of a commercial nature or is for nonprofit educational purposes” as part of the purpose-of-the-use analysis; and fourth, by urging the omission of limiting language (“to the extent reasonably necessary or incidental to a legitimate purpose”) from the fair use provision.⁷⁰

Because the divide over educational use copying was so deep, some members of Congress urged educators and publishers to negotiate a set of fair use guidelines for educational use copying.⁷¹ The final House Report about the 1976 Act published two sets of negotiated guidelines which

⁶⁴ *Id.* at xiv-xvi, 14-15.

⁶⁵ *Id.* at 27-28.

⁶⁶ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

⁶⁷ 17 U.S.C. § 108(d).

⁶⁸ For a detailed discussion of the debate over educational uses, see, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985).

⁶⁹ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 27-28. See H.R. REP. NO. 94-1476, *supra* note 48, at 66-72..

⁷⁰ Compare 17 U.S.C. § 107 with REGISTER'S SUPPLEMENTARY REPORT, *supra* note 44, at 27 (draft language for the fair use provision).

⁷¹ H.R. REP. NO. 94-1476, *supra* note 48, at 67.

have had considerable influence on institutional practices.⁷² It remains controversial whether these guidelines are a “floor,” with plenty of headroom for additional fair use copies for educational purposes, or a “ceiling,” so that copying beyond the guidelines should be presumed unfair.⁷³

Between 1965 and 1976, several new L&Es found their way into to the copyright revision bills,⁷⁴ and those proposed in 1965 generally became wordier and more complicated. During the copyright revision process, debates over L&Es were among the most controversial issues with which the Register and Congress had to contend, especially L&Es affecting the cable and jukebox industries, public broadcasters, and libraries and educational institutions. Since 1976, six new L&E provisions have been added to the statute, most of which contain subsections setting forth more than one L&E.⁷⁵

The L&E provisions of the amended 1976 Act constitute almost half of the heft of the copyright law of the U.S. They are a motley crew. The next Part will explain just how varied they are in substance and in policy justifications.

III. Justifications for Copyright L&Es

This Part discusses nine justifications for copyright L&Es.⁷⁶ Among the principled justifications are those L&Es that protect authorial interests, consumer interests, specific industry interests,

⁷² See Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with Respect to Books and Periodicals (often referred to as the “Classroom Guidelines”), *id.* at 68-70; Guidelines for Educational Uses of Music, *id.* at 70-71.

⁷³ See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 601 (2001). In *Cambridge University Press v. Becker*, which is currently before the Eleventh Circuit Court of Appeals, CUP has argued that Georgia State’s electronic course reserve policy is unfair because it exceeds what’s permissible under the Classroom Guidelines. See Brief of Appellants at 63, *Cambridge Univ. Press v. Becker*, Nos. 12-14676-FF, 12-15147-FF (11th Cir. Jan. 28, 2013). The legislative history viewed the guidelines as “a reasonable interpretation of the minimum standards of fair use.” H.R. REP. NO. 94-1476, *supra* note 48, at 72.

⁷⁴ A special exception for certain library and archival uses of copyrighted works was added to the legislation as 17 U.S.C. § 108. A negotiated compulsory license provision for cable retransmissions of broadcast programming became 17 U.S.C. § 111. A strangest exception in the 1976 Act was 17 U.S.C. § 117, which preserved the status quo (whatever that was) as to computer uses of copyrighted works while a National Commission on New Technological Uses of Copyrighted Works (CONTU) deliberated on these issues. Public broadcasters benefited from a compulsory license that became 17 U.S.C. § 118.

⁷⁵ The post-1976 new exceptions include §§ 119 and 122 to deal with secondary transmissions of broadcast programming via satellite, both of which have compulsory license provisions, § 120 to limit the scope of copyrights in architectural works, and § 121 to facilitate greater access to nondramatic literary works for print-disabled persons. Some exceptions adopted in 1976 have been amended, most notably, an L&E that allows certain copying and adaptations of computer programs in 17 U.S.C. § 117.

⁷⁶ The nine justifications set forth in this Part do not fit neatly into the categorizations of L&Es proffered by other scholars; they are the product of a bottom-up process (that is, I examined the L&Es that exist and then tried to cluster them, much as I did for clusters of fair uses in Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009)). Professor Hugenholtz recognizes three types of justifications for copyright L&Es: some to protect fundamental freedoms (such as free expression and privacy interests), some to fulfill public interests (such as library and disabled person exceptions), and others to address market failures (such as compulsory licenses).

and the public interest more generally, as well as those aimed at achieving social policy goals, balancing interests of competing stakeholders, and curing market failures. Less principled but still important are some L&Es adopted for politically expedient reasons.⁷⁷

While this Part concentrates mainly on justifications for L&Es found in U.S. law, this taxonomy of justifications may be useful in assessing justifications for L&Es in national laws more generally. It is worth noting that L&Es may be justified in other national laws not only based on the purpose of the use, but also based on the remuneration that goes to rights holders.⁷⁸

A. Promoting Ongoing Authorship

Authorship is an ongoing process of communicating knowledge and culture among authors and their readers, viewers, and listeners. All authors draw upon preexisting works in the process of creating new ones. As Justice Story famously noted in 1845, “in literature, in science, and in art, there are, and can be, few, if any, things, which in an abstract sense are strictly new and original throughout. Every book in literature, science, and art borrows, and must necessarily borrow, and use much which was well known and used before.”⁷⁹

To promote ongoing authorship, the Berne Convention for the Protection of Literary and Artistic Works requires member states to adopt a right of fair quotation in their national copyright laws.⁸⁰ In keeping with this norm, many jurisdictions have specific L&Es allowing quotations, as well as other L&Es to allow parodies, satires, and critical commentary.⁸¹ Fair dealing provisions in some jurisdictions allow researchers to make copies of protected works for purposes of study, a common practice among authors who are preparing to create new works.⁸² An example of a specific L&E in U.S. law that promotes ongoing authorship is that which allows people to make photographs, paintings and other representations of publicly visible buildings embodying architectural works.⁸³

Hugenholtz, *supra* note 4. The Wittem European Copyright Code grouped L&Es into four categories: incidental uses, uses for purposes of freedom of expression and information, uses for social, political and cultural purposes, and uses that enhance competition. WITTEM PROJECT, *supra* note 3, art. 5

⁷⁷ Political expediency has a long pedigree in U.S. copyright lawmaking processes. *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT 22-63 (2001).

⁷⁸ Ginsburg, *supra* note 3. Educational use and private copying L&Es are examples of permitted-but-paid uses in some national laws.

⁷⁹ Emerson v. Davies, 8 F. Cas. 615, 619 (1845).

⁸⁰ Berne Convention for the Protection of Literary and Artistic Works, art. 10(1) [hereinafter Berne Convention]. This treaty provision directs that quotations should be compatible with fair practice and no more extensive than is justified by the purpose.

⁸¹ *See, e.g.*, InfoSoc Directive, *supra* note 4, arts. 5(3)(d), (i), (k).

⁸² *See, e.g.*, UK Copyright, Designs, and Patents Act 1988, §§ 29-30.

⁸³ 17 U.S.C. § 120(a). Among the other reasons for this exception was the low likelihood of harm to the architects' market from these depictions and the difficulty, as a practical matter, of enforcing a rule that would make tourists into prima facie infringers. *See* Architectural Design Protection: Hearings on H.R. 3990 and 3991 Before the

Most of the breathing room for ongoing authorship in U.S. copyright law comes from the fair use doctrine. In its landmark decision *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court spoke of fair use as “permit[ting]...courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁸⁴ The facts of *Campbell* illustrate this point.

Acuff-Rose owns a copyright in the well-known Roy Orbison song, “Pretty Woman.” Luther Campbell and his rap group 2 Live Crew recorded an identically named song that drew upon some of the lyrics, melody, and guitar riffs of the Orbison song in a parodic manner. Acuff-Rose refused Campbell’s request for permission to make transformative use of the song and sued Campbell for infringement when 2 Live Crew went ahead with its rap parody anyway.

In considering Campbell’s fair use defense, the Supreme Court recognized that “[p]arody needs to mimic an original to make its point....”⁸⁵ The Court noted that the 2 Live Crew song conveyed a very different message than the Orbison song: “2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.”⁸⁶ The Court deemed it “significant” that after copying the first line of the Orbison song, 2 Live Crew “thereafter departed markedly from the Orbison lyrics for its own ends.”⁸⁷ The Court concluded that 2 Live Crew had taken no more than was necessary for its parodic purpose, which weighed in favor of its fair use defense.

Many productive uses of an earlier author’s work have been deemed fair by the courts. An example is *New Era Publications Int’l v. Carol Publishing Group*.⁸⁸ New Era owns copyrights in works authored by L. Ron Hubbard, the founder of the Church of Scientology. Carol published an unauthorized biography that contained 121 passages from 48 of Hubbard’s writings. In an affidavit, the biographer explained that these quotations were necessary to support the book’s thesis that “Hubbard was a charlatan and the Church [was] a dangerous cult.”⁸⁹ The court expressed skepticism that potential customers for the authorized biography that New Era planned to commission would be deterred from buying that work because of the disparaging biography published by Carol. Hence, the court upheld Carol’s fair use defense.

Campbell and *New Era* are examples of critical commentary fair uses, but productive uses may well be fair if they are neutral or positive about the works on which they draw. In *Bill Graham*

Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 15-18 (1990).

⁸⁴ 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). The Supreme Court cited approvingly, *id.* at 576-79, to a classic law review article on fair use., namely, Pierre L. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

⁸⁵ *Campbell*, 510 U.S. at 580-81.

⁸⁶ *Id.* at 583.

⁸⁷ *Id.* at 589.

⁸⁸ 904 F.2d 152 (2d. Cir. 1990).

⁸⁹ *Id.* at 156.

Archives v. Dorling Kindersley Ltd.,⁹⁰ for example, the publisher of a cultural history of the Grateful Dead band included seven small-size images of Grateful Dead concert posters as part of its chronological timeline to give readers a sense of the cultural context of the band's history. DK initially sought permission to reproduce the images in the book from the copyright owner. It ultimately used the images without permission after concluding that the price BGA offered was unreasonable. The Court of Appeals concluded that DK's use of the images was fair because they were very small and had not been put in the book to take advantage of the artistic merit of the posters but to illustrate cultural context.⁹¹

B. Fostering the Public Interest in Access to Information

Whenever an author forgoes the opportunity to reuse portions of another author's work out of fear that the use might be challenged as infringing, there is a loss not only to that author, but also to the public. The public cannot benefit from the insights that the second author's reuse of a first author's work would have enabled. There is, moreover, some loss to freedom of expression and to access to information when lawful reuses are forgone. Losses to the public may be more substantial when news is not reported or publications on matters of public concern are suppressed because of copyright concerns.

Many national copyright laws have specific L&E provisions that permit some reuses of in-copyright materials in the course of news reporting or other means of providing information to the public on current political or economic events.⁹² Some L&Es permit dissemination of political speeches.⁹³ The Berne Convention recognizes that member states might decide "to permit the reproduction by the press, the broadcasting or communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character...."⁹⁴ These provisions grant greater latitude to those who disseminate information on matters of public concern.

In the U.S., the fair use doctrine fulfills this function. The public interest in "having the fullest information available on the murder of President Kennedy," for instance, played an important role in the fair use case *Time, Inc. v. Bernard Geis Associates*.⁹⁵ Time owned the copyright in the Zapruder film of the presidential cavalcade in Dallas during which the President was shot. The Zapruder video was the only documentation of the assassination. It was a significant piece of evidence in the Warren Commission report on the President's death and the wider public debate over whether Lee Harvey Oswald was the sole assassin. Geis published a book aimed at proving

⁹⁰ 448 F.3d 605 (2d Cir. 2006).

⁹¹ *Id.* at 611. Documentary filmmakers often make fair uses of video footage in their films. *See, e.g., Hofheinz v. A & E Television Networks*, 146 F. Supp.2d 442 (S.D.N.Y. 2001). Some appropriation art may also be fair use. *See, e.g., Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

⁹² *See, e.g., InfoSoc Directive, supra* note 4, at art. 5(3)(c).

⁹³ *See, e.g., id.*, art. 5(3)(f).

⁹⁴ Berne Convention, *supra* note 80, art. 10bis.

⁹⁵ 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

that Oswald was not the only gunman. Its author relied heavily on several frames from the Zapruder film as evidence in support of his claim. After Time refused to license the use of these frames in the book, Geis prepared sketches of the frames for the book anyway, and Time sued for infringement. The court ruled that Geis' inclusion of the sketches in the book was a fair use in part because of public interest in information about the assassination.

Fair use also protected the Council on American-Islamic Relations against infringement claims based on its posting of four minutes of audio from a conservative radio talk show to prove that its host had made anti-Muslim statements.⁹⁶ The court ruled that "it was not unreasonable for defendants to provide the actual audio excerpts, since they reaffirmed the authenticity of the criticized statements and provided the audience with the tone and manner in which plaintiff made the statements."⁹⁷ Thus, the court's opinion vindicated not only the Council's free speech interests in making the statements known, but also the public interest in getting accurate access to this information about a radio personality's prejudicial remarks.⁹⁸

More mundane, but nonetheless newsworthy, was the use at issue in *Nunez v. Caribbean Int'l News Corp.*⁹⁹ The question was whether a newspaper was justified in publishing photos of a nude woman to inform public debate about whether Miss Puerto Rico deserved to retain her crown. The court observed that "the pictures were the story," adding that "[i]t would have been much more difficult to explain the controversy without reproducing the photographs."¹⁰⁰ It also mattered that the newspaper used the photos for a very different purpose than the original purpose (for a modeling portfolio). Under *Campbell*, uses for different purposes may be transformative, tipping in favor of fair use.¹⁰¹

Of course, newsworthiness is no guarantee that a use will be fair, as witnessed by the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.¹⁰² The left-leaning news magazine published a 2250 word story about the upcoming publication of Gerald Ford's memoirs. The story quoted verbatim 300 words from the book and paraphrased other passages. Ford's publisher sued The Nation for infringement. The Nation argued its use had been fair.

Several factors contributed to the Court's decision that the use was unfair. Probably the single most important was the fact that the book was unpublished when The Nation's story appeared. The Nation, in the Court's view, intended to "scoop" the right of first publication that copyright

⁹⁶ *Savage v. Council on American-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281 (N.D. Cal. July 25, 2008).

⁹⁷ *Id.* at *6.

⁹⁸ *Id.* at *8 (finding defendants fairly used the audio excerpts "to comment on and rebut derogatory statements regarding their organization and their religious affiliations").

⁹⁹ 235 F.3d 18 (1st Cir. 2000).

¹⁰⁰ *Id.* at 22 (internal quotation marks omitted).

¹⁰¹ *Campbell*, 510 U.S. at 579.

¹⁰² 471 U.S. 539 (1985).

provides to authors.¹⁰³ The Court criticized The Nation for having “purloined” a copy of the book and for having extracted a qualitatively substantial portion of the book, namely, the part in which Ford discussed his decision as President to pardon Richard Nixon.¹⁰⁴ This was the very part of the book that Harper & Row had contracted with Time magazine to publish. That contract was cancelled after The Nation’s publication of the Nixon pardon material.

Although the public interest in access to information did not favor fair use in the *Harper & Row* decision,¹⁰⁵ it has reemerged as worthy of consideration in *Campbell*.¹⁰⁶ The Court noted that even if the taking in a later work was too substantial to qualify as a fair use, the public’s interest in access to it might justify withholding injunctive relief and awarding damages instead.¹⁰⁷

The public interest in access to information has also been a significant factor weighing in favor of fair use in a series of U.S. cases in which search engines have won fair use defenses for copying texts and images in order to index their contents and make snippets available in response to user search queries.¹⁰⁸

Data-mining of copyrighted works may also be fair use. Data-mining involves the digitization of works and indexing of their contents so that the texts can be analyzed by specialized software programs. In *A.V. v. iParadigms, LLC.*, for instance, some high school students sued a software company for infringement because it made copies of their term papers and processed the copies with a computer program designed to detect plagiarism.¹⁰⁹ The court ruled that iParadigm had made fair use of the papers, for it was only copying and processing the papers to assess whether the papers were original or plagiarized. In *Authors Guild, Inc. v. HathiTrust*,¹¹⁰ the Second Circuit has ruled that the HathiTrust digital library made fair use of books from research library collections when creating a full-text searchable database enabling researchers to run search queries for books mentioning specific topics of interest. Some countries have adopted special exceptions for data-mining of in-copyright works.¹¹¹

C. Protecting User Privacy, Autonomy, and Property Interests

Privacy and autonomy interests of users of in-copyright works are protected in national copyright laws through limits on authorial rights to control performances, displays, communications, and

¹⁰³ *Id.* at 562.

¹⁰⁴ *Id.* at 562, 565.

¹⁰⁵ *Id.* at 557-58.

¹⁰⁶ *Campbell*, 510 U.S. at 578, n.10.

¹⁰⁷ *Id.*

¹⁰⁸ *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). Lexis and Westlaw recently won fair use defenses for digitizing briefs filed in litigated cases, which increased public access to legal information without harming the market for the briefs. *See White v. West Pub. Corp.*, -- F. Supp.2d -- (S.D.N.Y. 2014).

¹⁰⁹ 562 F.3d 630 (4th Cir.2009). For an in-depth discussion of copyright implications of data-mining issues, *see, e.g., Matthew Sag, Copyright and Copy Reliant Technology*, 103 NW. L. REV. 1607 (2009).

¹¹⁰ -- F.3d -- (2d Cir. 2014).

¹¹¹ *See, e.g., Copyright Law of Japan*, art. 47septies.

distributions to those that are to the “public.”¹¹² Privacy and autonomy interests of users are sometimes additionally protected through special L&E provisions that authorize copying for private or personal uses.¹¹³ Many nations have fair dealing provisions that enable personal use copying for purposes such as research, study, criticism, and review.¹¹⁴ In the U.S., fair use plays an important role in enabling personal use copying.

A key fair use decision affecting personal use copying was *Sony Corp. of America v. Universal City Studios*.¹¹⁵ Universal sued Sony for contributory infringement because it sold Betamax video tape recorders to the public knowing or having reason to know that purchasers would make infringing copies of movies in which Universal and its co-plaintiff Disney owned copyrights.

The Supreme Court ruled against this claim because Betamax machines had substantial non-infringing uses, including copying of television programs whose rights holders did not object to this practice. The most substantial use of Betamax was taping programming for viewing at a later time. The Court ruled that time-shift copying of television programs qualified as fair use. Private noncommercial copying, the Court opined, should be presumed to be fair, a presumption that should be overcome only if there was evidence of a meaningful likelihood of harm to the market for the works.¹¹⁶ Universal had conceded that no harm had happened to date and the Court viewed its theories of future harm to be speculative.¹¹⁷ This decision took a broad view of personal use copying as fair use.¹¹⁸

Exhaustion of rights also provides some breathing room in national copyright laws for owners of copies to make a range of personal uses of protected works.¹¹⁹ Owners of copies have personal property rights that give them a measure of freedom to use the copy and share it with others. The owner can generally lend the copy to others, rent or lease it, use it as collateral for a loan, resell

¹¹² See, e.g., 17 U.S.C. §§ 106(3)-106(5). This and other lacunae in U.S. copyright law affecting personal uses are explored in Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

¹¹³ See, e.g., Copyright Law of Japan, art. 29 (personal use), 30 (private study).

¹¹⁴ See, e.g., UK Copyright, Designs, and Patents Act 1988, §§ 29-30; Australia Copyright Act of 1968, §§ 40-41.

¹¹⁵ 464 U.S. 417 (1984).

¹¹⁶ *Id.* at 451.

¹¹⁷ *Id.* at 456.

¹¹⁸ There are few private or personal fair use decisions in the U.S., owing in part to difficulties in detecting such uses and the expense of litigation compared with likely recovery if the lawsuit succeeds. In the few peer-to-peer file-sharing cases that went to trial, fair use defenses have been unavailing. See, e.g., *Capitol Records v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

¹¹⁹ See, e.g., 17 U.S.C. § 109(a); Copyright Designs and Patents Act, Section 18(3)(a) (UK); InfoSoc Directive, *supra* note 4, art. 4. See also Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067 (2012). Another special exception allows owners of copies of computer programs to sell them as long as they delete copies after the resale. 17 U.S.C. § 117(b).

it, give it away, bequeath it to heirs, and/or destroy it if he so chooses.¹²⁰ Exhaustion also entitles the owner of a copy of a work to display his copy to the public.¹²¹

National copyright laws sometimes have special L&Es that provide consumers with some latitude in their uses as to certain types of works. Many countries, for example, have special provisions that confer on owners of copies of computer programs the right to make copies necessary to use the programs, to make backup copies, and to adapt the programs as necessary to enable its use.¹²² Another example is the special U.S. exception that allows owners of buildings embodying architectural works to modify them.¹²³

D. Fulfilling Social and Cultural Policy Goals

Virtually all national copyright laws have some L&Es aimed at fulfilling certain social and cultural policy goals. Especially common are rules that enable the use of in-copyright materials in the course of face-to-face teaching in nonprofit educational institutions,¹²⁴ enable libraries and archives to reproduce works to preserve them,¹²⁵ and enable the creation of special format works so print-disabled persons can have greater access to literary works.¹²⁶

L&Es that allow teachers and students to make instructional uses of copyrighted works obviously promote societal objectives to educate students to expose them to their cultural heritage and to prepare them for their future roles as members of society. Preservation of cultural heritage ensures that future generations will have access to the cultural and intellectual artifacts of the past. Increased access for print-disabled persons allows them to participate more fully in the cultural life of their society and become more productive citizens.¹²⁷

U.S. copyright law contains an outright exemption for classroom performances and displays of in-copyright works,¹²⁸ a privilege allowing libraries and archives to make copies to preserve some in-copyright works,¹²⁹ to replace lost or damaged copies if other copies are unavailable at a reasonable price,¹³⁰ and to give to patrons for research purposes,¹³¹ as well as special rules to

¹²⁰ Under U.S. law, exhaustion does not, however, apply to copies obtained by rental, lease, or lending. 17 U.S.C. § 109(d). The lending of computer programs and sound recordings is restricted under § 109(b).

¹²¹ 17 U.S.C. § 109(c).

¹²² See, e.g., Copyright Act of Japan, art. 47ter, 47quater.

¹²³ 17 U.S.C. § 120(b).

¹²⁴ See, e.g., InfoSoc Directive, *supra* note 4, art. 5(3)(a).

¹²⁵ See, e.g., *id.*, art. 5(2)(c).

¹²⁶ See, e.g., *id.*, art. 5(3)(b).

¹²⁷ The importance of enhancing access to works by disabled persons has recently been recognized in an international treaty. See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO Doc. VIP/DC/8 Rev (June 27, 2013), available at http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf.

¹²⁸ 17 U.S.C. § 110(1).

¹²⁹ 17 U.S.C. § 108(b).

¹³⁰ 17 U.S.C. § 108(c).

¹³¹ 17 U.S.C. § 108(d).

facilitate making books and journals more accessible to print-disabled persons.¹³² Fair use sometimes complements these specific exceptions. For example, in the *HathiTrust* case, the court upheld creation of a full-text searchable database of books for purposes of preserving the books and of making them more accessible to print-disabled persons.¹³³

Among the other exemptions in U.S. law that arguably achieve social policy goals are those that exempt public performances of music and nondramatic literary works in the course of religious services¹³⁴ and during other nonprofit educational, religious, or charitable events as long as certain obligations are satisfied.¹³⁵

The 1976 Act's exemptions for religious services and charitable events are perhaps understandable given that the public performance rights under the 1909 Act had not extended to these acts or actors. Some Washington-savvy representatives of these groups must have realized that their institutions were now facing prospective liability for activities in which they had long engaged without obtaining copyright licenses. They may have found a sympathetic ear in the Register and members of Congress, emphasizing the social benefits they provide.¹³⁶

E. Enabling Public Institutions to Function

Copyright is ubiquitous under modern laws, with rights attaching automatically by operation of law to original works of authorship.¹³⁷ This means that all manner of documents—memoranda, reports, letters, outlines, photographs, just to name a few—are covered by copyrights, even if their creation was not induced by copyright incentives. Reproducing and distributing copies of these documents may be necessary for discovery proceedings in civil cases, investigations of crimes, exhibits for trials or administrative proceedings, legislative deliberations, and useful in carrying out other public institutional functions.

Many nations have special exemptions from liability for uses of in-copyright materials in investigations, adjudications, administrative proceedings and the like.¹³⁸ In the U.S., fair use once again serves this function. Courts have found fair use, for example, when police made and publicly displayed copies of photographs of a crime victim in connection with the investigation of his murder in a case in which the photographer was a suspect.¹³⁹ Fair use also shielded an investigator who took a camcorder into a movie theatre to record scenes from a sexually explicit

¹³² 17 U.S.C. § 121.

¹³³ *Authors Guild, Inc. v. HathiTrust*, -- F.3d -- (2nd Cir. 2014).

¹³⁴ 17 U.S.C. § 110(3).

¹³⁵ 17 U.S.C. § 110(4).

¹³⁶ Yet one might question whether exemptions for religious and charitable events are justifiable subsidies. After all, churches and charities have to pay for many other products and services they consume. Singing music is such a regular part of religious services that it might have seemed logical to require churches to license the performance of copyrighted music.

¹³⁷ *See, e.g.*, 17 U.S.C. § 102(a). Under U.S. law, works must be fixed in a tangible medium to be protectable. *Id.*

¹³⁸ *See, e.g.*, Copyright Act of Japan, art. 42.

¹³⁹ *Shell v. City of Radford*, 351 F. Supp. 510 (W. D. Va. 2005).

film to provide the district attorney with evidence to prove that these depictions of certain sexual acts constituted a nuisance under local laws.¹⁴⁰ Patent lawyer copying of scientific and technical articles was held fair use because it was done to fulfill obligations to disclose prior art to the U.S. Patent and Trademark Office in connection with applications for patent protection.¹⁴¹

F. Fostering Competition and Ongoing Innovation

Many national copyright laws have specific L&Es aimed at promoting competition and ongoing innovation. This explains a provision that limits the scope of U.S. copyrights in PGS works by excluding the design of any useful article depicted therein.¹⁴² If designs of useful articles are depicted in copyrighted drawings, they are free for competitive copying and for ongoing innovation unless patented.¹⁴³

Some nations have adopted specific exceptions to permit computer programs to be reverse engineered when necessary to enable software engineers to extract information needed to create a second program that will successfully interoperate with an existing program.¹⁴⁴

Without a reverse engineering privilege, the developer of a first program would have complete control over who could make a computer program that would compete with applications either developed by that firm or by its licensees. The developer of the first program would also be able to block the development of innovative follow-on programs.

The fair use doctrine in the U.S. has allowed unauthorized persons to reverse engineer computer program code when this results in the creation of a non-infringing program. The principal U.S. case is *Sega Enterprises Ltd. v. Accolade, Inc.*¹⁴⁵ Accolade had developed videogames for PCs, but wanted to adapt its games so they could be played on the popular Sega platform. Accolade bought copies of Sega games and reverse engineered them to discern the interface information it would need to create a version of its games that would interoperate with the Sega system.

The Ninth Circuit Court of Appeals ruled that Accolade's purpose favored fair use because its goal was to extract information from the Sega programs to enable it to make a non-infringing interoperable program. The nature of the copyrighted works favored fair use because programs are functional works that do not reveal the unprotectable information they embody and reverse engineering was sometimes the only way to get that information. Although Accolade's copying was substantial, the copying was only intermediate (that is, part of the development process, not

¹⁴⁰ *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

¹⁴¹ *See, e.g., American Institute of Physics v. Schwegeman, Lundberg, & Woessner P.A.*, 2013 WL 4666330 (D. Minn. 2013).

¹⁴² 17 U.S.C. § 113(b).

¹⁴³ *See, e.g., Ralph S. Brown, Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985).

¹⁴⁴ *See, e.g., Directive 2009/24/EC of the European Parliament and of the Council on the Legal Protection of Computer Programs*, art. 6, L 111/16 O.J. 5.5.2009.

¹⁴⁵ 977 F.2d 1510 (9th Cir. 1992).

in the final product). Accolade games did not supplant market demand for Sega games, but merely competed on the merits with the Sega games. The court recognized the importance of allowing developers to offer consumers more choices among products.

Another competition and innovation fair use case was *Lewis Galoob Toys v. Nintendo of America*.¹⁴⁶ Galoob sold an add-on program called the Game Genie that allowed owners of videogames for the Nintendo platform to change temporarily the play of those games (e.g., increasing the number of lives of certain characters). Galoob asked a court to declare that its sale of Game Genies was non-infringing. The Ninth Circuit questioned whether use of the Game Genie created infringing derivative works, but even if so, this was fair use because it did not supplant demand for Nintendo games. This ruling freed others to develop add-on programs.¹⁴⁷

Galoob was the main precedent on which ClearPlay relied to justify its development of software that enabled owners of DVD movies to block violent, sexually explicit, or offensive parts of the movies to make them more “family-friendly.”¹⁴⁸ Before a court ruling on the claim that this software infringed the derivative work right, Congress enacted an L&E to enable the development of this type of software.¹⁴⁹

Two other competition-promoting specific L&E in U.S. law are those that allow copying of computer programs in the process of repairing computers and performance of music in stores where recordings are sold for the purpose of aiding retail sales of the recordings.¹⁵⁰

G. Accommodating Incidental Uses

It is sometimes necessary to make copies of copyrighted works in order to carry out legitimate functions. National copyright laws often recognize this through specific exceptions. One example in the 1976 Act is the ephemeral recording exception adopted at the behest of broadcast television operators.¹⁵¹ Broadcasters often make ephemeral copies of programs so the programs can be broadcasted at a later time. As long as such copies are retained only for archival purposes

¹⁴⁶ 964 F.2d 965 (9th Cir. 1992).

¹⁴⁷ Another competition-fostering fair use involved the use of copyrighted images in advertising. Sony Entertainment once claimed that the developer of a program that emulated the functions of Sony’s PlayStation platform infringed copyright by publishing ads featuring screen shots of Sony games on its platform. The court found the advertising use to be fair. *Sony Entm’t America Inc. v. Bleem LLC*, 214 F.3d 1022 (9th Cir. 2002).

¹⁴⁸ *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Filed Aug. 19, 2002). This exception does not extend to editing offensive materials out of the DVD movies. See *Clean Flicks of Colo. v. Soderburgh*, 433 F. Supp.2d 1236 (D. Colo. 2006).

¹⁴⁹ 17 U.S.C. § 110(11). This exception concomitantly serves the autonomy interests of owners of DVDs to watch movies in a manner that suits their tastes and preferences.

¹⁵⁰ 17 U.S.C. §§ 110(7), 117(c). The latter provision legislatively overturned the ruling in *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), which held that making RAM copies in the course of repairing a computer infringed copyrights in the programs.

¹⁵¹ 17 U.S.C. § 112(a). The Berne Convention recognizes ephemeral broadcast copying as legitimate conduct to exempt from copyright liability. Berne Convention, *supra* note 80, art. 11bis.

and used solely by the transmitting broadcaster, they lack a separate economic significance that would warrant imposition of copyright liability.

Another example is a common exception permitting owners of computer programs to make copies essential to the utilization of the programs.¹⁵² It is impossible to use a program without the computer itself making numerous copies in the course of use. These copies are incidental to the normal operation of the program. It would make no sense to say that individuals or firms must pay once to obtain a copy of the program and then pay again to make copies necessary to use it.

The European InfoSoc Directive recognizes that incidental copies made of digital works lack independent economic significance; it mandates that these incidental copies be exempted from copyright liability.¹⁵³ There is, interestingly enough, no equivalent provision in U.S. law. As a result, making incidental copies of music, photos, and texts when playing or viewing them on one's computer might seem to implicate the reproduction right because there is no statutory safe harbor for this activity akin to that created for computer programs. Fair use (or implied license) would almost certainly fill the gap for the missing equivalent to the software utilization exception. The Copyright Office has recently suggested that a more general incidental copying privilege should be given serious consideration.¹⁵⁴

H. Aiming to Cure Market Failures

Copyright markets can fail to form or be dysfunctional for a number of reasons.¹⁵⁵ The transaction costs of negotiating licenses on a work-by-work and rightsholder-by-rightsholder basis may, for instance, be prohibitive. Market power of some players in certain industry sectors can make it difficult or impossible to achieve or approximate competitive market pricing. Regulatory interventions intended to achieve certain goals in an industry sector can, as a byproduct, create barriers to attaining competitive market results. Holdup problems or other factors may make certain industry players unwilling to license uses on terms that other players deem reasonable.

Compulsory licensing has been a frequent tool to resolve market failures in copyright industry sectors. Some copyright exemptions may also be due, in whole or in part, to market failure considerations.

The first compulsory license in U.S. copyright law allowed anyone to make a mechanical reproduction of a musical composition after the first authorized sound recording of that music.¹⁵⁶

¹⁵² 117 U.S.C. § 117(a). Fair use also sometimes privileges incidental uses of copyrighted works. *See, e.g.*, Italian Book Corp. v. Am. Broad. Co., 458 F. Supp. 65 (S.D.N.Y. 1978) (incidental capture of music in news coverage of parade).

¹⁵³ InfoSoc Directive, *supra* note 4, art. 5(1).

¹⁵⁴ Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315, 325-26 (2013).

¹⁵⁵ *See, e.g.*, Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COP. SOC'Y 149 (2003) (discussing variety of reasons why copyright markets may fail).

¹⁵⁶ *See supra* note 33 and accompanying text.

This license was created out of fear of monopoly control of the sound recording market.¹⁵⁷ This fear arose because while the courts in the early 1900s were struggling over whether the unauthorized manufacture and sale of piano rolls infringed music copyrights,¹⁵⁸ the Aeolian Co. was quietly buying up exclusive licenses to make sound recordings of popular music. Aeolian wanted to be the only firm that could make sound recordings of popular music.

After the Supreme Court ruled that piano rolls were not copies of music under then-existing law, it was almost inevitable that Congress would be asked to expand the exclusive rights of composers to control mechanical reproductions of their works. But as this was under consideration, there was great concern about the competitive impact of Aeolian's exclusive licensing project. Adoption of a compulsory license made it possible for firms other than Aeolian to participate in the piano roll market as long as they provided statutorily prescribed compensation to rights holders for the music they recorded. Piano rolls were the first of many sound recordings that have been subject to this compulsory license.

By 1961, monopoly concerns no longer justified the existence of this compulsory license, which is why the Register of Copyrights called for its abolition in the first stage of the copyright revision process.¹⁵⁹ However, stable industry practices had grown up around the license, and so in 1965, the Register changed his mind about the desirability of repealing it.¹⁶⁰ The compulsory license needed some adjustments, however, to make it fairer and less cumbersome.¹⁶¹

In addition to retaining the compulsory license for sound recordings of music, Congress created three new ones in the 1976 Act. One required jukebox operators to pay an annual relatively small flat fee for public performances of musical works for each such machine on their premises.¹⁶² A second benefited public broadcasters. Proponents used market failure arguments in support of this license, saying it was necessary to overcome a multitude of administratively cumbersome and very costly rights clearance problems that, left unchecked, would impair the vitality of public broadcasting.¹⁶³ A third resolved a longstanding bitter dispute between broadcasters and cable television systems.

¹⁵⁷ REGISTER'S 1961 REPORT, *supra* note 35, at 32-36.

¹⁵⁸ *See, e.g.,* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

¹⁵⁹ REGISTER'S 1961 REPORT, *supra* note 35, at 32-36.

¹⁶⁰ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 40, at 53-54.

¹⁶¹ *Id.* at 53-59. The 1976 Act reduced some administrative burdens the 1909 Act license had imposed and increased the fixed rate for the license. H.R. REP. NO. 94-1476, *supra* note 48, at 107-11.

¹⁶² 17 U.S.C. § 116. The House Report did not directly invoke market failure as a rationale for this license, although it noted that "the whole structure of the jukebox industry has been based on the existence of the copyright exemption" the industry enjoyed under the 1909 Act. H.R. REP. NO. 94-1476, *supra* note 48, at 113. That license is no longer in effect, however, because after the U.S. joined the Berne Convention in 1989, Congress amended the 1976 Act to encourage voluntary negotiations for jukebox licenses with a proviso that Copyright Royalty judges could step in as needed if voluntary negotiations failed.

¹⁶³ H.R. REP. NO. 94-1476, *supra* note 48, at 116-17.

During the copyright revision process, broadcasters brought two lawsuits challenging cable television retransmissions of television programs. They complained that cable systems were making significant amounts of money for retransmitting broadcast programs and paying nothing for that privilege.¹⁶⁴ The Supreme Court twice ruled that the public performances right under the 1909 Act did not extend to passive retransmission of the broadcast programs by cable systems.¹⁶⁵

The highest priority for the broadcast industry in the copyright revision process was to ensure that cable retransmissions of broadcast programs would be covered by the public performance right under the new act. The Register supported this proposal in 1965.¹⁶⁶ However, “full scale verbal warfare” broke out in response to bills to codify this position in 1967.¹⁶⁷ The failure of the copyright revision legislation that year was largely owing to this unresolved controversy.¹⁶⁸

Complicating a resolution of the broadcaster-cable system copyright dispute was the important role that the Federal Communications Commission (FCC) played in regulating broadcasters. Initially the FCC had declined to exercise jurisdiction over cable television because it did not perceive cable systems to threaten the viability of the broadcast industry.¹⁶⁹ By the mid-1960s, as cable systems grew larger and more robust, the FCC decided they did pose a threat to broadcasting. The FCC issued a rule forbidding cable systems operating in the 100 largest television markets from importing distant signals unless they satisfied some stiff evidentiary requirements (which almost none undertook).¹⁷⁰ Then in the early 1970s, the FCC required cable systems to transmit broadcast signals from local stations to their customers and set limits on the number of distant signals cable systems could import, as well as specifying conditions under which cable systems could import these signals.¹⁷¹

The FCC’s intensive regulation of cable retransmissions of broadcast signals complicated the task of figuring out reasonable royalties and other terms because arms-length voluntary deals between broadcasters and cable systems on price and other terms was implausible given the “must carry” rules. Requiring each of the nearly then-existing 3500 cable systems to negotiate

¹⁶⁴ By 1976, there were approximately 3500 cable operators in 7700 communities, reaching 10.8 million homes, and earning revenues of almost \$770 million. H.R. REP. NO. 94-1476, *supra* note 48, at 88.

¹⁶⁵ *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

¹⁶⁶ REGISTER’S SUPPLEMENTARY REPORT, *supra* note 40, at 40-42.

¹⁶⁷ U.S. COPYRIGHT OFFICE, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL 122 (1975) [hereinafter REGISTER’S SECOND SUPPLEMENTARY REPORT].

¹⁶⁸ H.R. REP. NO. 94-1476, *supra* note 48, at 89.

¹⁶⁹ *CATV and TV Repeater Services*, 26 F.C.C. 403, 431. (1959).

¹⁷⁰ See REGISTER’S SECOND SUPPLEMENTARY REPORT, *supra* note 167, at 132-33. The cable industry had earlier challenged FCC’s jurisdiction to regulate the cable industry. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholding the FCC’s jurisdiction over cable television insofar as it was “reasonably ancillary” to its jurisdiction over broadcast television).

¹⁷¹ In the early 1990s, the “must carry” rules were codified at 47 U.S.C. §§ 534-35. Cable industry firms unsuccessfully challenged the “must carry” rules as a violation of their First Amendment-protected editorial judgments. See *Turner Broadcasting System, Inc., v. FCC*, 520 U.S. 180 (1997).

licenses with every rights holder of every protected work broadcast on television would be prohibitively expensive. A compulsory license thus seemed to be necessary to facilitate authorized uses.¹⁷²

In the end, an extremely complex inter-industry negotiation resulted in the nearly incomprehensible compulsory license provision embedded in the 1976 Act establishing the compensation framework that is still in effect today.¹⁷³

Three other compulsory licenses have been created in the years following the 1976 Act: two affecting satellite transmission of broadcast signals and one affecting webcasters. The satellite transmission compulsory licenses are very similar to the cable compulsory license adopted in 1976.¹⁷⁴ The prohibitively high transaction cost of negotiating with all possible rights holders was the main rationale for the creation of a compulsory license for webcasting.¹⁷⁵

Compulsory licenses are not the only way to address copyright market failures. Several of the outright exemptions from liability in U.S. law may partially be explained by market failure considerations. For example, the U.S. exception that allows authorized entities to make and distribute copies of literary works in special formats for blind persons is justifiable not just because of a social policy to aid disabled persons, but also because markets for special format works are so small that publishers rarely serve those markets.¹⁷⁶

Some U.S. exemptions may be attributable to the lack of an institutional infrastructure akin to collecting societies in Europe which license a wide range of nonprofit as well as commercial uses of literary and other works.¹⁷⁷ Without a one-stop-shop, low-cost licensing entity able to grant permission to copy and distribute large numbers of works owned by large numbers of rights holders, markets may fail to form. Outright exceptions may thus be justifiable to enable some socially desirable uses for which markets cannot effectively and efficiently operate.

I. Enabling Politically Expedient Outcomes

Legislatures sometimes enact L&Es based less on principle than on political expediency. One example from the legislative history of the 1976 Act was the Register's explanation for why sound recordings should not have public performance rights. The Register regarded this issue as so "explosively controversial" that "the chances of [the] passage [of the general revision bill]

¹⁷² Elements of the consensus finally achieved to resolve the cable-broadcast television controversy, including the compulsory license, are set forth in the REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 167, at 134-37.

¹⁷³ 17 U.S.C. § 111.

¹⁷⁴ See, e.g., Rob Frieden, *Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 MEDIA L. & POL'Y 230 (2006).

¹⁷⁵ See, e.g., Amy Duvall, *Note, Royalty Rate-Setting for Webcasters: A Royal(ty) Mess*, 15 MICH. TELECOMM. & TECH. L. REV. 267 (2008).

¹⁷⁶ 17 U.S.C. § 121. Senator Chafee noted the reluctance of publishers to produce special format works in his remarks in support of this legislation. See 142 Cong. Rec. S9066 (Chafee's statements).

¹⁷⁷ See, e.g., COLLECTIVE MANAGEMENT OF COPYRIGHTS AND RELATED RIGHTS (Daniel Gervais ed., 2d ed. 2010).

would be seriously impaired” if it included any proposal for a public performance right for sound recordings.¹⁷⁸ Broadcasters and owners of music copyrights opposed the grant of such a right.¹⁷⁹

Radio and television stations had, of course, played recorded music for decades without paying royalties to makers of the recordings because prior to 1972 sound recordings did not enjoy copyright or any other intellectual property protection in the U.S.¹⁸⁰ On purely utilitarian grounds, nonpayment of royalties to sound recording companies could be justified because broadcasts of music were like free advertising for the recordings. People who heard songs from the latest Beatles album on the radio were likely to go out to buy the album. (Indeed, sound recording companies sometimes paid broadcasters to play recordings to boost their popularity, a practice that was only legal if the radio station announced that it had taken money to play the music, which DJs did not always do.) Sound recordings that became “hits” on the radio were also in demand for jukeboxes.

Broadcasters were understandably not keen to support legislation that would cut into their revenue streams. After all, they were already paying hefty sums to ASCAP and BMI for licenses to broadcast musical compositions.

Composers, music publishers, and other copyright owners in musical works were even stronger objectors to public performance rights for sound recordings.¹⁸¹ These rights holders were miffed because sound recording companies had long benefited at their expense from the low fixed rate (2 cents per record) for the compulsory license fee for recorded music. Music copyright owners feared that broadcasters would demand lower payments for licensing music rights if they now had to pay royalties for public performances of sound recordings. Broadcasters could not easily pass on higher costs to consumers if required to pay royalties to both composers and sound recording companies. Broadcasters were, after all, transmitting music over the public airwaves for free, and advertisers were likely to balk at higher rates.

The politically expedient compromise that ensued granted makers of sound recordings copyright control over reproductions and distributions of the recordings, but not over public performances.¹⁸² Similarly politically expedient were the compulsory license compromises for cable retransmissions of broadcast programming and for jukebox operators who had threatened

¹⁷⁸ REGISTER’S SUPPLEMENTARY REPORT, *supra* note 39, at 51-52. Yet, S. 543, 91st Cong., 1st Sess. (1969) would have granted a public performance right to sound recordings; however, this provision was omitted in S. 22, 94th Cong., 1st Sess. (1975).

¹⁷⁹ REGISTER’S SUPPLEMENTARY REPORT, *supra* note 39, at 50-51.

¹⁸⁰ Some state laws and judicial decisions had provided legal protection against counterfeit recordings, but these laws and decisions did not confer public performance rights. *See, e.g.*, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 20-49 (2011).

¹⁸¹ REGISTER’S SUPPLEMENTARY REPORT, *supra* note 40, at 51.

¹⁸² The recording industry has continued to lobby for full public performance rights, but has yet to attain them. The U.S. Copyright Office has endorsed a general grant of public performance rights in sound recordings. *See* Pallante, *supra* note 154, at 324. However, sound recording copyright owners now enjoy only an exclusive right to control digital audio transmissions of their works. 17 U.S.C. § 106(6).

to stymie the general copyright revision process unless they either retained their exemption or got a compulsory license.¹⁸³

Among the other special L&Es in U.S. law that seem more the product of political expediency than of principle are the exemptions in the 1976 Act that allow governments and nonprofit agricultural and horticultural fairs to perform copyrighted music without a license.¹⁸⁴ Why do these groups have exemptions, but not other socially beneficial users and uses, such as Girl Scouts singing “Kumbaya” at their gatherings?¹⁸⁵

Nonprofit veterans’ and fraternal organizations also have an exemption allowing them to perform nondramatic literary works and music without a license at social functions.¹⁸⁶ This privilege does not, however, apply to college fraternity or sorority social functions. Why are the social functions of Shriners and Elks clubs, whose membership consists largely of middleclass employed adults, more deserving of copyright exemptions than social functions of Alpha Tau Omega, whose membership consists of mostly unemployed college kids?

If there is a principled basis for the strange pattern of exclusions and non-exclusions in U.S. copyright law, it is not apparent.

IV. Justifications for Flexible, Open-ended Exceptions

Flexible, open-ended exceptions have historically been an anathema in civil law jurisdictions. The civil law tradition in Europe, which has influenced much of the rest of the world, has

¹⁸³ This threat was real because jukebox operators lived in virtually every Congressional district and their owners were hopping mad about the proposed repeal of their exemption. The Register thought it would be “tragic” if their opposition would “cause the complete failure of a general revision bill that is urgently needed in the public and national interest.” Yet, it would also be “deplorable” not to require jukebox operators to pay performance royalties. REGISTER’S SUPPLEMENTARY REPORT, *supra* note 40, at 60. A compulsory license at a low fixed rate per machine was the politically expedient way to resolve this controversy.

¹⁸⁴ 17 U.S.C. § 110(6). Hugenholtz once identified this exception as the product of lobbying, not of principle. Hugenholtz, *supra* note 4, at 1. He is correct that this exemption was the product of lobbying by associations representing agricultural fairs. One proponent emphasized the nonprofit educational purposes of these fairs, noting that the fairs funded programs for young people and for farmers to learn how to raise better livestock. Forcing fairs to pay copyright fees would, proponents said, threaten their existence. *Hearings Pursuant to S. Res. 37 on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary Part 3, 90th Cong., 1st Sess. 779-81 (1967)*.

¹⁸⁵ ASCAP has sometimes gone after Girl Scouts for unlicensed public performances of music. See, e.g., Julien H. Collins III, *When In Doubt, Do Without: Licensing Public Performances by Nonprofit Camping or Volunteer Service Organizations Under Federal Copyright Law*, 75 WASH. U. L. Q. 1277 (1997) (proposing a new exemption for this kind of activity).

¹⁸⁶ 17 U.S.C. § 110(10). In lobbying for this L&E, the American Legion, the Veterans of Foreign Wars, and the Shriners argued that they were as deserving of an exemption as agricultural fairs because they supported youth programs, scholarships, mental health programs, the Red Cross, and cancer research. Any funds that went to pay copyright royalties would reduce the amounts these organizations could use to support these worthy causes. *Hearings on S. 2082 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 96th Cong. 23-27 (1980)*. The American Legion reported that it was at the “top of the collection list” for music licensing and had been unable to reach an acceptable agreement with ASCAP. *Id.* at 27.

assumed that legislators can and should make comprehensive laws that take account of all use-cases that the law should address.¹⁸⁷ This explains the myriad specific L&Es that are often found in national copyright laws.¹⁸⁸ These L&Es recognize that authors need to be able take some expression from existing works to create critical commentaries, parodies, and biographies; newspapers need to quote from political speeches and reports on issues of the day; teachers need to use works to illustrate lessons for students; libraries and archives need to copy materials for preservation purposes; and lawyers and judges need to make copies of documents as evidence.¹⁸⁹ It is eminently reasonable to adopt specific L&Es to deal with stable uses that legislatures can anticipate, but it is not really possible for legislators to foresee and account for all possible uses of in-copyright works, especially in a time of rapid technological change.¹⁹⁰

The U.S. Congress has been much more comfortable with fair use as a flexible, open-ended limit on copyright, which gives courts discretion to evolve the law in keeping with the long-standing American common law tradition. The legislative history of the 1976 Act characterized this doctrine as “one of the most important and well-established limits” on copyright with an “ample caselaw” applying it,¹⁹¹ and recounted other examples of uses that should be fair.¹⁹²

In keeping with precedents that had applied the fair use doctrine prior to its statutory codification, Congress provided guidance by setting forth four factors that courts should weigh together in making determinations about whether a challenged use was fair or foul. These include: the purpose of the challenged use, the nature of the copyrighted work, the amount and substantiality of the taking, and the harm likely to be caused to the market for the work.¹⁹³

Although some American and European commentators complain that fair use is unpredictable,¹⁹⁴ others have demonstrated empirically that fair use cases tend to fall into fairly predictable patterns.¹⁹⁵ Uses tend to be fair if the amount taken was reasonable in light of the challenged user’s purpose and the use did not cause measurable harm to the market.¹⁹⁶

¹⁸⁷ Flexibilities in European national copyright laws are discussed *infra* Part IV.B.

¹⁸⁸ Dutch copyright law, for instance, has 75 specific L&Es. See P.BERNT HUGENHOLTZ & MARTIN R.F. SENFTLEBEN, FAIR USE IN EUROPE: IN SEARCH OF FLEXIBILITIES 6 (Nov. 2011), available at <http://www.ivir.nl/publications/hughholtz/Fair%20Use%20Report%20PUB.pdf>. Some common law countries (Canada, for example) have fairly long lists of specific L&Es as well. See, e.g., Copyright Act of Canada (R.S.C., 1985, c. C-42), arts. 29-32.2.

¹⁸⁹ See, e.g., InfoSoc Directive, *supra* note 4, art. 5.

¹⁹⁰ Congress recognized the need for fair use as a copyright doctrine to provide flexibility in an era of rapid technological change. See H.R. REP. NO. 94-1476, *supra* note 48, at 66. The need for flexibility in copyright law for an “information society of highly dynamic and unpredictable change” is now recognized in Europe as well. See, e.g., HUGENHOLTZ & SENFTLEBEN, *supra* note 188, at 1-2.

¹⁹¹ H.R. REP. NO. 94-1476, *supra* note 48, at 65.

¹⁹² *Id.* at 65-66.

¹⁹³ *Id.*, now codified as 17 U.S.C. § 107.

¹⁹⁴ See, e.g., David Nimmer, “Fairest of Them All” and Other Fairy Tales of Fair Use 269, LAW & CONTEMP. PROBS. (Winter/Spring 2003).

¹⁹⁵ See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*,

A flexible, open-ended copyright limit like fair use has a distinct advantage over specific L&Es in an era of rapid technological change because it provides a framework within which courts can balance interests of copyright owners, of developers of new technologies or services, and of the public to decide whether a new use is or is not, on balance, harmful in ways that copyright laws are intended to address. Over time, a pattern of decisions or best practices guidelines can provide a reasonable degree of predictability about the scope of the flexible limit.¹⁹⁷

This Part explains how the fair use doctrine has accomplished this and other purposes in the United States. It also discusses ways that nations can achieve some flexibility and open-endedness in their copyright laws without adopting fair use as a limitation on copyright. These alternatives may be more suitable to civil law countries.

A. Fair Use Provides Flexibility in U.S. Copyright Law

Fair use mediates tensions that arise in many new technology cases in the U.S. nowadays, but this was not its original purpose. Fair use initially evolved as a limit on the scope of U.S. copyright law principally to balance competing interests in cases in which second comers made productive uses of a first author's work in creating a new one. In the last forty years, however, fair use has taken on an increasingly important role in enabling copyright law to adapt to new technological challenges not contemplated by the legislature.

Williams & Wilkins v. U.S. was arguably the first such case.¹⁹⁸ This publisher challenged the photocopying policy of the NIH library under which librarians made single copies of scientific research articles at the request of patrons. Photocopy machines did not exist in the time of the 1909 Act, but once these machines came into widespread use, the question arose whether using them to make single copies of in-copyright materials for research purposes was infringement. The NIH and many researchers likened this to the hand-copying of passages from books and articles that had long been thought fair. *Williams & Wilkins* insisted that the copies were not fair use because they were unproductive and harming the emergence of a market for licensing such use.

Under current law, NIH-like library photocopying is exempt under a specific subsection of the U.S. library exception and some educational use photocopying is unquestionably fair use.¹⁹⁹ But photocopying of articles for a commercial firm's scientific research was held to be unfair in

156 U. PENN. L. REV., 549 (2008); Samuelson, *supra* note 76.

¹⁹⁶ See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁹⁷ See, e.g., Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Uses*, CARDOZO ARTS & ENT. L. J. (forthcoming 2014).

¹⁹⁸ The *Fortnightly* case, which predates *Williams & Wilkins*, involved a new technological use of copyrighted works, but it concerned whether the retransmission of broadcast signals fell within the public performance right, not fair use. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

¹⁹⁹ Photocopying within the Classroom Guidelines, discussed *supra* note 72, is unquestionably fair. Library photocopying of single articles for patrons is privileged by 17 U.S.C. § 108(d).

American Geophysical Union v. Texaco, Inc.²⁰⁰ An important changed circumstance that cut against fair use in *Texaco* was the availability of licenses for photocopying from a new collecting society, the Copyright Clearance Center.

Sony v. Universal was the first case to test whether copyright owners could stop the distribution of a technology that consumers could use to make infringing copies of in-copyright works.²⁰¹ Fair use played a key role in resolving this dispute. Universal claimed that Sony was a contributory infringer because it sold Betamax machines knowing or having reason to know that consumers would use them to make infringing copies of television programs. But the Court thought otherwise:

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, or have enacted a flat prohibition against the sale of machines that make such copying possible.²⁰²

The Court noted that most owners of Betamax machines used them to make private noncommercial copies of television programs shown on public airwaves for free for time-shifting purposes. Because Universal offered only speculative theories about harm to its markets, the Court ruled that this time-shifting was fair use, saying:

[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.²⁰³

The Court ruled that consumers had legitimate interests in getting access to Betamax machines for their non-infringing uses.

The *Sony* decision is widely understood as having established a “safe harbor” for technologies with substantial non-infringing uses, insulating their makers from infringement lawsuits (in the absence of evidence that the makers were inducing users to infringe).²⁰⁴ This safe harbor has been an important shield against liability for the makers of many innovative information technologies, including iPods, MP3 players, scanners, and digital video recorders.

²⁰⁰ 60 F.3d 913 (2d Cir. 1994). See also *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (photocopying of in-copyright materials for educational coursepacks held unfair because licenses available from CCC).

²⁰¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁰² *Id.* at 456.

²⁰³ *Id.* at 450-451.

²⁰⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (reaffirming the safe harbor but holding that it does not shield those who induce infringement).

The *Sony* decision can also be credited with laying the conceptual groundwork for numerous other judicial decisions in new technology cases.²⁰⁵ It was, for instance, an important precedent that helped to resolve several other controversies, such as reverse engineering of computer programs to extract interface information necessary for compatibility,²⁰⁶ search engine copying of images on the Internet,²⁰⁷ and mass digitization of books from research library collections to make a full-text searchable database.²⁰⁸ It is no wonder, then, that some commentators consider fair use to be an important part of copyright's innovation policy.²⁰⁹

Fair use has other advantages as well. For one thing, it is a concept that ordinary people can understand. By learning about fair and unfair uses, people can adapt their behavior to conform to the fair ones. For another, fair use can avert a proliferation of specific exemptions that can make copyright laws read like the tax code. Most non-professional users of copyrighted works do not have the diligence or patience to wade through a long motley list of exceptions to find one that arguably applies to the specific activity in which they are engaged. Most users can, however, ask themselves a set of questions that will help them make fair use judgment (such as "is what I took from an author's work reasonable in light of my purpose for doing so, and how much (if any) harm might this cause to the copyright owner?"). Finally, fair use engenders respect for copyright law, for it avoids the rigidity that grants of exceptionally broad rights, tempered only by a few narrow exceptions, can cause.

Most jurisdictions do not, for example, have a noncommercial user-generated content (UGC) exception to allow remixes and mashups, even though this is a common form of creative expression among the young.²¹⁰ To leave UGC in copyright legal limbo is unwise. Fair use generally resolves UGC issues in U.S. law. In the current era, when copyright touches the lives of virtually everyone, it is important that copyright rules are worthy of the public's respect.

Interest in fair use as a limit on the exclusive rights of copyright has been increasing in the past decade. Fair use has been adopted in a number of national copyright laws, including in Israel, Taiwan, and Korea.²¹¹ Canada's fair dealing provision has been amended to give it greater

²⁰⁵ See, e.g., Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *FORDHAM L. REV.* 1831 (2006). Especially important has been *Sony's* recognition that copying the whole work does not preclude a finding of fair use and that when the statute is ambiguous, courts should be guided by the constitutional purposes of copyright. *Id.* at 1866.

²⁰⁶ *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

²⁰⁷ *Perfect 10, Inc. v. Amazon.com.*, 508 F.3d 1146 (9th Cir. 2007).

²⁰⁸ *Authors Guild, Inc. v. HathiTrust*, -- F.3d -- (2d Cir. 2014).

²⁰⁹ See, e.g., Fred von Lohmann, *Fair Use as Innovation Policy*, 23 *BERKELEY TECH. L.J.* 829 (2008). See also THOMAS ROGERS & ANDREW SZAMOSZEGI, *FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTIONS OF INDUSTRIES RELYING ON FAIR USE* (CCIA, 2011).

²¹⁰ Canada recently adopted a special exception to allow noncommercial UGC. See, e.g., Daniel Gervais, *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32* at 465-69 in *FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA* (Daniel Gervais, ed. 2010).

²¹¹ JONATHAN BAND & JONATHAN GERAFI, *THE FAIR USE/FAIR DEALING HANDBOOK* (May 2013).

flexibility so that it now resembles the U.S. fair use doctrine.²¹² Australia is considering adoption of a U.S.-style fair use provision.²¹³ The Dutch Parliament has expressed interest in fair use.²¹⁴ The European Commission's recent consultation paper has asked whether Europe needs a U.S.-style fair use provision or some other mechanism to provide greater flexibility in member state copyright laws.²¹⁵ Neelie Kroes, the Vice President of the European Commission, has urged that copyright laws in Europe be reformed to enable more flexibility in their application.²¹⁶

B. Other Ways to Achieve Flexibility

Fair use is, of course, not the only way that copyright laws can become more flexible. European copyright experts have proposed several ways to achieve this goal. The Wittem Project's model European Copyright Code, for instance, identifies twenty or so specific exceptions that such a code should embody, and then offers an open-ended exception to allow other analogous uses to be deemed non-infringing.²¹⁷

In an independent report prepared for the UK Intellectual Property Office, Professor Hargreaves recommended that the UK adopt a flexible copyright limitation designed "to accommodate future technological change where it does not threaten copyright owner."²¹⁸

Professors Hugenholtz and Senftleben have stated that "[t]he need for more openness in copyright law is almost self-evident in this information society of highly dynamic and unpredictable change."²¹⁹ These authors believe that there is already considerable flexibility built into existing European copyright rules.²²⁰ For instance, the InfoSoc Directive's list of permissible exceptions provides considerable room for member states to craft flexible rules for a wide range of activities.²²¹ Some European decisions have reached flexible results in Internet search engine cases, either by applying the fair quotation exception in a creative way or by relying upon a concept of implied consent.²²² Flexibility can also be achieved if courts rule

²¹² See, e.g., Michael Geist, *Fairness Found: How Canada Quietly Shifted From Fair Dealing to Fair Use* in *THE COPYRIGHT PENTAGON: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* (Michael Geist, ed. 2013), <http://www.michaelgeist.ca/2012/07/canada-now-fair-use/>.

²¹³ AUSTRALIA LAW REFORM COMMISSION, *COPYRIGHT AND THE DIGITAL ECONOMY: DISCUSSION PAPER*, Chap. 4 (DP 79), 5 June 2013, available at <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79/4-case-fair-use-australia>.

²¹⁴ HUGENHOLTZ & SENFTLEBEN, *supra* note 188, at 8, n. 19.

²¹⁵ EUROPEAN COMMISSION, *A PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES*, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.

²¹⁶ Neelie Kroes, *Reform of EU Copyright Rules: Your Chance to Give Your Views!* (Jan. 9, 2014), http://ec.europa.eu/commission_2010-2014/kroes/en/content/reform-eu-copyright-rules-your-chance-give-your-views.

²¹⁷ WITTEM PROJECT, *supra* note 3, art. 5.

²¹⁸ IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 5 (May 2011).

²¹⁹ HUGENHOLTZ & SENFTLEBEN, *supra* note 188, at 2.

²²⁰ *Id.*, Chap. 4.1.

²²¹ *Id.* at 14-16. Sweden, for instance, has a relatively open-ended fair quotation rule.

²²² *Id.* at 15-16.

against infringement claims when defendants are engaged in acts that would be lawful if done with analog products.²²³ External doctrines such as freedom of expression may also provide flexibility in applying copyright law in Europe.²²⁴

Some European scholars have proposed reconceptualizing the so-called “three step test” as a way to achieve copyright flexibilities.²²⁵ The first step of this test calls for identifying the particular purpose the L&E serves (that is, “certain special cases”); the second step inquires whether the L&E would conflict with a normal exploitation of the work; and the third step considers whether the L&E would unreasonably prejudice legitimate interests of the rights holder.²²⁶

These scholars explain that the drafting history of the three-step test “demonstrate[s] that [the test] was intended to serve as a flexible balancing tool offering national policy makers sufficient breathing space to satisfy economic, social and cultural needs.”²²⁷ The three-step test has some parallels to the U.S. fair use doctrine because its elements too are abstract concepts and because purpose, market harm, and other legitimate interests are to be taken account in assessing whether the three-step test is satisfied.²²⁸ Thus, application of the three-step test could be a treaty-compliant way to achieve flexibility in European copyright laws.²²⁹

V. Conclusion

Surprisingly little attention has been paid in the scholarly literature to the policy justifications for the wide range of L&Es set forth in national copyright laws.²³⁰ This essay has sought to fill this gap in the literature.

It has explained how U.S. copyright law evolved to create a substantial number of very specific L&Es to achieve certain social policy goals and to address particular industry needs. It has identified nine principled justifications for adoption of these L&Es, but recognized that some

²²³ *Id.* at 23-24.

²²⁴ *Id.* at 25-26.

²²⁵ Christophe Geiger, Daniel Gervais, & Martin Sentfleben, *The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, PIJIP Research Paper No. 2013-4 (2013), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=research>.

²²⁶ Berne Convention, *supra* note 80, Art. 9(2).

²²⁷ Geiger et al., *supra* note 225, at 3.

²²⁸ *Id.* at 31-32.

²²⁹ There is some debate about whether open-ended flexible L&Es are compliant with international treaty obligations. Some scholars assert that they are. *See, e.g.*, Geiger et al., *supra* note 225. Others have been more skeptical about this conclusion. *See, e.g.*, Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. L. & ARTS 75 (2000). Because fair uses tend to follow into fairly predictable patterns of policy relevant clusters, *see, e.g.*, Samuelson, *supra* note 76, the “certain special cases” requirement would seem to be satisfied. A use is unlikely to be fair if it would conflict with a normal exploitation of the work or otherwise unreasonably interfere with legitimate interests of rights holders.

²³⁰ A rare exception is SAM RICKETSON, WIPO STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT (2003), available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805. This study assesses the compatibility of several types of L&Es with the three step test.

L&Es have been adopted more out of political expediency than out of principle. It has explained why fair use became a flexible open-ended limit on copyright law in the U.S. to balance interests of copyright owners, subsequent creators, and the public interest.

National copyright laws today need L&Es to provide flexibility in their laws in an era of rapid technological change. Legislators today cannot possibly foresee all of the developments that may have implications for copyright owners in an era of rapid technological change. Nor can legislatures be expected to amend the law every time some new development raises questions not easily answerable under the existing statutory framework. The fair use doctrine has served the flexibility function well for U.S. copyright law, and fair use has been spreading to other jurisdictions. This doctrine is not, however, the only way to achieve flexibilities in national copyright laws, as several prominent European scholars have demonstrated in recent work.

The optimal policy for copyright L&Es may well be to have specific exceptions for categories of justified uses that are relatively stable over time and for which predictability is more important than flexibility and to have an open-ended exception such as fair use to allow the law to adapt to new uses not contemplated by legislatures.