

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 sometimes by courts through common law adjudication.² L&E provisions in national copyright laws often seem a hodgepodge of special purpose provisions whose policy justifications are sometimes difficult to discern.³

This essay discusses a set of policy 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 feature examples of L&Es embodied in other national copyright laws and authorized by international treaties.

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 U.S. 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. These doctrines were codified in the Copyright Act of 1976 ("1976 Act"),⁴ although they have continued to evolve in the nearly four decades after their enactment.⁵ Less visible, although quite important, are the dozens of other L&Es codified in the 1976 Act.

Part III offers eight principled justifications for the existence of these L&Es. One set promotes ongoing authorship. A second recognizes both authorial and broader public interests in news dissemination, freedom of expression, and access to information. A third protects privacy, personal autonomy, and ownership interests of consumers. A fourth aims to fulfill certain

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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. However, "exceptions" are probably best understood as outright exemptions from copyright liability. "Limitations" include compulsory or statutory licenses, which create a liability rule, so that the acts are permissible but subject to an obligation to pay for the use.

³ 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/IMPRIATUR conference on "Rights, Limitations and Exceptions: Striking a Proper Balance," 30-31 October 1997, available at <http://www.ivir.nl/staff/hughenholtz.html>.

⁴ 17 U.S.C. §§107, 109(a).

⁵ Parts III and IV will discuss some of this evolution.

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 that lack economic significance. An eighth addresses market failure problems. This Part also discusses some politically expedient exceptions.

Part III considers justifications for adopting a flexible and open-ended rule such as the U.S. fair use doctrine. Open-ended rules such as fair use enable copyright law to remain flexible and adaptable over time. Especially in an era of rapid technological change, flexible exceptions such as fair use have some advantages over specific L&Es.

The chapter 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.

I. 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 1790.⁶ 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 were to “print, reprint, publish or vend” those works.⁷ Failure to comply with the required formalities caused the work to attain public domain status and be free for all manner of unlicensed uses.⁸

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.⁹ 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.¹⁰ Authors of books got two new rights in 1870, one to control translations of their works, and a second to dramatize non-dramatic

⁶ Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

⁷ *Id.* § 1 at 124.

⁸ *Id.* § 3 at 125.

⁹ Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138–39 (repealed 1870).

¹⁰ Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909).

works.¹¹ Congress added musical compositions to copyright subject matter in 1831,¹² but did not grant composers a right to control public performances of their works until 1897.¹³

Up through the mid-19th century, copyright's exclusive rights were generally interpreted rather narrowly.¹⁴ Fair abridgements,¹⁵ dramatizations,¹⁶ making improved versions of older works,¹⁷ and translations¹⁸ were generally regarded as non-infringing. For the most part, only exact or near-exact copying of protected works was deemed an infringement.¹⁹

The fair abridgement doctrine was curtailed significantly after 1841 due to the influential decision in *Folsom v. Marsh*.²⁰ 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.²¹

Even though a few late 19th century decisions mention fair use, those cases involved weak and unconvincing infringement claims.²² Fair use did not become a meaningful common law limitation on the scope of copyright until the early 20th century. The 1903 case of *Bloom &*

¹¹ *Id.*

¹² 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).

¹³ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82.

¹⁴ 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).

¹⁵ 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....").

¹⁶ 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).

¹⁷ 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.

¹⁸ 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 11 and accompanying text.

¹⁹ In addition to caselaw, *supra* notes 15–18, 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).

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

²¹ *Id.* at 349.

²² 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).

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.²³

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.²⁴ 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.”²⁵ 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 meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.”²⁶ Thus was born copyright law’s first sale doctrine.

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.²⁷ Other exclusive rights were carefully cabined so that only unlicensed for-profit uses would infringe, notably in respect of musical compositions.²⁸

The 1909 Act was the first U.S. copyright statute to have L&E provisions. One codified the first sale exception to the vending right.²⁹ A second limited the right of composers to control mechanical reproductions of their music in sound recordings by subjecting it to a compulsory license.³⁰ Once a copyrighted song had been recorded once, anyone could re-record the song as

²³ 125 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].

²⁴ 210 U.S. 339 (1908).

²⁵ *Id.* at 341.

²⁶ *Id.* at 351.

²⁷ See Copyright Act of 1909, Pub. L. No. 60-349, § 1, 35 Stat. 1075, 1075–76 (repealed 1976).

²⁸ 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).

²⁹ *Id.* §41. In 1947, the provisions of the 1909 Act were renumbered, and the exhaustion doctrine became §27.

³⁰ *Id.*, §1(e). The rationale for this compulsory license is discussed *infra* Part II.H.

long as they paid the license fee set forth in the statute. A third exempted coin-operated music machines (that is, jukeboxes) unless their owners charged for admission to the premises.³¹

As the 20th century wore on, the uncoded 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.³² Some exhaustion cases were litigated as well.³³ Congress did not, however, create any new copyright exceptions through the first half of the 20th century.

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.³⁴ 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.³⁵

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.³⁶ 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.³⁷ The 1961 Report would, however, have retained the "for profit" limit on the public performance right as to literary and musical works.³⁸

By 1965, when the Register issued a supplementary report to accompany redrafted legislation,³⁹ many changes were evident. Under the new revision bills,⁴⁰ for instance, authors would have five exclusive rights applicable to all works: a reproduction right, a derivative work right, a

³¹ *Id.*

³² *See, e.g.*, LATMAN STUDY, *supra* note 23, at 8-12 (discussing cases).

³³ *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).

³⁴ *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 ix (Comm. Print 1961) [hereinafter REGISTER'S 1961 REPORT]. 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>.

³⁵ REGISTER'S 1961 REPORT, *supra* note 34, at 21-24.

³⁶ *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.

³⁷ *Id.* at 31-36.

³⁸ *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.*

³⁹ 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].

⁴⁰ H.R. 4347, 89th Cong., 2d Sess. (1965) and S. 1006, 89th Cong., 2d Sess. (1965) [hereinafter 1965 Revision Bill].

distribution to the public right, a public performance right and a public exhibition right.⁴¹ These are virtually identical to the rights enacted in 1976.

These exclusive rights would, as before, be subject to fair use and exhaustion limitations.⁴² However, because of certain proposed expansions in subject matter and in rights, the Register proposed several new exemptions for certain nonprofit activities and for industry-specific uses. However, by 1965 the Register had 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 omitted 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 nonprofit exemptions from public performances and exhibition rights: one, for face-to-face classroom teaching; a second, for closed circuit educational broadcasting of literary or musical works; a third, for performances in religious services; a fourth, for other nonprofit educational, religious, or charitable activities under certain conditions.⁴³ He also recommended an exemption for those who merely received broadcast programs in a public place.⁴⁴ With some modifications, these exemptions ended up in the 1976 Act.

The 1965 Report also recommended several industry-specific exemptions. One would shield broadcast signal “booster” technologies from liability (although not cable retransmissions of broadcast signals, which the Register thought should fall within the new public performance right).⁴⁵ A second new exemption would allow broadcasters to make ephemeral copies of programs essential to their business operations.⁴⁶ In addition, the Register proposed an L&E to clarify that the scope of copyright in pictorial, graphic, and sculptural (PGS) works did not extend to any useful article depicted therein.⁴⁷ 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.

⁴¹ *Id.*, § 106. The public exhibition right subsequently became the public display right. 17 U.S.C. § 106(5).

⁴² *Id.* at §§ 107-108.

⁴³ REGISTER’S SUPPLEMENTARY REPORT, *supra* note 39, at 31-40.

⁴⁴ *Id.* 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).

⁴⁵ *Id.* 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.

⁴⁶ REGISTER’S SUPPLEMENTARY REPORT, *supra* note 39, at 44-47. This exemption is now codified at 17 U.S.C. § 112.

⁴⁷ *Id.* at 47-49. This rule is now codified at 17 U.S.C. § 113(b). 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).

Four other L&E proposals in the 1965 report would affect the music industry. While now endorsing copyright protection for sound recordings,⁴⁸ the Register perceived the need for some limits on the rights accorded to their owners.⁴⁹ 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.⁵⁰ 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.⁵¹ The Register proposed a one year moratorium for jukebox operators so that they and music copyright owners could come to some understanding.⁵² With some refinements (and eventually a compulsory license for jukeboxes), these rules ended up in the 1976 Act.

The 1965 Report backed away from the Register's earlier proposal to create an exemption so that libraries could make single copies of articles or parts of other works for their 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.⁵³

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.⁵⁴ In the 1965 report, the Register acknowledged that rights holders had legitimate concerns that a library copying exception would threaten the markets for their works.⁵⁵ The Register suggested that library copying should be dealt with through the fair use doctrine.⁵⁶

While the library copying issue was being debated in the halls of Congress, Williams & Wilkins, a publisher of medical research journals, decided to test the library copying issue 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.⁵⁷

⁴⁸ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 5.

⁴⁹ *Id.* at 49-52.

⁵⁰ *Id.* at 51-53. Part III.I discusses the rationale for denying public performance rights to sound recordings.

⁵¹ *Id.* at 53. He did recommend some adjustments to the license. *Id.* at 53-59.

⁵² *Id.* at 59-61.

⁵³ 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).

⁵⁴ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 26-27.

⁵⁵ *Id.* at xiv-xvi, 14-15.

⁵⁶ *Id.* at 27-28.

⁵⁷ *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).

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.⁵⁸

Educational use copying was even more contentious than library photocopying in the revision process.⁵⁹ Educators had hoped for 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 indeed the 1976 Act did.⁶⁰

Educators were, however, able to influence the fair use provision in at least three significant 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; and 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.⁶¹

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.⁶² The final House Report about the 1976 Act published two sets of negotiated guidelines which have had considerable influence on institutional practices.⁶³ 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.⁶⁴

⁵⁸ 17 U.S.C. § 108(d).

⁵⁹ For a detailed discussion of the debate over educational uses, see, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985).

⁶⁰ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 27-28. See H.R. REP. NO. 94-1476, at 66-72 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5678-5686.

⁶¹ Compare 17 U.S.C. § 107 with REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 27 (draft language for the fair use provision).

⁶² H.R. REP. NO. 94-1476, at 67.

⁶³ 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"), *reprinted in* H.R. REP. NO. 94-1476, at 68-70; Guidelines for Educational Uses of Music, *reprinted in* H.R. REP. NO. 94-1476, at 70-71.

⁶⁴ 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).

Between 1965 and 1976, several new L&Es found their way into to the copyright revision bills,⁶⁵ 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.⁶⁶

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.

II. Justifications for Copyright L&Es

This Part discusses nine justifications for copyright L&Es. While it concentrates mainly on justifications for U.S. L&Es, this taxonomy of justifications may be useful in assessing justifications for L&Es in national laws more generally.

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.”⁶⁷

Many jurisdictions have adopted specific L&Es that promote ongoing authorship. These include exceptions allowing fair quotations, parodies and satires, and critical commentary.⁶⁸ Fair dealing provisions in many jurisdictions allow researchers to make some copies for purposes of study, a common practice among authors who are preparing to create new works.⁶⁹ An example of a

⁶⁵ 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.

⁶⁶ 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.

⁶⁷ *Emerson v. Davies*, 8 F. Cas. 615, 619 (1845).

⁶⁸ See, e.g., InfoSoc Directive, *supra* note 3, arts. 5(3)(d), (i), (k).

⁶⁹ See, e.g., UK Copyright, Designs, and Patents Act 1988, 29-30.

specific L&E in U.S. law that promotes ongoing authorship is that which allows photographs, paintings and other representations to be made of publicly visible buildings embodying architectural works.⁷⁰

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.”⁷¹ 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....”⁷² 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.”⁷³ 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.”⁷⁴ 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*.⁷⁵ 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.”⁷⁶ The court expressed skepticism that potential customers for an 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.

⁷⁰ 17 U.S.C. § 120(a).

⁷¹ 510 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).

⁷² *Campbell*, 510 U.S. at 580-81.

⁷³ *Id.* at 583.

⁷⁴ *Id.* at 589.

⁷⁵ 904 F.2d 152 (2d. Cir. 1990).

⁷⁶ *Id.* at 156.

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 Archives v. Dorling Kindersley Ltd.*,⁷⁷ for example, the publisher (DK) 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 (BGA). 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.⁷⁸

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 concern that the use might be challenged as infringing, even if it would be found non-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 always some loss to freedom of expression and to access to knowledge 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 when authors provide information to the public on current political or economic events.⁷⁹ Some L&Es permit dissemination of political speeches.⁸⁰ The international treaty known as the Berne Convention contemplates 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...."⁸¹ 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 as well. The public interest in "having the fullest information available on the murder of President Kennedy," for instance, played an important role in *Time, Inc. v. Bernard Geis Associates*.⁸² Time owned a 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 played a significant role in the Warren Commission report on the President's death and the wider public debate over

⁷⁷ 448 F.3d 605 (2d Cir. 2006).

⁷⁸ *Id.* at 611. In a similar vein, 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).

⁷⁹ See, e.g., InfoSoc Directive, *supra* note 3, at art. 5(3)(c).

⁸⁰ See, e.g., *id.*, art. 5(3)(f).

⁸¹ Berne Convention for the Protection of Literary and Artistic Works, art. 10bis [hereinafter Berne Convention].

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

whether Lee Harvey Oswald was the sole assassin. Geis published a book aimed at proving 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. Time refused to license the use of these frames in the book. After Geis prepared sketches of the frames for the book, 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.⁸³ 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."⁸⁴ 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.⁸⁵

More mundane, but nonetheless newsworthy, was the use at issue in *Nunez v. Caribbean Int'l News Corp.*⁸⁶ 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."⁸⁷ 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.⁸⁸

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*.⁸⁹ 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

⁸³ *Savage v. Council on American-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281 (N.D. Cal. July 25, 2008).

⁸⁴ *Id.* at *6.

⁸⁵ *Id.* at *8 (finding defendants fairly used the audio excerpts "to comment on and rebut derogatory statements regarding their organization and their religious affiliations").

⁸⁶ 235 F.3d 18 (1st Cir. 2000).

⁸⁷ *Id.* at 22 (internal quotation marks omitted).

⁸⁸ *Campbell*, 510 U.S. at 579.

⁸⁹ 471 U.S. 539 (1985).

provides to authors.⁹⁰ 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.⁹¹ 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,⁹² it has reemerged as worthy of consideration in *Campbell*.⁹³ The Court noted that even if a use 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 as an alternative remedy.⁹⁴

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.⁹⁵

One recent case has considered data-mining as fair use. In *Authors Guild, Inc. v. HathiTrust*,⁹⁶ the Second Circuit ruled that the HathiTrust digital library had made fair use of books in its partners’ research library collections by creating a full-text searchable database that enabled researchers to find relevant books without harming the market for the books. Some countries have adopted special exceptions for data-mining of in-copyright works.⁹⁷

C. Protecting User Privacy, Autonomy, and Property Interests

Privacy and autonomy interests of users of in-copyright works are protected to some degree in national copyright laws through limits on authorial rights to control performances, displays, communications, and distributions to those that are to the “public.”⁹⁸ Privacy and autonomy interests of users are also sometimes protected through special L&E provisions that authorize some copying for personal use.⁹⁹ Many nations have fair dealing provisions that enable personal use copying for purposes such as research, study, criticism, and review.¹⁰⁰ In the U.S., fair use plays an important role in enabling personal use copying.

⁹⁰ *Id.* at 562.

⁹¹ *Id.* at 562, 565.

⁹² *Id.* at 557-58.

⁹³ *Campbell*, 510 U.S. at 578, n.10.

⁹⁴ *Id.*

⁹⁵ See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

⁹⁶ -- F.3d -- (2d Cir. 2014).

⁹⁷ See, e.g., Copyright Law of Japan, art. 47septies.

⁹⁸ See, e.g., 17 U.S.C. §§ 106(3)-106(5).

⁹⁹ See, e.g., Copyright Law of Japan, art. 29 (personal use), 30 (private study).

¹⁰⁰ See, e.g., UK Copyright, Designs, and Patents Act 1988, §§ 29-30; Australia Copyright Act of 1968, §§ 40-41.

A key fair use decision on personal use copying was *Sony Corp. of America v. Universal City Studios*.¹⁰¹ 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. Some of these non-infringing uses were copying of television programming whose rights holders did not object to such copying. However, the most substantial of the non-infringing uses was taping programming for viewing at a later time. The Court ruled that time-shift copying of television programs was a fair use. Private noncommercial copying, the Court opined, should be presumed to be fair, and this presumption should be overcome only if there was evidence of a meaningful likelihood of harm to the market for the works.¹⁰² Universal had conceded that no harm had happened to date from Betamax copying and the Court viewed its theories of future harm to be speculative.¹⁰³ This decision took a broad view of personal use copying as fair use.¹⁰⁴

Exhaustion of rights also provides some breathing room in national copyright laws for owners of copies to make personal uses of protected works.¹⁰⁵ 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 it, give it away, bequeath it to heirs, and/or destroy it if he so chooses.¹⁰⁶ Exhaustion also entitles the owner of a copy of a work to display his copy to the public.¹⁰⁷

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

¹⁰¹ 464 U.S. 417 (1984).

¹⁰² *Id.* at 451.

¹⁰³ *Id.* at 456.

¹⁰⁴ 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).

¹⁰⁵ *See, e.g.,* 17 U.S.C. § 109(a) (U.S.); Copyright Designs and Patents Act, Section 18(3)(a) (UK); InfoSoc Directive, *supra* note 3, art. 4. *See also* Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067 (2012).

¹⁰⁶ 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).

¹⁰⁷ 17 U.S.C. § 109(c).

enable its use.¹⁰⁸ Another example is the special U.S. exception that allows owners of buildings embodying architectural works to modify them.¹⁰⁹

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,¹¹⁰ enable libraries and archives to reproduce works to preserve them,¹¹¹ and enable the creation of special format works so print-disabled persons can have greater access to literary works.¹¹²

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.

U.S. copyright law contains an outright exemption for classroom performances and displays of in-copyright works,¹¹³ a privilege allowing libraries and archives to make copies to preserve some in-copyright works,¹¹⁴ to replace lost or damaged copies if other copies are unavailable at a reasonable price,¹¹⁵ and to give to patrons for research purposes,¹¹⁶ as well as special rules to facilitate making books and journals more accessible to print-disabled persons.¹¹⁷ Fair use sometimes supplements these specific exceptions, as in the *HathiTrust* case in which 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.¹¹⁸

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 services¹¹⁹ and of other nonprofit educational, religious, or charitable events as long as certain obligations are satisfied and the events were not undertaken for private gain.¹²⁰

¹⁰⁸ See, e.g., Copyright Act of Japan, art. 47ter, 47quater.

¹⁰⁹ 17 U.S.C. § 120(b).

¹¹⁰ See, e.g., InfoSoc Directive, art. 5(3)(a).

¹¹¹ See, e.g., *id.*, art. 5(2)(c).

¹¹² See, e.g., *id.*, art. 5(3)(b).

¹¹³ 17 U.S.C. § 110(1).

¹¹⁴ 17 U.S.C. § 108(b).

¹¹⁵ 17 U.S.C. § 108(c).

¹¹⁶ 17 U.S.C. § 108(d).

¹¹⁷ 17 U.S.C. § 121.

¹¹⁸ *Authors Guild, Inc. v. HathiTrust*, -- F.3d -- (2nd Cir. 2014).

¹¹⁹ 17 U.S.C. § 110(3).

¹²⁰ 17 U.S.C. § 110(4).

The 1976 Act's exemptions for religious and charitable users and uses are perhaps understandable given that the public performance rights under the 1909 Act had not extended to any of these acts or actors. Some Washington-savvy 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. But one might wonder whether exemptions for religious and charitable events are really justifiable subsidies.

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.¹²¹ 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.¹²² 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.¹²³ Fair use also shielded an investigator who took a camcorder into a movie theatre to record scenes from a sexually explicit film to provide the district attorney with evidence to prove that these depictions of certain sexual acts constituted a nuisance under local laws.¹²⁴

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.¹²⁵ If designs of useful articles are depicted in copyrighted drawings, they are free for competitive copying and for ongoing innovation unless patented.¹²⁶

¹²¹ 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.*

¹²² See, e.g., Copyright Act of Japan, art. 42.

¹²³ *Shell v. City of Radford*, 351 F. Supp. 510 (W. D. Va. 2005).

¹²⁴ *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

¹²⁵ 17 U.S.C. § 113(b).

¹²⁶ See, e.g., Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985).

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.¹²⁷

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.*¹²⁸ 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 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*.¹²⁹ 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 did not infringe copyrights. The Ninth Circuit decided that users of the Game Genie were making only fair uses of the Nintendo games. This ruling freed others to develop add-on programs.

Another competition-fostering fair use involved the use of copyrighted images in advertising. For example, 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.¹³⁰

¹²⁷ See, e.g., Netherlands Copyright Act of 1912, art. 45m.

¹²⁸ 977 F.2d 1510 (9th Cir. 1992).

¹²⁹ 964 F.2d 965 (9th Cir. 1992).

¹³⁰ Sony Entm't America Inc. v. Bleem LLC, 214 F.3d 1022 (9th Cir. 2002).

The most recent specific L&E in U.S. copyright law is that which limits the scope of the derivative work right by allowing the development of software to enable owners of DVD movies to block violent, sexually explicit, or offensive parts of the movies to make them more “family-friendly.” ClearPlay, the developer of such a tool, relied on the *Galoob* decision to counter copyright challenge made by certain directors and motion picture studios.¹³¹ Before a court ruling on this claim, Congress enacted an L&E to enable the development of this type of software.¹³²

G. Accommodating Incidental Uses

It is sometimes necessary to make copies of copyrighted works in order to carry out common legitimate functions. National copyright laws often recognize this through specific exceptions. One example in the 1976 Act is the ephemeral recording and performance exception adopted at the behest of broadcast television operators.¹³³ 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 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.¹³⁴ 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 many incidental copies made of digital works lack independent economic significance; it mandates that these incidental copies be exempted from copyright liability.¹³⁵ 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.¹³⁶

¹³¹ *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Filed Aug. 19, 2002).

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

¹³³ 17 U.S.C. § 112(a). The Berne Convention recognizes ephemeral broadcast copying as legitimate conduct to be exempt from copyright liability. Berne Convention, *supra* note 81, art. 11bis.

¹³⁴ 117 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).

¹³⁵ InfoSoc Directive, *supra* note 3, art. 5(1).

¹³⁶ Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315, 325-26 (2013).

H. Aiming to Cure Market Failures

Copyright markets can fail to form or be dysfunctional for a number of reasons. 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. There may be a substantial likelihood of holdup problems or other reasons why certain industry players might be 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.¹³⁷ This license was created out of fear of monopoly control of the sound recording market.¹³⁸ 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,¹³⁹ 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 musical works.

Once the Supreme Court ruled that piano rolls did not infringe copyrights 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 when this occurred, 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 only the first of many sound recordings 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.¹⁴⁰ Stable industry practices had grown up around the license, and so in 1965,

¹³⁷ See *supra* note 30 and accompanying text.

¹³⁸ REGISTER'S 1961 REPORT, *supra* note 34, at 32-36.

¹³⁹ See, e.g., *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

¹⁴⁰ REGISTER'S 1961 REPORT, *supra* note 34, at 32-36.

the Register changed his mind about the desirability of repealing it.¹⁴¹ The compulsory license needed some adjustments, however, to make it fairer and less cumbersome.¹⁴²

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.¹⁴³ A second benefited public broadcasters. Proponents had used market failure arguments in support of such a 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.¹⁴⁴ A third resolved a longstanding bitter dispute between broadcasters and cable television systems.

While the legislative deliberations over copyright revision were ongoing, broadcasters brought two lawsuits to challenge cable television retransmissions of broadcast television programs. They complained that cable systems were making significant amounts of money for their retransmissions of broadcast programming and paying nothing for that privilege.¹⁴⁵ The Supreme Court twice ruled that the 1909 Act's public performances right did not extend to passive retransmission of the broadcast programs by cable systems.¹⁴⁶

The highest priority for the broadcast industry in the copyright revision process was to ensure that cable retransmissions of broadcast programming would be covered by the public performance right under the revised act. The Register supported this proposal in 1965.¹⁴⁷ However, "full scale verbal warfare" broke out in response to bills to codify this position in 1967.¹⁴⁸ The failure of the copyright revision legislation that year was largely owing to this unresolved controversy.¹⁴⁹

¹⁴¹ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 53-54.

¹⁴² *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, at 107-11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5722-27.

¹⁴³ 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, at 113. That license is no longer in effect, however, because after the U.S. joined the Berne Convention for Literary and Artistic Works 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.

¹⁴⁴ H.R. REP. NO. 94-1476, at 116-17.

¹⁴⁵ 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, at 88.

¹⁴⁶ *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

¹⁴⁷ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 40-42.

¹⁴⁸ 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].

¹⁴⁹ H.R. REP. NO. 94-1476, at 89.

Complicating the 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.¹⁵⁰ By the mid-1960s, as cable systems grew larger and more robust, the FCC decided they did pose a threat to broadcasting. The FCC forbade cable systems operating in the 100 largest television markets from importing distant signals unless they satisfied some stiff evidentiary requirements (which almost none undertook).¹⁵¹ 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.¹⁵²

The FCC's intensive regulation of cable retransmissions of broadcast signals complicated the task of figuring out reasonable fees and other terms because arms-length voluntary deals between broadcasters and cable systems on price and terms seemed implausible. Requiring each of the nearly then-existing 3500 cable systems to negotiate licenses with every rights holder of everything broadcast on television would be prohibitively expensive. A compulsory license thus seemed to be necessary to facilitate authorized uses.¹⁵³

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.¹⁵⁴

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 1976.¹⁵⁵ 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.¹⁵⁶

¹⁵⁰ CATV and TV Repeater Services, 26 F.C.C. 403, 431. (1959).

¹⁵¹ See REGISTER'S SECOND SUPPLEMENTARY REPORT, *supra* note 148, at 132-33. The cable industry had earlier challenged FCC regulations of 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).

¹⁵² 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).

¹⁵³ 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 148, at 134-37.

¹⁵⁴ 17 U.S.C. § 111.

¹⁵⁵ 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).

¹⁵⁶ See, e.g., Terry Hart, *A Brief History of Webcaster Royalties* COPYHYPE (Nov. 28, 2012), available at <http://www.copyhype.com/2012/11/a-brief-history-of-webcaster-royalties/>.

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.¹⁵⁷

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.¹⁵⁸ 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] would be seriously impaired" if it included any proposal for a public performance right for sound recordings.¹⁵⁹ This was because of opposition from broadcasters and owners of music copyrights.¹⁶⁰

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.¹⁶¹ 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.

¹⁵⁷ 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).

¹⁵⁸ See, e.g., COLLECTIVE MANAGEMENT OF COPYRIGHTS AND RELATED RIGHTS (Daniel Gervais ed., 2d ed. 2010).

¹⁵⁹ REGISTER'S SUPPLEMENTARY REPORT, *supra* note 39, at 51-52.

¹⁶⁰ *Id.* at 50-51.

¹⁶¹ Some state laws and judicial decisions had provided some 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).

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 strong objectors to public performance rights for sound recordings.¹⁶² 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 the broadcasters now had to pay royalties for public performances of sound recordings as well. 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 fees.

The politically expedient compromise was to grant makers of sound recordings copyright control over reproductions and distributions of phonorecords, but not over public performances.¹⁶³ Similarly politically expedient was the compulsory license compromise for jukebox operators who had threatened to stymie the general copyright revision process unless they got a compulsory license.¹⁶⁴

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.¹⁶⁵ Why do these groups have exemptions, but not other socially beneficial users and uses, such as Boy Scouts and Campfire girls singing “Kumbaya” at their gatherings?

The 1976 Act also grants nonprofit veterans’ and fraternal organizations a right to perform nondramatic literary works or music without a license at social functions.¹⁶⁶ This privilege does not, however, apply to college fraternity or sorority social functions. Why are the social functions of Elks and Moose clubs, whose membership consists largely of middleclass employed

¹⁶² REGISTER’S SUPPLEMENTARY REPORT, *supra* note 39, at 51.

¹⁶³ 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 136, 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).

¹⁶⁴ This threat was nontrivial because jukebox operators could be found 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 this opposition was “to 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 39, at 60. The compulsory license at a low rate was the politically expedient way to resolve this controversy.

¹⁶⁵ 17 U.S.C. § 110(6). Hugenholtz identifies this exception as the product of lobbying, not of principle. Hugenholtz, *supra* note 2, at 1.

¹⁶⁶ 17 U.S.C. § 110(10).

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.

III. 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, assumes that legislators can and should make comprehensive laws that take account of all use-cases that the law should address. This accounts for the myriad specific L&Es that are found in civil laws on copyright.¹⁶⁷ These L&Es recognize that authors need to be able take some expression from existing works to create critical commentaries, parodies, or 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.¹⁶⁸ 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.¹⁶⁹

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,¹⁷⁰ and recounted other examples of uses that should be fair.¹⁷¹

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.¹⁷²

¹⁶⁷ 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/hughenoltz/Fair%20Use%20Report%20PUB.pdf>.

¹⁶⁸ See, e.g., InfoSoc Directive, *supra* note 3, art. 5.

¹⁶⁹ 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, 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 167, at 1-2.

¹⁷⁰ H.R. REP. NO. 94-1476, at 65 (1976).

¹⁷¹ *Id.* at 65-66.

¹⁷² *Id.*, now codified as 17 U.S.C. § 107.

Although some American and European commentators complain that fair use is unpredictable,¹⁷³ other commentators have demonstrated empirically that fair use cases tend to fall into fairly predictable patterns.¹⁷⁴ 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.¹⁷⁵

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.

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 arising in many new technology cases in the U.S. today, 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.¹⁷⁶ 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

¹⁷³ See, e.g., David Nimmer, "*Fairest of Them All*" and Other Fairy Tales of Fair Use 269, LAW & CONTEMP. PROBS. (Winter/Spring 2003).

¹⁷⁴ See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV., 549 (2008); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

¹⁷⁵ See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁷⁶ The *Fortnightly* case, which predates *Williams & Wilkins*, challenged a new technological uses of copyrighted works, but the issue there was whether the retransmission of broadcast signals fell within the public performance right. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). There was no fair use issue in that case. See also *supra* notes 145-46 and accompanying text.

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, some photocopying is fair use, and some is infringement.¹⁷⁷ The fair use photocopy boundary lines, however, remain contested.

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.¹⁷⁸ 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.¹⁷⁹

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

[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.¹⁸⁰

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).¹⁸¹ This safe harbor has

¹⁷⁷ Photocopying within the Classroom Guidelines, discussed *supra* note 63, is unquestionably fair. Library photocopying of single articles for patrons is privileged by 17 U.S.C. § 108(d). Photocopying of in-copyright materials for educational coursepacks is unfair. *See, e.g., Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996).

¹⁷⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁷⁹ *Id.* at 456.

¹⁸⁰ *Id.* at 450-451.

¹⁸¹ *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).

been an important shield against liability for the makers of many innovative information technologies, including iPods, MP3 players, scanners, and digital video recorders.

The *Sony* decision can also be credited with laying the conceptual groundwork for numerous other judicial decisions in new technology cases.¹⁸² 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,¹⁸³ search engine copying of images on the Internet,¹⁸⁴ and mass digitization of books from research library collections to make a full-text searchable database.¹⁸⁵ It is no wonder, then, that some commentators consider fair use to be an important part of copyright's innovation policy.¹⁸⁶

Fair use has other advantages as well. For one thing, it is a concept that ordinary people can understand. Through 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 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. 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 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.¹⁸⁷ Canada's fair dealing provision has been amended to give it greater flexibility so that it now

¹⁸² 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 its 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.

¹⁸³ *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

¹⁸⁴ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

¹⁸⁵ *Authors Guild, Inc. v. HathiTrust*, -- F.3d -- (2d Cir. 2014).

¹⁸⁶ See, e.g., Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008). See also THOMAS ROGERS & ANDREW SZAMOSSZEGI, *FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTIONS OF INDUSTRIES RELYING ON FAIR USE* (CCIA, 2011).

¹⁸⁷ JONATHAN BAND & JONATHAN GERAFFI, *THE FAIR USE/FAIR DEALING HANDBOOK* (May 2013).

resembles the U.S. fair use doctrine.¹⁸⁸ Australia is considering adoption of a U.S.-style fair use provision.¹⁸⁹ The Dutch Parliament has expressed interest in fair use.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

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 a number of 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, but offers an open-ended exception to allow other analogous uses to be deemed non-infringing.¹⁹³

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."¹⁹⁴

Dutch Professors Hugenholtz and Senftleben have suggested some ways to introduce flexible limits in European copyright laws.¹⁹⁵ They perceive "[t]he need for more openness in copyright law [as] almost self-evident in this information society of highly dynamic and unpredictable change."¹⁹⁶ These authors explain why there is already more flexibility built into existing copyright rules than some commentators seem to believe.¹⁹⁷ They offer several suggestions for achieving flexibility goals within the European copyright framework.

¹⁸⁸ Michael Geist, *Has Canada Effectively Shifted From Fair Dealing to Fair Use?* (July 13, 2012), <http://www.michaelgeist.ca/2012/07/canada-now-fair-use/>.

¹⁸⁹ 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>.

¹⁹⁰ HUGENHOLTZ & SENFTLEBEN, *supra* note 167, at 8, n. 19.

¹⁹¹ 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.

¹⁹² 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.

¹⁹³ THE WITTEM PROJECT: EUROPEAN COPYRIGHT CODE, Art. 5 (April 2010), available at www.copyrightcode.eu (hereinafter WITTEM PROJECT)

¹⁹⁴ IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 5 (May 2011).

¹⁹⁵ HUGENHOLTZ & SENFTLEBEN, *supra* note 187.

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.*, Chap. 4.1.

Even bolder are proposals that look to the so-called “three step test” as providing some room for copyright flexibilities.¹⁹⁸ 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 other legitimate interests of the rights holder.¹⁹⁹

Proponents of this approach have noted 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.”²⁰⁰ 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.²⁰¹ Thus, application of the three-step test could be a treaty-compliant way to achieve flexibility in national copyright laws.²⁰²

Conclusion

Relatively little attention has thus far been paid in the scholarly literature to the policy justifications for the wide range of L&Es set forth in national copyright laws.²⁰³ This essay has sought to fill this gap in the literature.

It has offered an explanation for 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 suggested nine policy justifications for adoption of these L&Es, but recognized that some L&Es have been adopted more out of political expediency than out of policy justifications. 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.

¹⁹⁸ Christophe Geiger, Daniel Gervais, & Martin Sentfleben, *The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, PIIP Research Paper No. 2013-4 (2013), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=research>.

¹⁹⁹ Berne Convention, Art. 9(2).

²⁰⁰ Geiger et al., *supra* note 198, at 3.

²⁰¹ *Id.* at 31-32.

²⁰² 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 198. 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).

²⁰³ Hugenholtz has proffered three types of justifications for copyright L&Es: one to protect fundamental freedoms (such as free expression and privacy interests), a second to fulfill public interests (such as library and disabled person exceptions), and a third to address market failures (such as compulsory licenses). Hugenholtz, *supra* note 3. The Wittem model Copyright Code identifies four types: 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 193, art. 5.

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.