

# Lawful Personal Use

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We are perfectly fine with personal use.

—Mitch Bainwol, Recording Industry Association of America, 2005<sup>1</sup>

Despite having sued more than 20,000 of its customers,<sup>2</sup> the recording industry wants the world to know that it has no complaint with personal use. Copyright lawyers of all stripes agree that copyright includes a free zone in which individuals may make personal use of copyrighted works without legal liability.<sup>3</sup> Unlike other nations, though, the United States hasn't drawn the borders of its lawful personal use zone by statute.<sup>4</sup> Determining the circumstances under which personal use of copyrighted works will be deemed lawful is essentially a matter of inference and analogy, and differently striped copyright lawyers will differ vehemently on whether a particular personal use is lawful or infringing.<sup>5</sup>

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1. Mitch Bainwol, Chairman and CEO, Recording Indus. Ass'n of Am., State of the Union Panel Discussion at the Future of Music Coalition Fifth Annual Policy Summit (Sept. 12, 2005), available at <http://www.futureofmusic.org/audio/summit05/panel04.stateofunion.mp3>.

2. Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing "Contained,"* USA TODAY, June 13, 2006, at B1, available at [http://www.usatoday.com/tech/products/services/2006-06-12-riaa\\_x.htm](http://www.usatoday.com/tech/products/services/2006-06-12-riaa_x.htm); Electronic Frontier Foundation, *How to Not Get Sued for File Sharing*, <http://www.eff.org/IP/P2P/howto-notgetsued.php>.

3. Professor Marci Hamilton coined the phrase "free use zone" to describe these uses. See Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 615 (1996) ("While the corporeal universe has permitted Western societies to receive and copy large numbers of copyrighted works for free . . . the on-line era raises the possibility that the publishing industry can track every minuscule use of a work and thereby turn the free use zone into a new opportunity for profit.").

4. Two examples of the many countries with statutory personal use provisions are Canada and Norway. See, e.g., *BMG Canada Inc. v. Doe*, [2004] F.C. 488 (Fed. Ct.) (applying the Canadian Copyright Act to determine "downloading a song for personal use does not amount to infringement"); Tarja Koskinen-Olsson, *The Notion of Private Copying in Nordic Copyright Legislation in the Light of European Developments During Recent Years*, 49 J. COPYRIGHT SOC'Y U.S.A. 1003, 1003 (2002) ("Copying for private use has traditionally been free in all Nordic copyright legislations.").

5. See NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 129 (2000) [hereinafter *THE DIGITAL DILEMMA*] ("The extremes of the positions on this issue are well established . . . . Some rights holders . . . believe that all . . . unauthorized reproduction of their works, whether private or public, commercial or noncommercial, is an infringement. Many members of the general public . . . believe that all . . . private, noncommercial copying of copyrighted works is lawful."). Compare, e.g., Neil Weinstock Netanel,

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

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

*Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 300 (1996) (“[C]ourts have generally declined to find personal copying as infringing.”), with Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC’Y U.S.A. 113, 120 (2003) (“U.S. and international copyright law have increasingly recognized that the author’s right to authorize, or at least to be compensated for, the making of copies, extends . . . to end-users who make individual copies for private consumption.”).

6. See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 338, 338–50 (2002) [hereinafter Litman, *War Stories*] (“[T]he question whether individuals are liable for copyright infringement when they make unauthorized uses of copyrighted works has no clear answer.”).

7. See OFFICE OF TECH. ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 5, 5–14 (1989) (“The problem of private use arises because its legal status is ambiguous.”); THE DIGITAL DILEMMA, *supra* note 5, at 135, 129–36 (“This report cannot resolve the debate over private use copying.”); Alan Latman, *Fair Use of Copyrighted Works*, in 2 STUDIES ON COPYRIGHT 781, 789–90 (Copyright Soc’y of the U.S. ed., 1963); Borge Varmer, *Photoduplication of Copyrighted Material by Libraries*, in 2 STUDIES ON COPYRIGHT, *supra*, at 813, 817 (“It may be that copying for one’s own private use . . . is sanctioned by custom . . .”).

8. *E.g.*, Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. (2000)); No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2(a)–(b), 111 Stat. 2678, 2678 (1997) (codified at 17 U.S.C. §§ 101, 506); Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, §§ 801–05, 104 Stat. 5089, 5134–37 (codified at 17 U.S.C. § 109); Record Rental Amendment of 1984, Pub. L. No. 98-450, § 2, 98 Stat. 1727, 1727 (codified at 17 U.S.C. § 109).

9. See, *e.g.*, Sonia K. Katyal, *Privacy vs. Piracy*, 9 INT’L J. COMM. L. & POL’Y (SPECIAL ISSUE) 1, 7 (2004–2005) (“[P]rivate entities have successfully monitored transmissions in cyberspace to control uses of their copyrighted materials.”); Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587, 606, 602–13 (1997) [hereinafter Litman, *Reforming Information Law*] (“[T]he Internet has made it simpler to prevent, detect and avenge unauthorized copying.”).

10. See, *e.g.*, Ginsburg, *supra* note 5, at 114, 113–14 (“[D]igital media and communications made it even easier for consumers to create physical copies of any kind of work . . .”).

11. See, *e.g.*, Am. Library Ass’n v. FCC, 406 F.3d 689, 691, 693–96 (D.C. Cir. 2005) (describing the entertainment industries’ “broadcast flag” campaign).

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

Fifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public.<sup>15</sup> Twenty years ago, when the Supreme Court’s decision in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>16</sup> was still fresh, people believed they were free to use copyrighted works noncommercially, and the law for the most part backed up that belief.<sup>17</sup> Today, however, the recording industry has sued more than 20,000

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12. See THE DIGITAL DILEMMA, *supra* note 5, at 129, 129–45 (“[T]he risk to rights holders from unbridled private copying is especially acute when the information is in digital form and can be copied without loss of quality and disseminated by digital networks.”); Netanel, *supra* note 5, at 299, 299–301 (“With readily available consumer electronics and digital technology . . . individual consumers are now able to make perfect copies of many cultural works at virtually no cost.”).

13. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 436, 436–44 (2d Cir. 2001) (“The movie studios were reluctant to release movies in digital form until they were confident they had in place adequate safeguards against piracy of their copyrighted movies.”); see also Electronic Frontier Foundation, EFF: The Battle for Your Digital Media Devices, <http://www.eff.org/IP/fairuse/> (“Major entertainment companies are locking up the audio and video content you own and taking away your rights.”); Electronic Frontier Foundation, EFF: Endangered Gizmos!, <http://www.eff.org/endangered/> (illustrating new technologies that are threatened because of their copying ability).

14. See, e.g., Jane C. Ginsburg, “*The Exclusive Right to Their Writings*”: *Copyright and Control in the Digital Age*, 54 ME. L. REV. 195, 201, 201–02 (2002) [hereinafter Ginsburg, *Copyright and Control*] (“[T]he . . . statutory and caselaw history until 1976 often elevated claims for enhanced availability . . . over copyright owner interest . . . . The 1976 Act, however, implements a vision of ‘exclusive rights’ to which control is integral.” (footnote omitted)); Ginsburg, *supra* note 5, at 124 (“As we move to an access-based world of distribution of copyrighted works, a copyright system that neglected access controls would make copyright illusory, and in the long run it would disserve consumers.”); see also U.S. PATENT AND TRADEMARK OFFICE, NATIONAL INFORMATION INFRASTRUCTURE TASK FORCE WORKING GROUP ON INTELLECTUAL PROPERTY: PUBLIC HEARING ON INTELLECTUAL PROPERTY ISSUES INVOLVED IN THE NATIONAL INFORMATION INFRASTRUCTURE INITIATIVE 40–50 (1993) (remarks of Bruce A. Lehman, Chair, Working Group on Intellectual Property), available at <http://www.umich.edu/~jdlitman/NOV18NII.TXT> (suggesting that fair use may be unnecessary in an electronic environment).

15. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 35 (1994) (“[T]he public believes that the copyright statute . . . does not reach private or non-commercial conduct . . . . Until recently . . . the public’s impression was not a bad approximation of the scope of copyright rights likely, in practice, to be enforced.”); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 326 (2003) (“For the most part, the law of copyright has regulated public and commercial uses of copyrighted works, not private and noncommercial uses.”).

16. 464 U.S. 417 (1984).

17. See, e.g., *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970, 970–71 (9th Cir. 1992) (“Game Genie users are engaged in a non-profit activity. Their use of the Game Genie to create derivative works therefore is presumptively fair.”); Joel L. McQuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16

individuals for making personal uses that can be characterized as “commercial” only by redefining commercial to mean “unlicensed.” Today, trading music with your friends is called “piracy” and collecting photocopied articles relevant to your job is stealing.<sup>18</sup> Today, it’s a major concession when the lawyer representing the recording industry acknowledges to the Supreme Court that it is lawful for twenty-two million iPod owners to use them to listen to music they’ve copied from recordings they have purchased.<sup>19</sup>

Whether the shrinking of lawful personal use should disturb us depends on whether personal use has intrinsic value. If personal use was once lawful solely because of enforcement difficulties, the easy enforcement of copyright prerogatives against individuals for unlicensed personal uses is yet another benefit of technological progress. If the only factors discouraging us from welcoming the reduction in the scope of lawful personal use are concerns for the collateral damage to our privacy arising from vigorous enforcement of copyright within the home, or the effects of reduced access on social equality, we could address those fears directly by legislating new privacy rights or encouraging the adoption of innovative pricing models.

If those suggestions fail to quell the queasiness you feel at the idea that fewer and fewer personal uses remain lawful, then perhaps we’ve overlooked some role that personal use plays in the copyright system. Missing such a thing would certainly be understandable. We tend not to talk much about personal use when we’re considering copyright reform.<sup>20</sup> Personal users have historically found fervent advocates in copyright law discussions only when they’re employing consumer electronic devices, and only from the manufacturers of those devices.<sup>21</sup> Although copyright scholarship has wrestled with the lawfulness of personal uses since Universal Studios sued to

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HASTINGS COMM. & ENT. L.J. 311, 317, 317–21 (1994) (“The arguments for and against finding home taping a fair use will not be repeated at length since not only have such arguments been presented many times before, but also [the Audio Home Recording Act of 1992] makes the debate irrelevant by deeming noncommercial taping a noninfringing activity.” (footnote omitted)).

18. See Litman, *War Stories*, *supra* note 6, at 342–50 (tracing the evolution in language used to describe contested uses of copyrighted works).

19. Transcript of Oral Argument at 11–12, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-480.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf).

20. See Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 354, 348–54 (1989) [hereinafter Litman, *Technological Change*] (“[Members of Congress] have . . . demonstrated little eagerness for grappling with the general problems that private use poses.”).

21. See JESSICA LITMAN, DIGITAL COPYRIGHT 59–61, 122–45 (2006) [hereinafter LITMAN, DIGITAL COPYRIGHT] (reviewing the legislative history of the Audio Home Recording Act and the Digital Millennium Copyright Act); Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1841 (2006) (“[Sony] also argued that time-shift copying was a fair use and that Congress had intended to exempt private use home taping from radio or TV from claims of copyright infringement.”).

enjoin the Sony Betamax,<sup>22</sup> we've had some difficulty coming up with useful formulations. As copyright law has expanded to encompass more and more territory, our vocabulary to describe the remainder has seemed to shrink as well.

Particular scholars have sought to infuse the debate with a more nuanced analysis. Professors Julie Cohen,<sup>23</sup> Yochai Benkler,<sup>24</sup> Rebecca Tushnet,<sup>25</sup> and Neil Netanel,<sup>26</sup> among others, have attempted to derive legal principles that protect the interests of those who experience, rather than create, copyrighted works from the First Amendment.<sup>27</sup> Professor L. Ray Patterson, among others, found users' rights in the copyright and patent clause of the Constitution.<sup>28</sup> Professors Joseph Liu and Glynn Lunney,

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22. See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1652–57 (1982) (analyzing home videotaping as a case of market failure); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 40 (1987) (“A fair use doctrine intended to permit competitors to make reasonable use of a work is quite different from a fair use doctrine that makes a consumer’s use of the work for ordinary purposes suspect.”).

23. See Julie E. Cohen, *Copyright and the Jurisprudence of Self-help*, 13 BERKELEY TECH. L.J. 1089 (1998) (discussing users’ rights to hack DRM); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996) [hereinafter Cohen, *A Right to Read*] (discussing right to read anonymously).

24. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 393 (1999) (suggesting a First Amendment basis for a user’s right of access to the public domain); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000) (arguing that First Amendment interests require regulators to ensure broad public access to the tools for generating and disseminating expression); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter–Spring 2003, at 173 (2003) (articulating First Amendment constraints on Congress’s power to restrict individual rights to read and speak).

25. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004) (“Courts should recognize that various kinds of copying . . . promote free speech. . . . The point is not to denigrate fair use, but to recognize that many kinds of uses of copyrighted material may be justified . . .”).

26. See generally Netanel, *supra* note 5 (analyzing conflicts between the First Amendment and copyright, and suggesting resolutions).

27. See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 904 (2002) (“The expressive liberty protected by the First Amendment encompasses *copying* as a way of receiving or preserving personal access . . . and *distributing* copies as a means of communicating to others what the distributor wants to communicate.”); Malla Pollack, *The Democratic Public Domain: Reconnecting the First Amendment and the Original Progress Clause (A.K.A. Copyright and Patent Clause)*, 45 JURIMETRICS J. 23, 27 (2004) (“The Clause limits Congress, demonstrating that the base right is in the public, not in the government, the inventors, nor the writers.”); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 38 (2002) (“Because it protects the freedom of imagination, the First Amendment directly protects not only speakers, but readers, viewers, and listeners as well.”); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 326 (2004) (“Speech requires content to be meaningful. This includes some ability to acquire such content and certainly the privilege of using it.”).

28. See L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTEL. PROP. L. 223, 228 (2001) (“[T]he governing principle of both the First Amendment and the Copyright Clause is the right of public access to materials that enable the people to learn, for

among others, have suggested that we find a theoretical basis for protecting consumers within the four corners of copyright law itself.<sup>29</sup> Both Cohen and Liu have criticized as reductionist the common depictions of users in the copyright literature and have sought to refine our understanding of how the interests of users and consumers have been underappreciated in current copyright law and copyright legal scholarship.<sup>30</sup>

In the summer of 2005, the unanimous Supreme Court decision in *MGM v. Grokster*<sup>31</sup> caused the unsettled issue of personal use to assume increased importance.<sup>32</sup> The decision drew a line between the distributors of technology that makes infringement easier who would be liable for their customers' infringing use and the distributors of like technology who would not.<sup>33</sup> The difference, the Court held, lay in whether the distributors had promoted infringing or noninfringing use.<sup>34</sup> To assess likely contributory liability we need to know what personal uses are infringing. That question is more pressing because the recording and motion picture industries, which initially painted their suits against individuals as a last resort given the lower court rulings in *Grokster's* favor,<sup>35</sup> have apparently found the practice of suing hundreds of peer-to-peer file sharers each month too delicious a habit to

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political purposes in some instances, and for personal education in others."); Patterson, *supra* note 22, at 61 ("The copyright owner, by reason of the Copyright Act and the copyright clause, has not only no right to interfere, but a duty not to interfere with the consumer's use of a publicly disseminated work."); see also Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1134 (2001) (arguing that the policies underlying the copyright and patent clause support the enactment of a personal use privilege).

29. See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 398 (2003) ("After all, the overall purpose of the Copyright Act is not to reward authors for authors' sake, but to reward authors to benefit consumers and society more generally."); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 977 (2002) ("With the development and dissemination of digital technology, the importance of private copying and its legal status, whether fair or unfair under copyright law, has only increased.").

30. See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 347-48 (2005) ("Copyright doctrine, however, is characterized by the absence of the user. . . . [This] absence produces a domino effect that ripples through the structure of copyright law, shaping both its unquestioned rules and its thorniest dilemmas."); Liu, *supra* note 29, at 398 ("[C]onsumer interests are quite a bit more complex than we ordinarily think.").

31. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

32. See Jonathan Band, *So What Does Inducement Mean?*, COMPUTER & INTERNET L., Nov. 2005, at 1, 2 ("[T]his redefinition of contributory infringement . . . appears to run contrary to the Supreme Court's discussion of contributory infringement in *Sony*.").

33. *Grokster*, 545 U.S. at 934-40.

34. *Id.* at 937-39.

35. See *Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Cary Sherman, President and General Counsel, Recording Industry Association of America), available at <http://judiciary.senate.gov/hearing.cfm?id=902> ("[F]or copyright owners, the John Doe procedure is a lose-lose: they no longer have access to an expeditious procedure for identifying alleged infringers and they are faced with significantly greater administrative and monetary burdens associated with enforcing their rights under the law.").

break.<sup>36</sup> The suits generate a few thousand dollars each and may have some deterrent value.<sup>37</sup> The economics of defending them make it unlikely that individual defendants will choose to litigate.<sup>38</sup> We therefore face the prospect that thousands of consumers will pay stiff peer-to-peer taxes to the recording and motion picture industry each year without a meaningful chance to establish whether they are doing something illegal.<sup>39</sup> Nor should we feel confident that the assault on personal use will stop at peer-to-peer file sharing. Flush from its victory over *Grokster*, the recording industry changed its tune and explained that the copyright piracy threat posed by peer-to-peer file sharing was insignificant compared with the threat posed by unauthorized CD burning, and that the industry was rolling out copy-protected CDs to meet the threat.<sup>40</sup> Meanwhile, both the motion picture industry and the recording industry seek laws requiring consumer electronics companies to incorporate copy prevention technology into digital televisions and radios.<sup>41</sup> Thus, the effort to capture control over personal uses is moving further and further into consumers' homes.<sup>42</sup>

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36. See, e.g., Press Release, Recording Indus. Ass'n of Am., RIAA Launches New Initiatives Targeting Campus Music Theft (Feb. 28, 2007), available at <http://www.riaa.com/news/newsletter/022807.asp> ("The Recording Industry Association of America (RIAA), on behalf of the major record companies, today sent 400 pre-litigation settlement letters to 13 different universities. Each letter informs the school of a forthcoming copyright infringement lawsuit against one of its students or personnel.").

37. See, e.g., Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 744, 747-50 (2005) (suggesting that the "John Doe" suits deter some file sharing and may, in addition, become a profit center for the recording industry).

38. See Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 958 (2005) [hereinafter Litman, *Sony Paradox*] ("[O]nly one of the 8000 consumers sued so far for peer-to-peer file sharing by the recording industry has found the arguments in favor of personal copying sufficiently compelling to be worth the risk of taking the law suit to trial.").

39. See Brief of Amici Curiae Law Professors in Support of Respondents at 3, *Grokster*, 545 U.S. 913 (No. 04-480) ("[T]he right of private copying, which has existed (as a matter of legal realism) for years, may well be lost not through a fair and vigorously contested adversary process, but through silence.").

40. See Mitch Bainwol, CEO, Recording Indus. Ass'n of Am., Address at the Nat'l Ass'n of Recording Merchandisers Insights and Sounds Convention 2005, Building a Brighter Future: Making and Selling Great Music, at 58 (Aug. 12, 2005), <http://www.narm.com/2005Convention/Bainwol.pdf> ("Burning and Ripping Are Becoming A Greater Threat Than P2P"). The copy-protection software has not been entirely benign. In 2005, Sony BMG released a number of recordings on CDs that incorporated copy-protection technology. The CDs played normally in a conventional CD player, but, when inserted into a CD-ROM drive of a computer running the Windows operating system, the CDs automatically and secretly installed software on the user's computer. Press Release, FTC, Sony BMG Settles FTC Charges (Jan. 30, 2007), available at <http://www.ftc.gov/opa/2007/01/sony.htm>. The Federal Trade Commission charged Sony BMG with violating federal law, claiming that the software "Posed Security Risks, Limited CD Use, and Monitored Users' Listening Habits on their Computers, Without Consumer Consent." *Id.* Sony settled the charges in January of 2007. *Id.*

41. See *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) ("[T]he Commission adopted 'broadcast flag' regulations, requiring that digital television receivers . . . include technology allowing them to recognize the broadcast flag."); *Broadcast and Audio Flag: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 47 (2006), available

This Article seeks to refocus the discussion of users' and consumers' rights under copyright, by placing people who make personal use of copyright works at the center of the copyright system. The view of copyright that such a reconfiguration permits yields some useful insights. It allows us to look at nineteenth and twentieth century copyright cases in a new light. Rather than viewing those opinions as decisions by common law judges construing statutes stingily,<sup>43</sup> we can appreciate them as interpretations informed by a view of copyright in which readers and listeners were as important as authors and publishers.

I propose in this Article to look at the place of readers, listeners, viewers, and the general public in copyright through the lens of personal use. After *Grokster*, the topic of personal use is timely, indeed critically so. Limiting myself to personal use, moreover, allows me to evade, for now, many of the interesting questions that arise when readers, listeners, users, and experiencers morph into publishers and distributors.<sup>44</sup> Finally, personal use is a realm where even the most rapacious copyright owners have always agreed that some uses are lawful even though they are neither exempted or

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at <http://commerce.senate.gov/pdf/bainwol-012406.pdf> (hearing on proposals for legislation directing the FCC to implement the broadcast flag); Anne Broache, *Senators Aim to Restrict Net, Satellite Radio Recording*, CNET NEWS.COM, Jan. 16, 2007, [http://news.com.com/2102-1028\\_3-6149915.html](http://news.com.com/2102-1028_3-6149915.html) (“[Proposed legislation] says that all audio services . . . would be obligated to implement ‘reasonably available and economically reasonable’ copy-protection technology aimed at preventing ‘music theft’ and restricting automatic recording.”); Electronic Frontier Foundation, EFF: Broadcast Flag, <http://www.eff.org/IP/broadcastflag/> (“[I]f the broadcast flag mandate is passed, Hollywood and federal bureaucrats will get a veto over innovative devices and legitimate uses of recorded programming. The mandate forces all future digital television (DTV) tuners to include ‘content protection’ (aka DRM) technologies.”).

42. See *The Audio and Video Flags: Can Content Protection and Technological Innovation Coexist?: Hearing Before the H. Subcomm. on Telecommunications and the Internet*, 109th Cong. 40–70 (2006) (discussing the degree to which the proposed audio broadcast flag would impinge on listeners’ control of their radios); *id.* at 71 (statement of Fritz Attaway, Executive Vice President and Special Policy Advisor, Motion Picture Association of America) (“Whether or not the [video broadcast] flag is reinstated, the vast majority of digital TV channels received by the American public will be capable of protecting content against mass redistribution.”); *The Analog Hole: Can Congress Protect Copyright and Promote Innovation?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (June 21, 2006) (statement of Dan Glickman, Chairman and CEO, Motion Picture Association of America), <http://judiciary.senate.gov/hearing.cfm?id=1956> (“[W]e can, and must, implement basic technological measures . . . to discourage what I call ‘casual misuse’ of our intellectual property.”); see also Platform Equality and Remedies for Rights Holders in Music Act of 2007, S. 256, 110th Cong. (requiring radios and audio recorders to include content protection technology).

43. See, e.g., Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 980 (1990) [hereinafter Litman, *Public Domain*] (“[Nineteenth century] courts interpreted the scope of the copyright grant narrowly and continued to hold that what Congress did not grant to the author became common property upon publication of the work containing it.”).

44. For some of my thoughts on those questions, see Jessica Litman, *Sharing and Stealing*, 37 HASTINGS COMM. & ENT. J.L. 1 (2004) [hereinafter Litman, *Sharing*].



privileged in the copyright statute nor recognized as legal by any judicial decision.<sup>45</sup>

In Part II of this Article, I urge that reading, listening, viewing, watching, playing, and using copyrighted works is at the core of the copyright system. For most of its history, copyright law was designed to maximize the opportunities for nonexploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins. I term the freedom to engage in those activities copyright liberties, and argue that they are both deeply embedded in copyright's design and crucial to its promotion of the "Progress of Science." In Part III, I revisit copyright cases that have attracted criticism for their stingy construction of copyright owners' property rights, and suggest that the courts' narrow reading of copyright rights was motivated, at least in part, by their solicitude for the interests of readers and listeners. These courts sought to evaluate whether accused uses were more akin to reading and listening than to publishing and distributing, and they examined the potential impact of their decisions on readers and listeners as well as authors and publishers. When a broad literal reading of statutory language would have significantly burdened reading, listening, and viewing, these courts resisted that interpretation of the statute. In Part IV, I articulate a definition of personal use. Armed with that definition, in Part V, I look at a range of personal uses that are uncontroversially noninfringing under current law. I focus in particular on personal uses that seem to fall within the literal terms of copyright owners' exclusive rights, and seem to be excused by no statutory limitation, but which are nonetheless generally considered to be lawful. I proceed in Parts VI and VII to offer an alternative analysis of the scope of copyright owners' rights and the lawfulness of personal uses that might invade them. Finally, in Part VIII, I return to the conventional paradigm of copyright statutory interpretation, under which all unlicensed uses are infringing unless excused. I suggest that the rubric is not only inaccurate, but potentially destructive of copyright's historic liberties.

#### I. What Is Copyright Law for?

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

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

We sometimes talk and write about copyright law as if encouraging the creation and dissemination of works of authorship were the ultimate goal,

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45. See Hamilton, *supra* note 3, at 623 ("There has been a cushion of 'free use' surrounding the author's capacity to prohibit unauthorized or unpaid uses. Examples . . . include: browsing among copyrighted books and magazines for sale in a bookstore, loaning a book to a friend, borrowing copyrighted works from public libraries, and visiting an art gallery or museum."); *infra* text accompanying notes 137–84.

with nothing further required to “promote the Progress of Science.”<sup>46</sup> We have focused so narrowly on the production half of the copyright equation that we have seemed to think that the Progress of Science is nothing more than a giant warehouse filled with works of authorship. When we do this, we miss, or forget, an essential step. In order for the creation and dissemination of a work of authorship to mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program, and build and inhabit the architecture.

This insight seems so obvious that it is surprising that it shows up so rarely in the copyright laws, the legislative efforts to enact them, or the scholarship that critiques them. The copyright interests of the readers, viewers, listeners, watchers, builders, and inhabitants may get short shrift in congressional hearings because they have so few paid representatives beyond members of Congress themselves. Their absence until very recently from copyright scholarship is more difficult to account for. The notion that copyright law’s primary purpose is to benefit the public has been commonplace for many years.<sup>47</sup> The understanding that its mechanism was to enable works of authorship to enrich the people who read, listened to, and viewed them has appeared in many copyright cases.<sup>48</sup> Yet copyright scholarship’s recent preoccupation with law and economics has translated those pronouncements into assertions that the public will benefit when authors and distributors have robust incentives to create and market works.<sup>49</sup> So long as people buy books and CDs, who cares if they read or listen to them? Outlier scholars have published books and articles seeking to argue that copyright law, properly understood, places readers, listeners, and viewers at its center.<sup>50</sup> Those

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46. U.S. CONST. art. I, § 8, cl. 8.

47. See, e.g., 1 PAUL GOLDSTEIN, *COPYRIGHT* 5, 3–9 (1989) (“The constitutional clause empowering Congress to enact a copyright statute reflects the belief that property rights, properly limited, will serve the general public interest in an abounding national culture.”); ROBERT GORMAN, *COPYRIGHT LAW* 1 (1991) (“The basic purpose of copyright is to enrich our society’s wealth of culture and information.”).

48. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . .”); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”).

49. See LITMAN, *DIGITAL COPYRIGHT*, *supra* note 21, at 79–81 (describing the influence of the economic incentive model of intellectual property on copyright theory and scholarship).

50. See, e.g., L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 3–4 (1991) (stating that copyright should be viewed “as a law for consumers as well as for creators and marketers”); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 267 (2002) (“[C]yberspace and the economics of digital technology require the unbundling of the public’s interests in the creation and distribution of digital works.”); Lunney, *supra* note 29, at 977 (“[I]ncreasing access to a work, even unauthorized access, represents a sufficient public interest to invoke the fair use doctrine.”).

arguments, though, have for the most part been poorly received even by copyright skeptics, who have viewed them as extreme.<sup>51</sup>

Copyright law is intended to create a legal ecology that encourages the creation and dissemination of works of authorship, and thereby “promote the Progress of Science.” As James Boyle has reminded us, ecologies are complex and interdependent systems.<sup>52</sup> If we build shopping centers and housing tracts on all of the marshes and frog ponds, we will eventually find ourselves overrun with mosquitoes. In the same way, laws that discourage book reading end up being bad for book authors. Thus, it isn’t difficult to frame an argument that copyright law cannot properly encourage authors to create new works if it imposes undue burdens on readers. Such arguments are more palatable to fans of strong copyright than arguments urging the primacy of reading, and much of the scholarship urging limited copyright, my own included,<sup>53</sup> has relied on them.<sup>54</sup> Those arguments, though, have been vulnerable to the assertion that if strong copyright laws prove unfavorable to authors because of the burdens they impose on readers, authors can always exercise their options to waive some of their rights, or license them on easy and generous terms.<sup>55</sup> Recent rejoinders have focused on the difficulties attending licensing.<sup>56</sup> I want to resist the temptation to advance an argument

51. See, e.g., Cohen, *supra* note 30, at 348 (“I do not intend to argue that copyright is, as some have asserted, ‘a law of users’ rights.” (citing PATTERSON & LINDBERG, *supra* note 50)). Copyright true believers have been even less receptive. For a strident and not entirely coherent argument that users have and should have no rights whatsoever under copyright laws, see David R. Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC’Y U.S.A. 345, 357, 357–58 (2005) (“No ‘Users’ Rights’ Exist (Explicitly or Implicitly)”).

52. James Boyle had the insight that intellectual property laws created an information ecology. See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 110 (1997) (“In both environmental protection and intellectual property, the very structure of the decisionmaking process tends to produce a socially undesirable outcome.”); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter–Spring 2003, at 33, 70–74 (comparing copyright activism to the environmental movement); Symposium, *Cultural Environmentalism at 10*, LAW & CONTEMP. PROBS., Spring 2007 (collecting essays presented at a conference honoring Boyle’s cultural environmentalism work).

53. See Litman, *Public Domain*, *supra* note 43, at 1018–19 (cataloguing the advantages for authors of a broad public domain).

54. See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 29 (2004) (“Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. . . . No society, free or controlled, has ever demanded that every use be paid for. . . .”); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (forthcoming 2008) (manuscript at 135–36, on file with author) (arguing that an expansive copyright law will tend to diminish the creation and dissemination of additional works and lead to a clustering in already popular genres).

55. I. Trotter Hardy, *Copyright and “New-Use” Technologies*, 23 NOVA L. REV. 657, 697 (1999) (“[T]he likelihood that authors given both a right and a market that permits them to demand royalties in some profitable amount, would instead refuse royalties in any amount, seems small—far less than the likelihood that they would happily receive them.”).

56. See LESSIG, *supra* note 54, at 106 (“[T]he cost of complying with the law is impossibly high. Therefore, for the law-abiding sorts, a wealth of creativity is never made. And for that part that is made, if it doesn’t follow the clearance rules, it doesn’t get released.”); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 698 (2003) (“[A]s a result of the dual layers of copyrights and the divided rights granted to each owner, there are too many

that personal use requires protection for the sake of authors. Rather, I want to insist that copyright law encourages authorship at least as much for the benefit of the people who will read, view, listen to, and experience the works that authors create, as for the advantage of those authors and their distributors.

For most of the history of copyright, the law left reading, listening, and viewing unconstrained.<sup>57</sup> The copyright statutes on the books neither mentioned personal uses expressly, nor needed to. The exclusive rights granted by copyright were narrow, and the law aimed its proscriptions at commercial and institutional entities.<sup>58</sup> Thus the opportunities of members of the public to engage in unfettered reading, listening to, and looking at works protected by copyright received little explicit attention. They nonetheless functioned as historic copyright liberties,<sup>59</sup> implicit in the copyright statutory scheme and essential to its purpose. Copyright scholarship has tended to view these liberties as lacunae in copyright owner control; this tendency may obscure their affirmative importance in the copyright scheme.<sup>60</sup> Courts, however, have in many cases appreciated the role of copyright liberties and preserved them against incursion, even where the language of the copyright statute offered no obvious route to protect them. Where copyright claims posed serious threats to copyright liberties, courts often responded by reading the scope of copyright's exclusive rights narrowly.<sup>61</sup>

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vested industry players for downstream users to be able to efficiently obtain the authorizations needed for downstream use of recorded music.”); Katie Dean, *Copyright Reform to Free Orphans?*, WIRED, Apr. 12, 2005, <http://www.wired.com/news/culture/0,1284,67139,00.html> (discussing problems with licensing “items still locked up under copyright but where the owners are unknown or impossible to locate”).

57. *E.g.*, R. Anthony Reese, *Innocent Infringement in Copyright Law* 20 (Jan. 7, 2007) (unpublished manuscript, on file with author); Tushnet, *supra* note 25, 541–44.

58. *See, e.g.*, Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899 (2007) (contrasting early U.S. copyright laws with the current statute).

59. *See* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1397–1400 (1989) (reimagining copyright law from the vantage point of user privilege).

60. *See* Litman, *Public Domain*, *supra* note 43, at 967 (“This tendency can distort our understanding of the interaction between copyright law and authorship. Specifically, it can lead us to give short shrift to the public domain by failing to appreciate that the public domain is the law’s primary safeguard of the raw material that makes authorship possible.”).

61. *See, e.g.*, *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (“It may be true . . . these perforated [piano] rolls . . . enable[] the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. . . . As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music . . .”).

## II. Revisiting Older Cases

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

—Alan Latman, 1958<sup>62</sup>

U.S. copyright law initially limited itself to securing the author’s right to “print, reprint, publish or vend.”<sup>63</sup> In 1856, Congress added a public performance right, limited to dramatic compositions.<sup>64</sup> In 1870, it added dramatization and translation rights.<sup>65</sup> In 1897, it extended the public performance right to musical compositions.<sup>66</sup> The standard account of nineteenth and early twentieth century copyright in the United States tells us that Congress defined the scope of the copyright grant narrowly and courts construed it stingily.<sup>67</sup> Looking back at early copyright law from the vantage point of the twenty-first century, when copyright rights are broad, deep, and very long,<sup>68</sup> the scope of early copyright laws can seem startlingly constrained. Focusing on the relative narrowness of early copyright’s exclusive rights, though, can obscure the importance of the corresponding breadth of individual liberties to read, view, listen, and use copyright-protected works. When ambitious copyright-owner claims threatened to encroach on copyright liberties, some courts resisted. The language of some of the most notorious decisions limiting the scope of copyright advanced the interests of readers, listeners, and viewers. Courts confronting novel claims of infringement sought to locate the allegedly infringing behavior on the continuum between exploitation and enjoyment, in order to preserve copyright owners’ control over exploitation while denying them control over individual reading, listening, playing, and viewing.<sup>69</sup>

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62. Latman, *supra* note 7, at 783.

63. Act of May 31, 1790, ch. 15, 1 Stat. 124.

64. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

65. Act of July 8, 1870, ch. 230, 16 Stat. 198.

66. Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 481–82 (repealed 1909).

67. See ARTHUR R. MILLER & MICHAEL H. DAVID, *INTELLECTUAL PROPERTY* 326–27 (3d ed. 2000) (describing the “narrow view of copyright” applied by courts in the eighteenth and early nineteenth centuries); NETANEL, *supra* note 54 (manuscript at 46–47); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 325–47 (1989) (surveying the development of copyright case law).

68. See *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (upholding the Copyright Term Extension Act, in which Congress extended the terms of existing and future copyrights).

69. The late Ray Patterson, in an important article published two decades ago, articulated this distinction as the difference between using the copyright and using the work. See Patterson, *supra* note 22, at 11 (“The distinction between the work and the copyright of the work is made clear by the definition of copyright—a series of rights to which a given work is subject, for example, the right to print, reprint, publish, and vend the work.”).

In *Stowe v. Thomas*,<sup>70</sup> for example, Harriet Beecher Stowe sued to enjoin the publication of an unauthorized German translation of *Uncle Tom's Cabin*, and lost.<sup>71</sup> The court held that her copyright in the book did not extend so far:

An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise.<sup>72</sup>

Eaton Drone's 1879 copyright treatise described the decision in *Stowe v. Thomas* as "clearly wrong, unjust and absurd,"<sup>73</sup> and it has long been traditional to cite the case as an example of the extraordinary stinginess of nineteenth century U.S. copyright.<sup>74</sup> What we miss, though, when we look only at how narrowly the court construed the author's rights, is its focus on the rights of readers. The court struck a balance between the author's property interests and readers' "common property" interests, in which the author's exclusive right yielded to her readers' right to communicate the author's conception.<sup>75</sup> The translator and publisher of the German edition were, in this analysis, simply readers of Stowe's book, exercising the liberties that copyright law afforded them.<sup>76</sup>

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70. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

71. *Id.*

72. *Id.* at 206.

73. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 455 n.4 (1879).

74. See, e.g., Litman, *Public Domain*, *supra* note 43, at 980 (noting that *Stowe's* analysis influenced courts in subsequent cases to interpret copyright law narrowly); Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 824 (2000) (characterizing *Stowe* as evidence of how far copyright protection has progressed beyond the narrow prohibition extending only to literal copies); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1233 (1997) (citing *Stowe* as epitomizing copyright law's narrow protection).

75. *Stowe*, 23 F. Cas. at 206.

76. See also *Baker v. Selden*, 101 U.S. 99, 103 (1880) ("The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book."); Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEXAS L. REV. 1921, 1933 (2007) ("*Baker* was concerned not just with freedoms for follow-on authors, but also with freedoms for readers and users of copyrighted works, especially in the freedom to extract and employ the useful know-how from such works . . .").

A century later, in a pair of copyright cases challenging cable television systems' unlicensed transmission of broadcast signals, the Supreme Court held that the cable operators were not performing the signals they transmitted within the meaning of the statute, but should be deemed akin to viewers.<sup>77</sup> Similarly, when composers sued the owner of a small Pittsburgh restaurant who entertained his customers by playing radio programs in the dining area, the Court held that the restaurant owner could not be held liable for publicly performing the music for profit.<sup>78</sup> What restaurant owner George Aiken was doing when he played the radio for his customers, the Court insisted, was not performing, but listening.<sup>79</sup> The Court predicated its construction of the

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77. In *Fortnightly v. United Artists Television, Inc.*, 392 U.S. 390 (1968), a motion picture studio that had licensed its programming to television for broadcast sued the operator of cable television systems that had, without a license, transmitted the programming to customers in nearby areas who had poor television reception because of the hilly terrain. The studio claimed that Fortnightly was performing its motion pictures for profit. *Id.* at 400–01. The Supreme Court disagreed. *Id.* at 393. The Court continued:

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

*Id.* at 399–400 (footnotes omitted). Six years later, the Court was invited to reexamine the line between broadcaster and viewer in a copyright infringement case against a cable television company that imported television broadcast signals from geographically remote areas. *See Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974). The Court refused to find copyright liability. *Id.*

78. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

79. *Id.* at 162. The Court explained:

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

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

And a ruling that a radio listener "performs" every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else. Secondly, to hold that all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far

public performance right in part on its concern for the restaurant owner's interest in listening to the radio.<sup>80</sup>

None of these cases targeted individual personal users directly,<sup>81</sup> all were suits against intermediaries who facilitated reading, listening, and viewing.<sup>82</sup> The courts resolved them in defendants' favor, though, by treating the intermediaries' activities as on the readers', listeners', or viewers' side of the line between exploitation and enjoyment of copyrighted works.<sup>83</sup> In other cases, courts explicitly addressed the intermediaries' role, but considered the potential effect on reader, listener, or viewer liberties of prohibiting the use as an important and possibly determinative consideration.<sup>84</sup>

*Williams & Wilkins Co. v. United States*<sup>85</sup> has the distinction of having been dubbed the "Dred Scott" case of copyright law.<sup>86</sup> Williams & Wilkins, a publisher of thirty-seven medical journals, sued the National Library of Medicine, claiming that photocopying journal articles to meet requests for

beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1(e):

The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

*Id.* at 162–64 (footnotes omitted) (quoting H.R. REP. NO. 61-2222, at 7 (1909)).

80. *Id.*

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

82. See, e.g., *Twentieth Century Music Corp.*, 422 U.S. 151 (restaurant owner defendant); *Fortnightly*, 392 U.S. 390 (CATV system defendant); *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (publisher defendant).

83. See, e.g., *Twentieth Century Music Corp.*, 422 U.S. at 162–64 (comparing the restaurant owner to a listener rather than a performer under the statute).

84. See, e.g., *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908) ("In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration."); *Stowe*, 23 F. Cas. at 206 ("The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or treatise.").

85. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

86. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 970 (9th Cir. 1981) ("*Williams & Wilkins Co.*, which has been appropriately regarded as the 'Dred Scott decision of copyright law' is clearly not binding in this circuit, and, in any event, we find its underlying rationale singularly unpersuasive." (citation omitted) (quoting *Williams & Wilkins Co.*, 487 F.2d at 1387 (Nichols, J., dissenting))), *rev'd*, 464 U.S. 417 (1984).



interlibrary loans infringed its copyrights.<sup>87</sup> The Court of Claims held the photocopying to be fair use.<sup>88</sup> The court began its analysis with the observation that the statutory right to “‘copy’ is not to be taken in its full literal sweep.”<sup>89</sup> The court continued:

The court-created doctrine of “fair use” . . . is alone enough to demonstrate that Section 1 does not cover all copying (in the literal sense). Some forms of copying, at the very least of portions of a work, are universally deemed immune from liability, although the very words are reproduced in more than *de minimis* quantity. Furthermore, it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use . . . .<sup>90</sup>

Judge Davis’s opinion relied on “years of accepted practice” of copying entire poems, songs, illustrations, articles, and judicial opinions for personal use to support the proposition that copyright law permits unlicensed copying in a host of situations,<sup>91</sup> and then focused on the burden to individual medical researchers of deeming the Library’s copying to be infringing:

If photocopying were forbidden, the researchers, instead of subscribing to more journals or trying to obtain or buy back-issues or reprints (usually unavailable), might expend extra time in note-taking or waiting their turn for the library’s copies of the original issues—or they might very well cut down their reading and do without much of the information they now get through NLM’s and NIH’s copying system. The record shows that each of the individual requesters in this case already subscribed, personally, to a number of medical journals, and it is very questionable how many more, if any, they would add. The great problems with reprints and back-issues have already been noted. In the absence of photocopying, the financial, time-wasting, and other difficulties of obtaining the material could well lead, if human experience is a guide, to a simple but drastic reduction in the use of the many articles (now sought and read) which are not absolutely crucial to the individual’s work but are merely stimulating or helpful. The probable effect on scientific progress goes without saying.<sup>92</sup>

In the aggregate, the Library’s photocopying was massive.<sup>93</sup> The court nonetheless concluded it was noninfringing because of the personal use

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87. *Williams & Wilkins Co.*, 487 F.2d at 1346–48.

88. *Id.* at 1362.

89. *Id.* at 1350.

90. *Id.*

91. *Id.* at 1353.

92. *Id.* at 1358.

93. *Id.* at 1348.

interests of each of the many individual researchers for whom the copies were made.<sup>94</sup>

In *Sony v. Universal Studios*, copyright owners sued the producer of the videocassette recorder, claiming that it should be liable for the massive copyright infringement of the millions of consumers who used its VCR to record broadcast programming off the air.<sup>95</sup> The Supreme Court held that recording a program to enable its later viewing, while technically an unauthorized copy, was fair use and therefore not actionable<sup>96</sup>: “One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home . . . .”<sup>97</sup>

Other opinions famous for their stingy constructions of copyright owners’ control also advanced the interests of readers, listeners, and viewers. *White-Smith v. Apollo*, for example, stands in the copyright lexicon for the illogical narrowness of the copyright law of its era.<sup>98</sup> In *White-Smith*, a music publisher sued to enjoin the manufacture of piano rolls designed to cause player pianos to play songs protected by the publisher’s copyright.<sup>99</sup> The Court held that piano rolls were not “copies” within the meaning of the statute, and they therefore did not infringe:

When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, as that term is generally understood . . . .”<sup>100</sup>

94. *Id.* at 1362.

95. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

96. *Id.* at 454–55; see also Jessica Litman, *The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler*, in *INTELLECTUAL PROPERTY STORIES* 358 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005) [hereinafter Litman, *Story of Sony*] (describing internal Supreme Court memoranda that document the Court’s deliberations in *Sony*).

97. *Sony*, 464 U.S. at 456. The interests of television viewers had more influence on the result in *Sony* than the ultimate opinion reveals. Justice Stevens, who authored the majority opinion, focused primarily on the rights of homeowners using VCRs from the first Supreme Court deliberations on the case. Indeed, an early draft of Justice Stevens’s opinion characterized the lawsuit as an effort “to control the way William Griffiths watches television.” Litman, *Story of Sony*, *supra* note 96, at 358.

98. See, e.g., CRAIG JOYCE ET AL., *COPYRIGHT LAW* 75 (6th ed. 2003) (asking whether the *White-Smith* analysis is “at least defensible”); Deborah Tussey, *Technology Matters: The Courts, Media Neutrality, and New Technologies*, 12 J. INTELL. PROP. L. 427, 428 (2005) (characterizing the *White-Smith* judgment as “formalistic”). For a different analysis that seeks to rehabilitate the *White-Smith* opinion, see Kenneth M. Alfano, *Copyright in Exile: Restoring the Original Parameters of Exclusive Reproduction*, 11 J. TECH. L. & POL’Y 215, 230 (2006) (arguing that the Court in *White-Smith* construed “copying” as “substitution—the functional equivalent of ‘printing’ for books” (footnote omitted)).

99. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 8–9 (1908).

100. *Id.* at 17. The Court reasoned:

It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of

The effect of *White-Smith* was to allow nonmusicians who would otherwise have been unable to play the copyrighted songs to enjoy listening to them in their homes.<sup>101</sup>

Looked at from the vantage point of a copyright owner seeking enforcement of its rights, these opinions have seemed unreasonably conservative and have been criticized accordingly.<sup>102</sup> Viewed from the perspective of readers, listeners, and viewers, though, the decisions vindicate their continuing importance in the copyright formula. *Stowe v. Thomas* recognized the rights of Stowe's readers; *White-Smith v. Apollo* and *Twentieth Century Music Corp. v. Aiken* advanced the interests of listeners; *Sony* and the cable television cases upheld the rights of viewers. *Williams & Wilkins* suggested that copyright law has always excused strictly personal copying. If copyright law is designed to encourage reading, viewing, listening, and experiencing works of authorship as well as creating and distributing them, then courts' reluctance to read the copyright grant too expansively can be seen as an effort to preserve that equilibrium. Cases that are conventionally painted as the most notorious examples of courts' crabbed construction of copyright may be more usefully understood as defenses of the central place of readers, listeners, and players in the copyright scheme. Copyright rights cannot promote the Progress of Science unless readers, listeners, and viewers have the liberties necessary to enjoy copyrighted works. Where expansive constructions of statutory rights would have meaningfully constricted historic copyright liberties, these courts refused to interpret the rights so broadly.

More recently, a handful of courts have given copyright rights a similarly constrained reading in cases involving computer technology. In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,<sup>103</sup> Nintendo sued the maker of the Game Genie, which allowed consumers to modify the way a

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musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

*Id.*; see also *Stern v. Rosey*, 17 App. D.C. 562 (D.C. Cir. 1901) (holding that phonograph records are not "copies").

101. See *White-Smith*, 209 U.S. at 17–18.

102. See, e.g., Ginsburg, *Copyright and Control*, *supra* note 14, at 210, 206–10 (“[C]ourts faced with what appeared to be all-or-nothing attempts at copyright enforcement, preferred to interpret the statute in a way that would leave the copyright owners with nothing.”).

103. 780 F. Supp. 1283 (N.D. Cal. 1991), *aff'd*, 964 F.2d 965 (9th Cir. 1992).

Nintendo game played.<sup>104</sup> Nintendo argued that the Game Genie caused consumers to create unauthorized derivative works by varying the Nintendo games' audiovisual display.<sup>105</sup> The trial court noted: "The alleged infringer in this case is not a commercial licensee, but rather a consumer utilizing the Game Genie for noncommercial, private enjoyment. Such use neither generates a fixed transferable copy of the work, nor exhibits or performs the work for commercial gain."<sup>106</sup> The consumer, the court concluded, did not infringe Nintendo's copyright by using a Game Genie to alter the game play of Nintendo games:

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

Because of the technology involved, owners of video games are less able to experiment with or change the method of play, absent an electronic accessory such as the Game Genie. This should not mean that holders of copyrighted video games are entitled to broader protections or monopoly rights than holders of other types of copyrighted games, simply because a more sophisticated technology is involved. Having paid Nintendo a fair return, the consumer may experiment with the product and create new variations of play, for personal enjoyment, without creating a derivative work.<sup>107</sup>

It followed that Galoob did not infringe by selling the device that enabled the consumers' use.<sup>108</sup> The court of appeals affirmed.<sup>109</sup> Neither the trial court nor the court of appeals was able to ground its interpretation in the literal language of § 106(2) of the copyright statute; instead, each court gave the language a narrowing gloss because each was persuaded of the importance of the consumers' interest in playing games they had purchased. That

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104. *Id.*

105. *Id.* at 1286.

106. *Id.* at 1291.

107. *Id.*

108. *Id.* at 1292.

109. *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992); *see also Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 262, 266 (5th Cir. 1988) (dismissing a contributory infringement claim for the distribution of software that allowed consumers to make infringing copies of a computer program on the ground that the software also facilitated consumers' unauthorized but noninfringing backup copies and was therefore capable of substantial noninfringing use).

interest, the courts concluded, extended to adapting the games to enable them to play them in ways that they wanted to play them.<sup>110</sup>

In *Lotus Development Corp. v. Borland International Inc.*,<sup>111</sup> Lotus sued Borland for copying the words and arrangement of the menu command hierarchy of the Lotus 1-2-3 spreadsheet program, which Lotus insisted embodied the program's "look and feel."<sup>112</sup> The Court of Appeals for the First Circuit concluded that whether or not the menu command hierarchy resulted from expressive choices, it was uncopyrightable as a "method of operation" under § 102(b) of the copyright statute.<sup>113</sup> Judge Boudin, concurring, expressed some discomfort with the majority's rationale. In his view, the interests of Lotus's customers, who had invested time learning Lotus's commands and devising their own macros, required a judgment for Borland. The difficulty was finding an appropriate rationale to support it:

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

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

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110. See *Lewis Galoob Toys*, 780 F. Supp. at 1291. The trial court observed:

The Game Genie is a tool by which the consumer may temporarily modify the way in which to play a video game, legally obtained at market price. Any modification is for the consumer's own enjoyment in the privacy of the home. Such a process is analogous in purpose, if not in technology, to skipping portions of a book, learning to speed read, fast-forwarding a video tape one has purchased in order to skip portions one chooses not to see, or using slow motion for the opposite reasons.

*Id.*

111. 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

112. *Id.* at 810.

113. *Id.* at 816; see 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

Thus, for me the question is not whether Borland should prevail but on what basis.<sup>114</sup>

In *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*,<sup>115</sup> the recording industry brought suit to enjoin the sale of the first portable MP3 player under the Audio Home Recording Act.<sup>116</sup> The recording industry argued that, in return for shielding consumers from liability for noncommercial copying of recorded music, the law required digital audio recording devices to incorporate copy-protection technology and pay copyright royalties to compensate rights holders for the presumed copies made by individuals.<sup>117</sup> Since Diamond neither paid the statutory royalties nor included serial copy management technology in the device's design, the RIAA argued, its manufacture and sale of the device was illegal.<sup>118</sup> The Court of Appeals for the Ninth Circuit ruled that portable MP3 players were not subject to the copy-protection and royalty payment requirements of the Audio Home Recording Act.<sup>119</sup> Moreover, the court continued: "The Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. . . . Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."<sup>120</sup> The court's language reflects a conviction that noncommercial personal use was lawful, and marketing devices that facilitated it, therefore, could not engender liability.

The line of authority reading copyright rights narrowly to preserve the liberties of readers, listeners, or viewers is by no means undisputed. For every case in which a copyright defendant persuaded a court to read statutory exclusive rights narrowly, there is at least one in which the court mechanically applied the literal language of the statute to find infringement without much attention to the effects of the ruling on readers, listeners, or viewers.<sup>121</sup> In *A&M Records, Inc. v. Napster, Inc.*,<sup>122</sup> for example, defendant sought to rely on *Sony* and *Recording Industry Ass'n of America* to argue that users of

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114. *Lotus Dev. Corp.*, 49 F.3d at 821 (Boudin, J., concurring).

115. 180 F.3d 1072 (9th Cir. 1999).

116. *Id.* at 1073.

117. *Id.* at 1075.

118. *Id.*

119. *Id.* at 1081.

120. *Id.* at 1079.

121. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that transitory random access memory reproduction of the copyrighted software was sufficiently "fixed," under the statutory definition, to infringe the right to reproduce a work in copies); *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278-79 (4th Cir. 1989) (holding that playing a coin-operated videogame in a video arcade is an infringing public performance); *Worlds of Wonder, Inc. v. Veritel Learning Sys., Inc.*, 658 F. Supp. 351, 354-55 (N.D. Tex. 1986) (concluding that children who played tapes containing public domain material in Teddy Ruxpin toys created infringing audiovisual works that were substantially similar to the copyrighted audiovisual work comprising a Teddy Ruxpin tape playing in a Teddy Ruxpin toy).

122. 239 F.3d 1004 (9th Cir. 2001).

its software engaged in lawful personal copying.<sup>123</sup> The Court of Appeals for the Ninth Circuit found that argument too hard to swallow. Judge Beezer's opinion rejected Napster's argument that downloading music from other individuals might be excused either by the Audio Home Recording Act or by the fair use doctrine.<sup>124</sup> Indeed, appalled by the vast scale, in the aggregate, of millions of individuals' copying music from each other's hard drives, Judge Beezer declared the consumer copying to be commercial.<sup>125</sup> In *Grokster*, the Supreme Court predicated its opinion on the assumption—uncontested by defendants—that the vast majority of consumer file sharing over peer-to-peer networks was blatantly illegal.<sup>126</sup> Not all courts consider the impact of their rulings on personal uses, and not all personal uses strike courts as legitimate. The strongest inference the case law supports is that reader, listener, and viewer interests have influenced many courts' reading of the scope of copyright, and that influence dates back to the earliest copyright cases.

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

### III. What Is "Personal Use?"

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

—Justice John Paul Stevens, 1983<sup>127</sup>

In order to sidestep extant debates about what counts as "private use," "noncommercial use," or "use by a consumer," in which advocates for

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123. *Id.* at 1019.

124. *Id.* at 1019, 1024.

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

126. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005).

127. Memorandum from Justice John Paul Stevens to the Justices of the 1983 U.S. Supreme Court at 18 (June 1983) (on file with author); see Litman, *Sony Paradox*, *supra* note 38, at 930–34 (discussing Justice Stevens' first draft of his opinion in *Sony*).

various results have taken hardened positions,<sup>128</sup> I'd like to avoid previously contested vocabulary. I want to start with a definition of "personal use." I offer the definition on the assumption that some subset of personal use will be lawful, some subset will be infringing, and that the legality of some personal uses will be controversial. With that disclaimer, I propose to define "personal use" as a use that an individual makes for herself, her family, or her close friends.<sup>129</sup> So defined, personal use can take place at home or at work, on the street or in the store. It may happen with or without a commercial purpose. It may or may not compete with copyright owners' planned exploitation of their works. It may occur within a statutory exemption. It may be either permitted or prohibited by a license. Figuring out which personal uses are lawful and which are not will give us a chance to examine the place of personal use in the copyright scheme.

In the spirit of rhetorical experiment, and as part of my strategy for sidestepping existing controversies, I propose to refer to the individuals who make personal use as "persons," "people,"<sup>130</sup> or "individuals" rather than "consumers,"<sup>131</sup> "users,"<sup>132</sup> or "fans."<sup>133</sup>

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128. See *Music on the Internet: Is There an Up Side to Downloading?: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (2000), available at <http://judiciary.senate.gov/hearing.cfm?id=195> (expressing divergent views); Lutheran-Hymnal.com, Permissions and Copyright, [http://www.lutheran-hymnal.com/about\\_us/permission\\_and\\_copyright.html](http://www.lutheran-hymnal.com/about_us/permission_and_copyright.html) ("Personal private use is not permission for archiving this material for your self [sic] or others in any manner . . ."); MusicUnited.org, The Law, [http://www.musicunited.org/2\\_theLaw.html](http://www.musicunited.org/2_theLaw.html) ("If you make unauthorized copies of copyrighted music recordings, you're stealing."); University of Georgia, Regents Guide to Understanding Copyright & Educational Fair Use – Office of Legal Affairs, <http://www.usg.edu/legal/copyright/#part3d3b> ("[S]ince personal fair use is a use of the work—not the copyright—it is always a protected use.").

129. For a somewhat broader definition, see Tussey, *supra* note 28, at 1134 ("Personal use,' in the broad sense, means consumption or adaptation of intellectual properties by individual users for their own purposes, including uncompensated sharing of those works with others."). For a narrower definition, see Lutheran-Hymnal.com, *supra* note 128 ("Personal private use is that which occurs within you [sic] immediate biological family . . .").

130. See Stadler, *supra* note 58, at 914 (referring to consumers of copyrighted material as "people").

131. See, e.g., Liu, *supra* note 29, at 400 ("I am consciously choosing the term 'consumer,' rather than a more neutral term like 'user,' 'the public,' or 'audience,' in part because I wish to focus on those uses that are literally consumptive rather than productive in nature, and the term roughly captures this distinction.").

132. See, e.g., Cohen, *supra* note 30, at 347 ("Most . . . have settled . . . on 'users,' a term that manages simultaneously to connote both more active involvement . . . and a residual aura of addiction . . .").

133. See, e.g., Fred von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM, Sept. 29, 2004, <http://www.law.com/jsp/article.jsp?id=1095434496352> (referring to users of peer-to-peer file-sharing software as "music fans"); see also Justin Hughes, "Recoding" Intellectual Property and Overlooked Audience Interests, 77 TEXAS L. REV. 923 (1999) (critiquing scholarly assertions of nonowner interests in intellectual property).



#### IV. What Personal Uses Are Lawful?

Anyone may copy copyrighted materials for purpose of private study and review.

—Saul Cohen, 1955<sup>134</sup>

With a definition of personal use to work with, we can start to map out which personal uses are lawful and which infringe. A standard paradigm for construing the copyright law holds that any unlicensed use that falls within the literal terms of § 106, which gives copyright owners control over fixed reproductions, adaptations, and public distributions, performances, and displays,<sup>135</sup> violates the copyright law unless it comes within the terms of an express statutory exemption.<sup>136</sup> As I will explore in detail below, I believe that rubric is at best misleading, but it will give us a place to begin. Even if the standard paradigm accurately describes the law, there is a large class of personal uses that are simply outside of the scope of the current copyright statute. That zone, smaller than it used to be, includes all private performances and displays.<sup>137</sup> It includes all private distributions, since the copyright owner's distribution right is limited to distributions "to the public."<sup>138</sup> Copyright owners have no copyright rights that would allow them to control private performances, displays, or distributions. Nor have copyright owners any right to prohibit people from making unfixed reproductions of copyrighted works.<sup>139</sup>

134. Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 58 (1955).

135. 17 U.S.C. § 106 (2000).

136. See, e.g., MusicUnited.org, *supra* note 128 ("[Y]ou need the permission of the copyright holder before you copy and/or distribute a copyrighted music recording."); Brad Templeton, 10 Big Myths About Copyright Explained, <http://www.templetons.com/brad/copymyths.html> ("[C]opyright law makes it technically illegal to reproduce almost any new creative work . . .").

137. 17 U.S.C. § 106(4)–(5). The copyright statute's definitions of "display" and "perform" are broad enough to encompass looking at and listening to:

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially. . . .

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

17 U.S.C. § 101. Because the statutory performance and display rights are limited to public performance and public display, they do not encompass watching television in the living room, listening to music in the bedroom, or looking at the poster that is hanging on the wall of the kitchen. See H. R. REP. NO. 94-1476, at 62–65 (1976).

138. 17 U.S.C. § 106(3) ("[T]o distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental lease or lending . . ."). This limitation has attracted almost no attention in the thirty years since the enactment of the 1976 Act, presumably because few unauthorized private distributions of copies or phonorecords have attracted litigation.

139. 17 U.S.C. §§ 101, 106(1).

A number of other personal uses are permitted because of statutory exemptions and privileges. The first sale doctrine in § 109 allows distribution and display to the public of owned, lawfully made copies and phonorecords.<sup>140</sup> Section 109(e) permits the public performance of video games on coin-operated machines.<sup>141</sup> Section 110(5) allows people to listen to and watch radio and television broadcasts in public places, so long as they use the sort of equipment commonly found in private homes.<sup>142</sup> Section 110(11) allows private households to use software to hide objectionable scenes in motion pictures they are viewing.<sup>143</sup> Section 117 permits people to modify and make backup copies of the computer programs on their computers.<sup>144</sup> Section 120 allows homeowners to renovate and photograph their homes, notwithstanding the architects' reproduction and adaptation rights.<sup>145</sup> Section 602 permits people to import copies or phonorecords of copyrighted works for use (as distinguished from sale) as part of their personal luggage.<sup>146</sup> Section 1008 prohibits copyright infringement suits against consumers who make noncommercial copies of recorded music (at least so long as they use analog or digital audio recording devices or media).<sup>147</sup>

In addition, the statute includes specific exemptions for intermediaries to reproduce, adapt, distribute, perform, or display works for the benefit of people who are making exempt personal uses. Section 110(11) allows software companies to create and market programs designed to assist individuals who wish to censor offensive scenes in motion picture broadcasts or DVDs.<sup>148</sup> Section 111 allows the proprietors of hotels and apartment buildings to transmit broadcast programs to individual apartments and hotel rooms so that the occupants can perform them privately.<sup>149</sup> Section 117 permits computer repair services authorized by people who own computers to run the copyrighted computer programs installed on individuals' machines as part of the repair process.<sup>150</sup> Section 121 allows nonprofit groups to reproduce

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140. 17 U.S.C. § 109.

141. 17 U.S.C. § 109(e).

142. 17 U.S.C. § 110(5).

143. Family Movie Act of 2005, Pub. L. No. 109-9, §§ 201-02, 119 Stat. 223, 223-24 (to be codified at 17 U.S.C. § 110(11)).

144. 17 U.S.C. § 117.

145. 17 U.S.C. § 120.

146. 17 U.S.C. § 602(a)(2).

147. 17 U.S.C. § 1008. The scope of the § 1008 prohibition against infringement suits is contested. See *Atlantic Recording Corp. v. XM Satellite Radio*, 81 U.S.P.Q. 2d (BNA) 1407 (S.D.N.Y. 2007) (holding that § 1008 protects XM radio from suit based on actions taken in its capacity as a distributor of audio recording devices, but not from suit based on its conduct as a satellite radio broadcaster, or from suit based on its actions as an "XM + Mp3" content delivery provider); Litman, *War Stories*, *supra* note 6, at 357-60, 359 n.114 (discussing § 1008 and its scope).

148. See Family Movie Act of 2005, Pub. L. No. 109-9, §§ 201-02, 119 Stat. 223, 223-24 (to be codified at 17 U.S.C. § 110(11)).

149. 17 U.S.C. § 111.

150. 17 U.S.C. § 117(c).

copyrighted books and magazines in a format that allows blind and disabled people to read or listen to them.<sup>151</sup>

Finally, some personal uses that qualify for no express statutory exemption have been held to be privileged by courts. *Sony v. Universal Studios* classified home video recording of broadcast television signals for time shifting purposes as fair use, and the manufacture and sale of devices to accomplish it as noninfringing.<sup>152</sup> *Recording Industry Ass'n of America v. Diamond Multimedia Systems* held that the consumer copying of digital music recordings to a portable MP3 player was noninfringing personal use,<sup>153</sup> and that the manufacture and sale of devices to facilitate it was not actionable.<sup>154</sup>

Before moving into more controversial territory, let's pause for reflection. All of us make personal uses of copyrighted works that don't seem to fall within any of the exclusions I outlined above.<sup>155</sup> I back up my hard disk every week, even though I know that I am making archival copies of material that is not a computer program and therefore is not within the scope of the privilege in § 117.<sup>156</sup> Indeed, chastened by the repeated meltdown of a shiny new iMac G5 two years ago, I back it up to three

151. 17 U.S.C. § 121.

152. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–56 (1984).

153. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). The court's basis for this conclusion is ambiguous. It isn't clear whether the court intended to hold that such copying came within the shelter of 17 U.S.C. § 1008 or was excused on some other ground, such as fair use. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In a recent Copyright Office filing, a coalition of copyright owners insisted that such copying was lawful only to the extent that copyright owners had implicitly authorized it. See Joint Reply Comments of Ass'n of American Publishers et al. at 21–23, 22 n.46, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, No. RM 2005-11 (U.S. Copyright Office Feb. 2, 2006), available at [http://www.copyright.gov/1201/2006/reply/11metalitz\\_AAP.pdf](http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf).

154. *Recording Indus. Ass'n of Am.*, 180 F.3d at 1081.

155. See *Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001) (“Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of law.”).

156. According to the Register of Copyrights, the literal scope of the § 117 privilege to make archival or backup copies is very narrow; so narrow, indeed, that compliance makes little sense:

Section 117 requires the destruction of any archived copy once possession of the program ceases to be rightful. Possession—or at least use—of a program typically ceases to be rightful once the user acquires an upgraded version. A literal reading of section 117 would require the user to go through all of the backup tapes, CD-Rs and other archival media, identify each of the files that constitute the earlier version of the computer program, and attempt to delete them. This is neither practical nor reasonable.

Based on the evidence presented during the course of preparing this Report, there is a fundamental mismatch between accepted, prudent practice among most system administrators and other users, on one hand, and section 117 on the other. As a consequence, few adhere to the letter of the law.

U.S. COPYRIGHT OFFICE, DMCA § 104 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 150 (2001) [hereinafter DMCA § 104 REPORT] (footnote omitted), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

different locations. My son collects comic books and manga, and practices drawing manga characters that look as much as possible like the drawings he uses as models. My husband has purchased two computer programs that allow him to record, scan, manipulate, transpose, revise, and generate sheet music or audio files for musical compositions. He uses them on songs from Broadway musicals to create versions easy for our son to sing. My sister's family has a TiVo. They like it so much that they bought one as a birthday present for our mother. My friend Ann cannot be discouraged from forwarding me email messages that she thinks I'll enjoy. My neighbor across the street has triplets to whom she frequently reads aloud. Because of her firm ideas about what's appropriate literature for her children, she commonly edits language, gender, and important plot points as she reads, on the fly. My neighbors down the block are college students who party loudly on summer weekends, playing their CDs through powerful speakers; if they open their windows, their sound of music reaches the entire neighborhood.

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

The tools we have developed to evaluate a claim of fair use, though, seem ill-fitted to assess the lawfulness of these or other common personal uses.<sup>157</sup> The statute, as interpreted by the courts, would have us ask whether the purpose of use is commercial or noncommercial, whether it is transformative or duplicative, whether the work we are using is primarily factual or occupies the core of protected copyrightable expression, whether we use only a small part of the work or a large part, or even the entire thing, and whether our uses threaten to substitute for authorized, licensed uses in the marketplace.<sup>158</sup> Whether the use is commercial seems as if it might be important, as does whether it usurps the market for or competes with the

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157. See, e.g., Tushnet, *supra* note 25, at 554 ("Commentators have noted a tendency to claim as fair use activities like private reading or listening . . . . But fair use . . . is ill suited to protecting activities that are at the core of ordinary uses of copyrighted works; it is supposed to deal with unusual or marginal activities.").

158. 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (applying the fair use factors to a musical parody); *Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 886–99 (2d Cir. 1994) (analyzing institutional copying of legally acquired scholarly journals under fair use). *But see id.* at 932, 933–34 (Jacobs, J., dissenting) (arguing that photocopying should be deemed the modern equivalent of taking notes).

copyright owner's exploitation.<sup>159</sup> The other fair use factors, though, don't seem apposite.<sup>160</sup> Two of the weightiest considerations in a conventional fair use analysis are whether the use is transformative<sup>161</sup> and how much of the work is being used.<sup>162</sup> Neither seems to illuminate whether a given personal use should be lawful.<sup>163</sup> Nor is the nature of the work being used likely to make a big difference. We care about the nature of a work when we are asking whether it makes sense to allow someone to make the work available to the public in either transformed or unchanged form. Where the use is personal, though, it's hard to see how the nature of the work would matter. If copyright law is designed to encourage the creation and dissemination of works of that nature, it should also welcome their consumption.

Thus, if we analyze my multiple backups of my hard disk, it's difficult to conclude that I am making a fair use unless we put a thumb on the scales. The purpose of the use is duplicative and archival, something that cut against a finding of fair use in *American Geophysical Union v. Texaco Inc.*<sup>164</sup> Moreover, many of the files on my hard drive are files I use for projects, like my trademarks casebook,<sup>165</sup> that I pursue primarily for commercial gain. The nature of the works that I copy is mixed, but at least some of the works are of the sort that courts locate at the core of copyright protection. I have, for example, more than fourteen gigabytes of music on my hard drive. All of it got there legitimately in the first instance, but that doesn't give me the right to make three different copies of entire songs every week, nor to transmit one of those copies over the Internet to a remote location. Some of the files on my hard disk, such as early drafts of student papers and other people's

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159. See, e.g., Stadler, *supra* note 58, at 933–42 (reconceptualizing copyright law to protect authors from competitive harms).

160. Indeed, it's interesting that *Sony*, the sole Supreme Court case to try to assess personal use under the fair use rubric, was widely criticized for its analysis of the fair use factors. The case attracted particular scorn for giving only nominal consideration to factors other than whether the use was commercial and whether it was likely to harm the copyright owner's market. See, e.g., Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 897–98 (1987) [hereinafter Litman, *Copyright*] (explaining how this analysis would “truncate[] the statutory inquiry”); Litman, *Technological Change*, *supra* note 20, at 350 n.411 (criticizing the *Sony* Court's approach); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1153 (1990) (“Most of the commentary about the *Sony* opinion has been critical, even dismissive.”).

161. See *Campbell*, 510 U.S. at 579 (“Although . . . transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . .”).

162. See *id.* at 587, 586–89 (“[T]his factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”).

163. *Accord* Tushnet, *supra* note 25, at 555–60 (arguing that increasing emphasis on the transformiveness of a use has made fair use unavailable for copying that should be lawful).

164. 60 F.3d 913 (2d Cir. 1994).

165. JANE C. GINSBURG, JESSICA LITMAN & MARY L. KEVLIN, *TRADEMARKS AND UNFAIR COMPETITION: CASES AND MATERIALS* (4th ed. forthcoming 2007).

scholarship, further, are unpublished works.<sup>166</sup> Other files represent copies that infringe other people's copyrights. The amount of these works that I copy is entire works, and I copy them, in their entirety, many times. Finally, we come to the effect of my promiscuous copying on the copyright owner's potential market. There is currently no market for licensing backup copies. Copyright owners' release of copy-protected copies of their works that permit purchasers to make a small number of copies, however, suggests that such a market may be beginning to emerge.<sup>167</sup> If I, and people like me, may make multiple archival copies without a license, then that nascent market could be damaged.<sup>168</sup>

Less fancifully, consider my sister's TiVo. Let's imagine that she sets it to copy every first-run episode of ABC's hit series *Lost*, which airs in her community at a time when she is otherwise occupied. The purpose of her copying is duplicative rather than transformative. She's motivated solely by considerations of convenience. The nature of the work is highly creative and subject to copyright's strongest protection. She's copying entire programs, and her copies allow her to avoid paying \$1.99 per episode for downloadable copies through the friendly neighborhood Apple iTunes online music store.<sup>169</sup> That last fact has been enough in some cases to persuade a court to characterize a use as commercial, since one is getting for free something one would otherwise have to pay for.<sup>170</sup>

My sister doesn't do a lot of business travel, but my mother does. Let's imagine that, next year, one of mom's tech-savvy children buys her a Slingbox to hook up to that TiVo she got from my sister. A Slingbox is a small and clever electronic device that connects to the source of one's television signal and to one's home network.<sup>171</sup> The Slingbox will then allow one

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166. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985) (holding that the unpublished nature of a work tends to negate the fair use defense).

167. See Steve Jobs, *Thoughts on Music* (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/> (describing Apple iTunes "FairPlay" DRM, which allows songs to be copied to up to five computers).

168. Cf. *Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881 (2d Cir. 1994) (finding copying of scientific articles for a company's researchers unfair in part because it might undermine the nascent market for photocopy licenses); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006) (finding a display of thumbnail images in an image search engine unfair because it might undermine the nascent market for downloadable thumbnail images of pornography to display on cell phone screens).

169. See *Apple - iTunes - iTunes Store - TV Shows*, <http://www.apple.com/itunes/store/tvshows.html> (offering episodes of *Lost* for \$1.99 per episode).

170. See, e.g., *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 (S.D.N.Y. Aug. 28, 2002) (holding that a music file search engine and the people who used it made commercial use of copyrighted works because they didn't pay the customary price); *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001) ("Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.").

171. Sling Media, *Slingbox Tuner*, <http://us.slingmedia.com/page/slingboxtuner.html>.

to “place shift” one’s television signal.<sup>172</sup> That is, the Slingbox-equipped are able to watch whatever is currently playing on their home televisions on remote computers over the Internet.<sup>173</sup> My mother isn’t much for *Lost*, but she likes to watch games being played by her local Pittsburgh sports teams, and she likes to watch them live. She subscribes to whatever tier of cable service allows her to see all of the Pittsburgh sporting events. Last winter, she came to visit us in Michigan. As delightful as she found our company, she was upset to be missing a University of Pittsburgh basketball game that was going on at the time but not being broadcast nationally. If she had just stayed home, she could have watched the game. If she had had a Slingbox, though, she could have visited us and watched the game. Any of her children could buy one at the local Circuit City and hook it up for her, but would using it be legal? The Slingbox makes no copies, unless you count RAM copies (reproductions that appear only in a device’s volatile computer memory), but many courts do.<sup>174</sup> It also is transmitting a television signal over the Internet, in what may not be a private (and therefore exempt) performance. If we have to apply the fair use factors to allow my mother to view material she has subscribed to and paid for in my home rather than her own, her chances don’t look too good. Mom’s purpose is consumptive rather than transformative. The material she’s copying and transmitting, at least in this instance, is a televised sporting event. While sportscasts don’t reflect the sort of authorship that we think of as at the core of copyright, they are among the most valuable broadcasts that copyright protects. She’s copying and transmitting entire programs, and her doing so undercuts the market for online and mobile phone products that copyright owners target to viewers like her.<sup>175</sup>

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

The inaptness of the fair use factors shouldn’t surprise us. They derive from an era when copyright covered only the rights to print, reprint, publish,

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172. Mark Glaser, *Slingbox Lets You Place-Shift Your TV*, PBS.ORG, May 1, 2006, [http://www.pbs.org/mediashift/2006/05/cool\\_factorslingbox\\_lets\\_you\\_b.html](http://www.pbs.org/mediashift/2006/05/cool_factorslingbox_lets_you_b.html).

173. *Id.*

174. *See, e.g.*, *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (“The law also supports the conclusion that Peak’s loading of copyrighted software into RAM creates a ‘copy’ of that software in violation of the Copyright Act.”). For a discussion of why reproductions in RAM should not be deemed “copies” under the copyright statute, see Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1255–78 (2001) and Pamela Samuelson, *The Copyright Grab*, WIRE, Jan. 1996, at 134.

175. *See* Wireless - CBS SportsLine.com, <http://www.sportsline.com/wireless/general/mobile> (offering live coverage of sporting events); Fox Sports on MSN, <http://msn.foxsports.com> (same).

and vend, and most personal uses required no excuse to be lawful.<sup>176</sup> When seeking language in which to codify the fair use privilege, the drafters of the 1976 Copyright Act looked back to *Folsom v. Marsh*,<sup>177</sup> an 1841 case involving commercial publication of an allegedly infringing biography.<sup>178</sup> Litigated cases involving fair use over the next century involved uses that were public and almost always commercial.<sup>179</sup> The application of the fair use privilege to personal use received almost no attention during the twenty-five year process that led to the enactment of the 1976 Act.<sup>180</sup> When the topic came up, witnesses invariably pointed out that reported fair use decisions involved public, commercial uses.<sup>181</sup> Although witnesses disagreed then, as they undoubtedly would now, as to whether the paucity of judicial decisions on the lawfulness of personal use derived from the legitimacy of the uses or the litigation costs that might make suits against individuals unappetizing,<sup>182</sup> it seems clear that fair use cases, then as now, have overwhelmingly concerned uses that were public, commercial, or both. For that reason, the fair use factors are designed to address whether and when it is appropriate to make a public and often commercial use without permission. They were not devised to evaluate the legitimacy of personal uses.

Fair use is a poor tool for assessing the lawfulness of particular personal uses for another reason: it is not realistically available to the people who most need to use it. Fair use in its current form is notoriously fact specific,

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176. See Lunney, *supra* note 29, at 997–98 (“At that time, the printing press was essentially the only technology available for reproducing a copyrighted work, and given that technology, the question of infringement arose . . . when a second, competing printer published a later work that incorporated, to a greater or lesser extent, material from an earlier copyrighted work.”); R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES* 259, 280, 286–88 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006) (“Justice Story never mentions the specific rights actually conferred on the plaintiffs by the copyright statute, but the 1931 Act provided that the copyright owner of a book ‘shall have the sole right and liberty of printing, reprinting, publishing, and vending such book.’”).

177. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

178. Reese, *supra* note 176, at 292.

179. See Latman, *supra* note 7, at 789–90 (describing the case law).

180. See Litman, *Technological Change*, *supra* note 20, at 313–14 (“The fact that private use had no defenders and received no explicit treatment in the revision conferences, therefore, had substantive results on the legality of private use under the revision bill.”).

181. Litman, *Copyright*, *supra* note 160, at 898 n.256, 883–88, 897–98 (“Indeed, prior to the 1976 Act, almost all fair use case law involved commercial uses. This fact figured significantly in the controversy between copyright owners and educational organizations over the appropriate scope of fair use in educational contexts.”).

182. See *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 1498–99 (1965) (statement of Ralph H. Dwan, on behalf of 3M Company) (“Since no legal action has ever been brought against anyone for [copying works for personal use], the public has a right to believe that the practice is perfectly lawful, and copyright owners have acquiesced in that right.”); *id.* at 1514–16 (statement of Lyle Lodwick, Director of Marketing, Williams & Wilkins Company) (suggesting that millions of individuals who make photocopies are innocent infringers, and Congress should expand infringement liability to the owners and operators of photocopy machines to give publishers a meaningful remedy against this widespread infringement).



requiring a hideously expensive trial on the merits to determine.<sup>183</sup> If a person seeking to determine whether a given personal use is lawful needs to go to court, each time, to find out, then the tool is of almost no practical assistance.

To recap, there is a zone of personal use that is uncontroversially noninfringing. That zone includes personal uses that are outside the scope of copyright law, uses that come within express statutory exemptions and privileges, and uses that have been found noninfringing by courts. The zone also includes a bunch of other uses. Conventional analysis dictates that those other uses are either infringing or fair use under § 107. If personal uses like the ones I've listed can be described as "infringing," though, they are infringing only in the most nominal sense. If some copyright owner sued me, my family, my friend, or my neighbor over those uses, the copyright owner would lose. Copyright lawyers may disagree on what theory the copyright owner should lose, but not about the ultimate result.<sup>184</sup> If that means that all of the personal uses must be fair use, though, then that is possible only by construing fair use to cover any use that is nominally but not enforceably infringing, regardless of its purpose, the work's nature, the amount taken, and the effect on the market. The minute we insist on applying fair use consistently, the situation becomes even more unstable. My neighbor's censored read-alouds are perhaps transformative; my hard disk backups are, on the other hand, profoundly duplicative.

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

## V. Copyright Rights Versus Copyright Liberties

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

—Jack Valenti, 1982<sup>185</sup>

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183. See Mark A. Lemley, *Dealing with Overlapping Copyrights in the Internet*, 22 U. DAYTON L. REV. 547, 566 (1997) ("[T]he fair use analysis is extremely fact-specific, which means both that it is hard to predict in advance and that it will be expensive to prove."); Litman, *Reforming Information Law*, *supra* note 9, at 611–13 ("The potential chilling effect of having to go through hundreds of thousands of dollars in attorneys' fees in order to prevail after a trial on the merits can be substantial.")

184. *Cf. Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001) ("Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of law.")

185. *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the*

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

If the analysis derived from § 107 is not helpful in assessing the lawfulness of particular personal uses, can we derive a better approach? Our starting point should be the recognition that copyright law is intended to encourage reading as well as writing. Thus, I would argue, the nature and scope of copyright liberties are relevant not only to the application of copyright privileges, exceptions, and defenses, but also to the construction of copyright's exclusive rights. Courts that construed copyright's exclusive rights to preserve copyright liberties, in other words, were doing precisely what courts need to do to protect the copyright system from defeating its own design.

The cases explored in Part III revealed that courts have sought to protect copyright liberties by interpreting copyright law to draw a distinction between exploitation and enjoyment of a copyrighted work. The law, they insisted, gave copyright owners exclusive rights to control the former, but not the latter. Congress has indicated repeatedly that it views copyright law this way as well. Although Congress has significantly expanded the scope of copyright rights, it has done so against a background understanding that the law does and should protect copyright owners' ability to exploit their works, while preserving the public's liberties to read, listen, view, or use those works. Thus, Congress reacted to new technological opportunities to exploit and infringe copyrighted works by expanding copyright to give owners rights in new forms of exploitation, but without divesting people of historic copyright liberties to enjoy protected works. When Congress extended copyright to sound recordings, members explained that the new reproduction right did not affect the legality of consumers' copying recorded music.<sup>186</sup> When the

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*Administration of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) (statement of Jack Valenti, President, Motion Picture Association of America, Inc.).

186. See H.R. REP. NO. 92-487, at 7 (1971), as reprinted in 1971 U.S.C.C.A.N. 1566, 1572 ("[I]t is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use . . ."); 117 CONG. REC. 34,748-49 (1971) (colloquy between Reps. Kastenmeier and Kazen) (confirming that the bill excludes liability for personal home recording).

specter of multiplying perfect digital copies of music persuaded Congress to enact U.S. copyright law's first copy-protection mandate, it paired it with a provision forbidding infringement suits against consumers for making non-commercial analog or digital copies of recorded music.<sup>187</sup>

When courts read § 106 rights broadly to reach commercial activity that was arguably analogous to common personal uses, members of Congress read those decisions to apply to exploitative and commercial acts without calling personal uses into question. When the Court of Appeals for the Ninth Circuit, for example, decided that turning on a computer could infringe the § 106(1) reproduction right,<sup>188</sup> Congress amended the law to privilege computer maintenance and repair services' turning on of their customers' computers.<sup>189</sup> It included no comparable provision allowing consumers to turn on their own computers because of members' assumption that despite the literal language of § 106, consumer computer use did not violate copyright owners' reproduction right.<sup>190</sup> When the Register of Copyrights later proposed legislation to add a narrow statutory privilege to make temporary digital copies, representatives of the entertainment and software industries objected.<sup>191</sup> Rather than arguing that individuals who made such copies were

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187. 17 U.S.C. § 1008 (2000); *see supra* note 147 and accompanying text.

188. *See MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that the automatic transfer of copyrighted data from a storage medium, e.g., a hard drive, into a computer's random access memory constitutes copyright infringement); *supra* note 174 and accompanying text.

189. Computer Maintenance Competition Assurance Act, Pub. L. No. 105-304, §§ 301-02, 112 Stat. 2886, 2886-87 (1998) (codified at 17 U.S.C. § 117).

190. Senator Ashcroft's Digital Copyright Clarification and Technology Education Act of 1997, one of the precursor bills to the Digital Millennium Copyright Act, included a more general exemption:

[I]t is not an infringement to make a copy of a work in a digital format if such copying—(1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

S. 1146, 105th Cong. § 205 (1997); *see* 143 CONG. REC. 17,487-91 (1997) (describing exemption); 144 CONG. REC. 3,224-26 (1998) (same). The Senator was persuaded to endorse the narrower amendment limited to computer repair businesses because only computer repair businesses had been found liable for making RAM copies. 144 CONG. REC. 9,237, 9,250 (1998).

191. Section 104 of the Digital Millennium Copyright Act directed the Copyright Office to study the question (among others) and to submit a report to Congress within two years. In the 2001 report, the Copyright Office noted sharp division between proponents of a broad privilege to make ephemeral RAM copies incidental to lawful use and opponents of any diminution in the scope of the reproduction right. *See* DMCA § 104 REPORT, *supra* note 156, at 50-53. Representatives of copyright owners had argued, the Copyright Office reported, that it was inappropriate to enact any exception for the benefit of any user interest that had not demonstrated concrete harm from the potentially overbroad application of § 106. *Id.* at 55-56. Computer repair services had demonstrated harm and Congress had accordingly enacted a narrow exception. *Id.* at 55. Since others had not yet been held liable for making RAM copies, any statutory privilege was premature. *Id.* at 56. After examining testimony and written comments on both sides, the Copyright Office had concluded that the scope of the exclusive reproduction right was disputed:

or should be liable under extant law, opponents of the legislation complained that such an exemption might provide a loophole for unspecified future commercial pirates.<sup>192</sup> When film studios sued the producers of software to censor objectionable content on DVDs,<sup>193</sup> the Register of Copyrights testified that she believed the manufacture, sale, and use of such software was completely legal.<sup>194</sup> In response to the lawsuit, however, Congress enacted The Family Movie Act, to immunize from liability “the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing.”<sup>195</sup> The House Committee Report emphasized that “copyright and trademark law should not be used to limit a parent’s right to control what their children watch in the privacy of their own home,” but characterized the law as a clarification of potential liability for companies that assisted parents in this pursuit.<sup>196</sup>

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Nonetheless, a general rule can be drawn from the language of the statute. In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner’s exclusive right to extend to all reproductions from which economic value can be derived.

*Id.* at 111. RAM copies, the Office concluded, should generally be deemed to be fixed within the meaning of the statute and therefore potentially infringing. *Id.* at 112–23. There was, however, no evidence that anyone was bringing copyright infringement suits against consumers for such copying, and the Office had concluded that consumer RAM copies would generally be deemed noninfringing because of fair use or implied license. *Id.* at 124–45. The Register nonetheless supported an amendment to clarify that no liability should attach to ephemeral copies that were incidental to lawful music transmissions; music industry representatives insisted, however, that such an amendment would be inappropriate since no showing of harm had been made. *See, e.g., Digital Millennium Copyright Act § 104 Report: Hearing Before Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 76–85 (2001) [hereinafter *104 Report Hearing*] (statement of Marvin Berenson, Senior Vice President and General Counsel, Broadcast Music Inc.), available at <http://www.judiciary.house.gov/media/pdfs/printers/107th/76669.pdf>.

192. *See 104 Report Hearing, supra* note 191, at 22, 17–23 (statement of Carey Ramos, Attorney, Paul, Weiss, Rifkind, Wharton & Garrison LLP, on behalf of National Music Publishers Association) (“[T]he line of demarcation between downloads and streams is already far from clear, and is likely to be further blurred as new technologies and business models develop. It would be unwise to codify an exemption for a technology that is rapidly changing.”); *id.* at 46, 45–52 (statement of Emery Simon, Counsel, Business Software Alliance) (“If temporary copy exceptions were somehow introduced . . . into law, we think this would create uncertainty.”).

193. Complaint, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Aug. 29, 2002).

194. *See The Family Movie Act: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 7 (2004) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (“[I]t seems clear to me that under existing law this conduct and these products are lawful.”); *see also id.* at 82 (statement of Rep. J. Randy Forbes, Member, House Comm. on the Judiciary) (“Why shouldn’t I have that fundamental core right as a consumer to either say give me all of the 29th Division clips from a movie that I want to find or, reverse, take out all the sexual items in that movie?”).

195. Family Movie Act of 2005, Pub. L. No. 109-9, §§ 201–02, 119 Stat. 223, 223 (to be codified at 17 U.S.C. § 110(11)).

196. H.R. REP. NO. 109-33, pt. 1, at 5 (2005).

My purpose is not to make a broad argument for the legality of all personal uses under current law, but rather to reiterate that Congress has consistently viewed copyright as securing copyright owners' opportunities to exploit works without invading individuals' liberties to enjoy works.<sup>197</sup> Where individual activities have threatened to compete with or undermine copyright owner exploitation, Congress has sometimes been amenable to giving copyright owners enhanced legal weapons,<sup>198</sup> and sometimes not.<sup>199</sup> Congress has expressed its rationale in these cases as protecting copyright businesses' commercial interests in exploiting their work.<sup>200</sup> When organizations purporting to represent consumers have lobbied for explicit consumer exemptions, members of Congress expressed skepticism that courts would hold consumers liable for ordinary uses of copyrighted works.<sup>201</sup>

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197. See, e.g., *Digital Media Consumers' Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 4 (2004) [hereinafter *Hearing on H.R. 107*] (statement of Rep. Joe Barton, Chairman, Comm. on Energy and Commerce) (“[A]fter I buy a music video or a movie CD, it is mine once I leave the store. Does that mean that I am under the impression that I have unlimited rights? Of course not. I understand that I’m limited under existing law to activities that are not commercial and I want to emphasize that, not commercial, or would come into competition with the manufacturer of that product.”); 144 CONG. REC. 18,771 (1998) (statement of Rep. Barney Frank) (“What we wanted to do was to come up with ways to adapt the protection of intellectual property to a modern technological era, without unduly diminishing people’s rights to enjoy things.”).

198. See No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2, 111 Stat. 2678, 2678 (1997) (codified at 17 U.S.C. § 101 (2000)) (amending the term “financial gain” to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works”); Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, § 802, 104 Stat. 5089, 5134 (codified at 17 U.S.C. § 109) (amending § 109 to prohibit unauthorized rental of computer programs); Record Rental Amendment of 1984, Pub. L. No. 98-450, § 2, 98 Stat. 1727, 1727 (codified at 17 U.S.C. § 109) (amending § 109 to prohibit unauthorized rental of phonorecords).

199. See LARDNER, *supra* note 81, at 173–227, 263–88 (describing the failure of attempts to persuade Congress to enact laws protecting copyright owners from the VCR or video rental).

200. See, e.g., H.R. REP. NO. 105-339, at 5 (1997) (asserting that the bill was intended to prevent “willful conduct from destroying businesses, especially small businesses, that depend on licensing agreements and royalties for survival”); *The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the H. Comm. on Commerce*, 105th Cong. 2, 1–3 (1998) (statement of Rep. Billy Tauzin, Chairman, House Subcomm. on Telecommunications, Trade, and Consumer Protection) (“As electronic commerce develops, we as policymakers must indeed establish clear policy for consumers, network and hardware providers, and copyright owners which protects the integrity and value of electronic commerce.”).

201. See, e.g., *Hearing on H.R. 107, supra* note 197, at 46–47 (statement of Rep. Cliff Stearns, Member, Comm. on Energy and Commerce) (“So I ask you, Mr. Valenti, if the Supreme Court has ruled that the right of the consumer to make a fair use of his own copies is there, why would you deny that right, if the Supreme Court has ruled that?”); *id.* at 68–71 (colloquy) (discussing scope of fair use privilege for consumer home copying); *WIPO Copyright Treaties and Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. (1997).

## VI. A Geography of Personal Use

What we wanted to do was to come up with ways to adapt the protection of intellectual property to a modern technological era without unduly diminishing people's rights to enjoy things. We do not want to prevent the public from having the enjoyment of these products.

—Representative Barney Frank, 1998<sup>202</sup>

Even if everyone could agree that Congress intended to secure the ability to exploit copyrighted works to copyright owners, while preserving the copyright liberties that have enabled individuals to enjoy those works, that wouldn't tell us how to resolve specific disputes. The line between exploitation and enjoyment has never been completely obvious, and it has gotten more difficult to discern as networked digital technology enables ordinary people to engage in acts of mass dissemination at negligible expense. Today, we see some authors reaching readers, composers connecting directly with listeners, and photographers and filmmakers finding viewers without help from traditional intermediaries; at the same time, ordinary Internet users are disseminating works to one another.<sup>203</sup>

Personal uses, though, occupy the heart of copyright's historic liberties to enjoy copyrighted works. Thus, the potential payoff from figuring out how to draw the line in the right place for personal uses is large. Insisting that personal uses deserve no special treatment under copyright law, in contrast, poses huge risks of undermining copyright's historic liberties, and with them the architecture implicit in the copyright system.

An individual who rips a CD to her iPod, turns on her brother's computer, fast forwards through objectionable portions of a television show or DVD, or plays music with the windows open isn't violating the copyright law, despite the plain language of § 106. People disagree on the rationale.<sup>204</sup> It might be fair use; it might be implicitly licensed by copyright owners; it might be that the harm caused by each consumer is *de minimis*, or it might be, as I argue, that Congress intended the § 106 rights to be interpreted subject to the understanding that copyright prohibits unauthorized exploitation but not unauthorized enjoyment. There's broad consensus that unauthorized enjoyment is not and should not be illegal unless it crosses the line into exploitation or otherwise interferes with copyright owners' opportunities to exploit their works. The difficulty is in telling the difference.

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202. 144 CONG. REC. 18,771 (1998) (statement of Rep. Frank).

203. See Litman, *Sharing*, *supra* note 44, at 2–4, 27–30 (offering examples); see also Kurt Hunt, Note, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2007) (manuscript at 2–8, on file with author) (analyzing copyright implications of YouTube).

204. See, e.g., Fred von Lohmann, *RIAA Says Ripping CDs to Your iPod is NOT Fair Use*, DEEP LINKS, Feb. 15, 2006, <http://www.eff.org/deeplinks/archives/004409.php> (contrasting the statement by RIAA counsel in the *Grokster* case that ripping a CD was “perfectly lawful” with the later RIAA statement that ripping a CD is not fair use).

People will disagree on the appropriate place to draw the line. More than a decade of polarized debate on the proper scope of copyright doesn't make it easier.<sup>205</sup> Supporters of strong copyright rights want to secure a zone of safety surrounding copyright's exclusive rights both to ease copyright enforcement and to offer some protection in the event that technology delivers new ways to exploit copyright loopholes. Opponents of enhanced copyright protection, for their part, want to safeguard copyright liberties from erosion and perceive the plea for enhanced copyright protection as unjustified grabbiness.<sup>206</sup> Perhaps, though, even if we can't reach agreement on where to locate the boundary between exploitation and enjoyment, we can agree on the principles that should inform such a decision and the factors that might bear on it.

One principle is the value of technology neutrality. Copyright owners and Congress insist that they drafted the copyright law using general terms to ensure that the scope of copyright could be independent of specific technological changes.<sup>207</sup> Supporters of copyright enhancements maintain that copyright owners need broader rights because technology has both enabled new and exciting ways of dissemination and chipped away at their control of their works.<sup>208</sup> Technology has had comparable consequences for readers, listeners, and viewers. It has created new and exciting ways to enjoy works and eroded individual copyright liberties by enabling copyright owners to control, meter, and prevent reading, listening, and viewing. Individuals' claims that copyright liberties must be technology-independent should be no less compelling than copyright owners'.

A second principle is the importance of balance. Copyright law is a law for both writers *and* readers, for composers, performers, listeners, and viewers. If the relationship between copyright's exclusive rights and its liberties is unbalanced, then the writers or readers who feel ill-served by copyright law will disrespect or disregard it. Writers and publishers might bristle at suggestions that copyright should give them as much as they need to persuade them to write and *no more*. Readers and listeners have at least as much reason to resent suggestions that so long as they have *some* opportunity to read or listen to copyrighted material, the system is working,<sup>209</sup> or that they

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205. See generally Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC'Y U.S.A. 101 (2006) (discussing the polarization in the "copyright war").

206. See generally *id.* at 103–11 (summarizing divergent views).

207. See, e.g., H.R. REP. NO. 94-1476 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659. See generally Litman, *Copyright*, *supra* note 160.

208. See, e.g., Ginsburg, *supra* note 5, 115–16 (“[W]hen the exploitation of works shifts from having copies to directly experiencing the content of the work, the author’s ability to control access becomes crucial.”).

209. See, e.g., *Hearing on H.R. 107*, *supra* note 197, at 83, 80–83 (statement of Cary Sherman, President, Recording Industry Association of America) (“[T]he marketplace is addressing what consumers want and expect . . .”).

should look for preservation of their liberties to the grace or greed of copyright owners, who will (eventually) do what the market demands.<sup>210</sup>

Once upon a time, disseminating works of authorship entailed significant capital investment, and discerning the difference between publishers and readers, record labels and listeners was difficult only at the margins, where intermediaries sought to facilitate the reading or listening experience without a license.<sup>211</sup> The rapid growth of networked digital technology, though, has put cheap mass dissemination within the reach of individuals.<sup>212</sup> At the same time, consumers have access to software tools that permit them to alter and combine copies of copyrighted works in ways that until recently were reserved to commercial businesses.<sup>213</sup> Individuals' new abilities to engage in acts once the exclusive province of publishers, record labels, film studios, and television broadcasters have blurred the line between conventional exploitation of works of authorship and digitally enhanced enjoyment.<sup>214</sup>

If we are grounding the analysis of personal use in part on the extent to which the use is best understood as akin to reading, listening, and their cousins, then we need to reflect on what sorts of reading, listening, looking at, using, running, playing, and building copyright seeks to encourage. How broadly does copyright need its liberties to be drawn? We want people to be able to interact with texts as well as absorb them.<sup>215</sup> Clapping hands, humming along, or playing a song on the piano all, technically, create

210. See, e.g., *Consumer Benefits of Today's Digital Rights Management Solutions: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 107–10 (2002) (colloquy).

211. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (suit against manufacturer of VCR that facilitated consumer copying); *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) (suit against operator of cable television system that enabled viewers to watch television signals broadcast outside their local service area); Reese, *supra* note 57, at 16–25 (contrasting current U.S. copyright law with earlier statutes).

212. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (tracing the rise of networked peer production); Hunt, *supra* note 203 (describing YouTube and the copyright issues it implicates).

213. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, *LAW & CONTEMP. PROBS.*, Spring 2007, at 133 (2007) (analyzing copyright implications of fan videos disseminated over the Internet); Hunt, *supra* note 203 (describing the manipulation and transformation of clips on YouTube).

214. See Liu, *supra* note 29, at 413, 412–14 (“[D]igital technology is changing both the opportunities for, and costs of, engaging in this kind of communicative consumption.”); Stadler, *supra* note 58, at 945, 944–45 (“The most significant impact of technological advancement has been the transformation of consumers into public distributors.”); Hunt, *supra* note 203 (manuscript at 6–7) (describing different material posted on YouTube).

215. See Jessica Litman, *Creative Reading: A Comment on Rebecca Tushnet's Payment in Credit: Copyright Law and Subcultural Creativity*, *LAW & CONTEMP. PROBS.*, Spring 2007, at 175 (discussing the creativity involved in reading, listening, viewing, and playing); Stadler, *supra* note 58, at 946–47 (explaining the public value of individual copying); Tushnet, *supra* note 25, at 546 (“Copies can still serve free speech purposes when their culture-altering and culture-constituting effects aren't distilled into some new derivative work but remain in a viewer's mind or appear in her conversation . . .”).



unlicensed derivative works, as do reading aloud, playacting, and imagining a story's ending differently. They are nonetheless lawful by long tradition; they're precisely the sorts of interaction with copyrighted works that promote the Progress of Science. Nor does it make any copyright sense to limit readers, listeners, and lookers to the reading and listening behaviors that were customary in 1790. Just as technology spurs evolution in the creation and marketing of works of authorship, it causes parallel evolution in the modes of interaction with those works. We don't want to limit copyright owners to the traditional marketing outlets of bookstore and sheet music sales. Similarly, it makes no sense to limit readers, listeners, and players to pianos or analog cassette tapes.

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

We can appropriate some useful insights from older cases that sought to parse the statute to advance both. Those courts focused on whether the allegedly infringing uses were more akin to exploiting the copyrighted works or enjoying them. In making this determination, some courts sought to evaluate the impact of the accused activity on individuals' opportunities to read, listen, and view as well as on authors and publishers' incentives to write, compose, publish, and perform. I suggest that when we look at the lawfulness of personal uses, we need to situate particular personal uses on the continuum between exploitation and enjoyment. As part of that inquiry, we should evaluate both the uses' potential to undermine core copyright incentives and their potential to enhance essential copyright liberties of reading, viewing, listening, and their kin. Conversely, will prohibiting the uses be likely either to meaningfully enhance core copyright incentives or undermine essential copyright liberties?

#### *A. The Impact of Particular Personal Uses on Copyright Incentives and Liberties*

In order to evaluate whether particular personal uses should, as a normative matter, be lawful, it is useful to look at the likely effects of the use on copyright incentives, and the degree the use is likely to enhance what I have called historic copyright liberties. Some personal uses will significantly undermine copyright incentives without enhancing reading, viewing, or

listening. Those uses, it seems to me, are uses we should feel comfortable in deeming infringing. Some uses will pose little threat to copyright incentives while greatly enhancing copyright liberties, and those uses should almost always be deemed legal, whether they line up with conventional fair use analysis or not. Personal uses that neither contribute to the exercise of copyright liberties nor undermine core copyright incentives are more problematic to classify, but little turns on whether we get the answer wrong. Uses that both enhance reading, listening, using, running, and playing, and also threaten to significantly undermine copyright incentives are, and should be, the most difficult uses to resolve, and may require sensitive and careful balancing. In works and markets for which copyright owner incentives are abundant, the core purposes of copyright should counsel permitting uses that advance copyright liberties.

The only doctrinal tool in copyright law currently in common use for evaluating the plausible impact of a use on copyright incentives is the fair use test, which is problematic in this context for all of the reasons I discussed in the last Part. I don't, however, urge that we revise the fair use test to incorporate these considerations as supplementary factors.<sup>216</sup> In my view, the problem is less that fair use has grown too narrow, than that our conception of the exclusive rights granted in § 106 has grown too broad.<sup>217</sup> I suggest, therefore, that we need to take another look at whether particular personal uses in fact invade the exclusive rights to exploit copyrighted works conferred in § 106. Some of the considerations that inform a fair use determination, though, seem to have relevance to the question where a use sits on the spectrum between exploitation and enjoyment.

There seems to be a strong social consensus in the United States, for example, that copyright owners should be able to control the commercialization of their works.<sup>218</sup> The commercial nature of a use

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216. Several legal scholars have proposed expanding or rethinking fair use in ways that might accommodate an enhanced personal use exemption. Their analyses would stretch or reformulate fair use to clarify its application to customary personal uses. *See, e.g.*, Lunney, *supra* note 29, at 1026 (“To the extent that private copying expands access to existing works without decreasing the copyright owner’s revenues and the resulting incentive to create additional works, private copying is Pareto optimal and should constitute a fair use.”); Deborah Tussey, *supra* note 28, at 1129 (proposing adoption of a defined, limited personal use exemption). *But see* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 *CARDOZO ARTS & ENT. L.J.* 391, 414 (2005) (“[F]air use is not the place for the personal as such.”).

217. *Accord* Stadler, *supra* note 58, at 956 (“The problem underlying both of these interpretations of ‘fair use’ is that the property rights to which it makes exception have grown increasingly, even unmanageably broad.”).

218. *See* OFFICE OF TECH. ASSESSMENT, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* 209 (1986) (reporting that an OTA commissioned survey reveals that majority of respondents finds copying for personal use to be acceptable and copying for commercial purposes to be unacceptable); THE POLICY PLANNING GROUP, YANKELOVICH, SKELLY & WHITE, INC., *PUBLIC PERCEPTIONS OF THE “INTELLECTUAL PROPERTY RIGHTS” ISSUE* (1985) (OTA Contractor Report describing survey in detail); *see also* OFFICE OF TECH. ASSESSMENT, *supra* note 7, at 163–65 (1989) (describing a survey where respondents generally agreed that it was improper to commercialize the work of another).

captures something important about the public's impression of the nature of the copyright bargain. If a use is intended for commercial gain, it seems reasonable to share some portion of that gain with the copyright owner; moreover, if a use involves commercial exploitation of a work, it seems more likely to collide with the copyright owner's exploitation. Thus, a commercial use is more likely than a noncommercial one to interfere with the incentives promised by the Copyright Act.

Recent analyses of the commercial nature of personal uses, however, have seen unprincipled expansion of the meaning of the term.<sup>219</sup> In *A&M Records v. Napster*, for example, the Ninth Circuit held that people who used the Napster file sharing software made commercial use of copyrighted works because "repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."<sup>220</sup> In *Arista Records, Inc. v. MP3Board, Inc.*, the court concluded that individuals who used an Internet search engine to find online sources for music files were making commercial use of the files they searched for because they "profit[ed] from the exploitation of the copyrighted work without paying the customary prices."<sup>221</sup> What seems to have distracted courts<sup>222</sup> in the online context into a violent expansion of the meaning of "commercial" is the perception that multiple, individual noncommercial online uses can combine to make something that seems commercial in scale and threatens to undermine copyright owners' opportunities to exploit their works commercially.<sup>223</sup> If any use that allows a person to get for free something she would otherwise

219. See Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Towards Shared Works*, 77 S. CAL. L. REV. 903, 952 (2004) (discussing the Ninth Circuit's expansive view of commercial use); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 502-03 (2005) (criticizing holdings that have taken commercial use beyond its logical extreme).

220. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); see also *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001) ("Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.").

221. *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165, at \*39 (S.D.N.Y. Aug. 28, 2002) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

222. Arguably, Congress is guilty of something analogous in connection with criminal copyright infringement. See No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2(a), 111 Stat. 2678, 2678 (1997) (codified at 17 U.S.C. § 506 (2000) and 18 U.S.C. § 2319 (2000)) (expanding the definition of "financial gain"). See generally Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 788-806 (2005) (using cost-benefit analysis to evaluate broadened criminalization of copyright infringement).

223. In the context of a fair use inquiry, though, that observation implicates the fourth fair use factor, which asks what effect the use might have on the effect on the market for the copyrighted work. Using it to transform noncommercial personal uses into commercial ones under the first fair use factor and then noting its effect on the market in considering the fourth factor is double counting. See Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1, 20 (2002) (critiquing the practice of double counting, particularly in *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997)).

need to pay for is a commercial one, though, then most lawful unlicensed uses would be commercial. Defining commercial use so broadly makes it useless as a sorting tool. In order to help us distinguish permissible from impermissible uses, we need to define commercial use narrowly enough to capture direct financial gain and exclude more indirect benefit.

Whether a use might compete with uses licensed by the copyright owner is a factor that has been important to a number of courts in evaluating the lawfulness of personal uses.<sup>224</sup> That's appropriate: a use that competes with a copyright owner's program of exploitation has the potential to undermine the copyright owners' incentives significantly. At the same time, we don't want to presume that every time a copyright owner devises a new license, that fact without more transforms historical lawful uses into unlawful ones. Apple's iTunes store's sale of downloadable *Desperate Housewives* episodes did not make the users of videocassette recorders into infringers, nor should it have. We need to give the analysis of competitive uses more serious attention than simply accepting assertions that any time a person gets for free something that she might otherwise buy, she has damaged the copyright owner's market by displacing a sale. As Glynn Lunney has pointed out, we've assumed the unlawfulness of much personal use without trial or rigorous analysis because we've been too ready to equate free goods with displaced sales.<sup>225</sup>

Unless we assume that the optimum incentive for copyright owners is boundless, the fact that a use of a work could be monetized if making it without a license were made illegal should not without more persuade us that we need to give the use into copyright owners' control.<sup>226</sup> On the other hand, where a personal use competes with commercial uses at the heart of the copyright owner's exploitation of its works, the use's potential to undermine important copyright incentives should be a cause for concern.

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

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224. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450–54 (1984) (examining evidence that time shifting might undermine the market for television programming).

225. See Lunney, *supra* note 29, at 983 (“[U]nauthorized copying, again unlike theft, becomes socially undesirable only when it goes so far as to threaten the public’s interest in an adequate supply of creative works.”); see also *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 936–39 (1994) (Jacobs, J., dissenting) (criticizing the majority opinion because photocopying had no measurable effect on the publishers’ market); Sam Hughes, *The Piracy Calculator*, <http://qntm.org/owe> (“What’s your illegal hoard worth? What’s the street value of all your pirated MP3s and movies? How much would the RI/MPAA demand - minimum - if they sued you? Find out!”).

226. See Sara K. Stadler, *Incentives and Expectation in Copyright*, 58 HASTINGS L.J. 433, 473–78 (2007) (arguing that the appropriate level of copyright incentive is both a policy question and an empirical one).

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

In addition, permitting private uses advances important copyright and noncopyright interests. Julie Cohen has written several articles exploring the idea of "intellectual privacy."<sup>227</sup> Intellectual privacy advances liberty by giving us freedom to think without surveillance and is a crucial aspect of any liberty worth having. The ability to read works without surveillance may, for some works and some readers, be key to being able to read them at all.

Another consideration that is intuitively appealing is whether the personal use is incidental to some other use, and, if so, whether that primary use is permissible, either because it is exempt or because it is licensed.<sup>228</sup> Incidental uses occupy the core of the sort of personal use that copyright law should encourage. If one purpose of copyright law is to encourage creation and dissemination of works of authorship, and another goal is to advance reading, listening, viewing, and playing of those works, uses that facilitate authorized reading, listening, and viewing have a very strong claim for copyright's solicitude. Because incidental uses are secondary to uses that are either excluded from the copyright owner's bundle of rights or already otherwise licensed, they pose little threat of undermining copyright incentives.

For much of copyright law's history, it was conventional to treat many incidental uses as impliedly licensed.<sup>229</sup> Music publishers first exploited their public performance right by licensing public performance with the sale of copies. The initial justification for what became the jukebox exemption was that the public performance of music on coin-operated devices was purely

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227. See Julie E. Cohen, *Comment: Copyright's Public-Private Distinction*, 55 CASE W. RES. L. REV. 963 (2005) (discussing the importance of user privacy to copyright law); Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 582 (2003) (defining intellectual privacy); Cohen, *A Right to Read*, *supra* note 23 (positing a constitutional privacy and autonomy interest for readers).

228. The incidental nature of many RAM copies was a key factor persuading the Register of Copyrights that most of them should be deemed noninfringing. DMCA § 104 REPORT, *supra* note 156, at 130–46; see *supra* notes 191–92 and accompanying text. Similar considerations seemed to be at work in the *Fortnightly* and *Sony* decisions, discussed earlier. In both cases, the Court emphasized that defendant merely facilitated consumers watching programming that they were entitled to view. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Fortnightly v. United Artists Television, Inc.*, 392 U.S. 390, 399–400 (1968); see also *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) (holding that "extending the range of viewability of a broadcast program" did not constitute a performance).

229. See, e.g., David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 13–31 (1996) (discussing implied licenses).

promotional, for the purpose of selling copies of sheet music.<sup>230</sup> Radio and later television broadcasters commonly made temporary copies of licensed material to facilitate broadcasts, on the assumption that such copies were within the scope of the license.<sup>231</sup>

In the digital realm, the results have been different. When the company MP3.com purchased and copied CDs to facilitate licensed streaming of the musical works recorded on them, it was held liable for willful infringement.<sup>232</sup> MP3.com argued that its purchase of a performing rights license carried with it an implied license to reproduce the works insofar as necessary to perform them.<sup>233</sup> The court disagreed.<sup>234</sup> MP3.com's licensors had no authority to grant an implied reproduction license, and therefore could not have done so:

“Performance” and “reproduction” are clearly and unambiguously separate rights under the Copyright Act of 1976. Here, the performing rights licenses themselves, as their name implies, explicitly authorize public performance only, do not purport to grant a reproduction right in musical compositions, and, in at least one case, expressly disclaim such a grant. Moreover, the performing rights societies themselves do not, and do not purport to have, the authority to grant such a right.<sup>235</sup>

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

The chaos wrought by divisible copyright is impeding licensing of online content even for businesses well supplied with copyright lawyers.<sup>236</sup> While courts might once have inferred permission for activity incidental to a licensed use, they now face the obstacle that the owner of the licensed right

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230. See Litman, *War Stories*, *supra* note 6, at 352 (tracing the history of the jukebox exemption).

231. See 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, at 44–47 (Comm. Print 1965). Congress later incorporated an express ephemeral recording privilege for licensed broadcasters in the 1976 Copyright Act. See 17 U.S.C. § 112 (2000).

232. See *Country Road Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325, 333 (S.D.N.Y. 2003) (holding that defendant is liable for willful copyright infringement).

233. *Id.* at 327.

234. *Id.* at 328.

235. *Id.* at 327–28 (citations and footnote omitted).

236. See generally *Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 4–21 (2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (arguing that new digital methods of distribution required reassessing statutory licensing schemes); Loren, *supra* note 56, at 674 (“Even ventures backed by the major record companies are having a difficult time getting off the ground.”).

may not own the right to authorize the incidental use. Exacerbating the problem is the copyright fashion to claim that any digital use of a work necessarily implicates multiple distinct copyright rights, each of which may be separately owned.<sup>237</sup> The need to secure several licenses for a single use of any given work has stymied efforts to launch licensed online businesses and driven unlicensed start-ups into bankruptcy. Negotiations to amend the copyright law to solve this set of problems, though, have stalled as competing copyright owners try to ensure they get the largest slices of pie.<sup>238</sup>

We can leave them to sort it out among themselves. For the purposes of personal use, we should avail ourselves of a simplifying solution. Since treating copyrights as if they were plots of real estate, subject to subdivision and separate exploitation, has caused the problem, we can look to basic property law for its way out of the problem. The property law solution to this sort of mess is the easement by implication.<sup>239</sup> If Abel carves Blackacre up into teeny tiny plots so that Baker can build a mess of ticky-tacky houses, but draws the lines so that half the houses have no access to the road, the law implies an easement to enable the purchasers of the remote lots to reach the highway, because road access is a necessary incident to enjoyment of the land ownership. Without road access, how could purchasers move into their ticky-tacky houses? Copyrights are unitary before they are divided. If the author or her assignee chooses to convey the reproduction, adaptation, public distribution, public performance, and public display rights to separate entities, it makes sense to presume that she conveys with each distinct exclusive right the power to engage in uses incidental to that right, even if they implicate other exclusive rights.

In particular, we should deem noninfringing any personal uses that are merely incidental to the exercise of historic copyright liberties to read, listen to, or see. Thus, even if one concurs with the line of cases that holds that any appearance of a work in a computer's random access memory is a fixed and therefore infringing reproduction,<sup>240</sup> RAM copies made in the course of

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237. See Litman, *Sharing*, *supra* note 44, at 13–23 (describing problems caused by Congress's adoption of copyright divisibility); Loren, *supra* note 56, at 678 (suggesting that the need to negotiate multiple licenses hampers innovation); see also *United States v. Am. Soc'y of Composers, Authors, and Publishers (In re Am. Online)*, No. 41-1395, slip op. at 11 (S.D.N.Y. Apr. 25, 2007) (“Although the Act's classification provisions are non-exclusive and it is thus theoretically possible for the same transmission to constitute both a public performance and a reproduction, . . . we can discern no basis for ASCAP's sweeping construction of § 101.”).

238. See Audio Recording: State of the Union Panel Discussion at the Future of Music Coalition Fifth Annual Policy Summit (Sept. 12, 2005), available at <http://www.futureofmusic.org/audio/summit05/panel04.stateofunion.mp3>.

239. See, e.g., *Morrell v. Rice*, 622 A.2d 1156 (Me. 1993) (holding that an implied right of access had been created by necessity); *Soltis v. Miller*, 282 A.2d 369 (Pa. 1971) (holding that an implied right of way over adjacent property existed in order to gain access to a public way).

240. *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1311 (Fed. Cir. 2005); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999); see *supra* note 174.

reading an ebook, watching a DVD, or listening to a CD should not infringe, whether or not the copies come within an express exemption in §§ 107, 117, or 1008.

*B. The Lawfulness of Personal Uses*

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

A healthy copyright system requires an equilibrium between copyright owners' rights to exploit works and individuals' liberties to enjoy them. The realm of personal use is where the need for balance between those interests is most acute. Personal uses that are public, that are commercial, or that compete with copyright owner exploitation seem like attractive candidates to bring within the realm of copyright owner control, while personal uses that are private, noncommercial, or incidental to uses that are either licensed or require no license seem like uses that should be treated as beyond the scope of copyright owner control. If we construe the language of § 106 to reflect the distinction between copyright owner exploitation and reader, listener, and viewer liberties, then it becomes clear that many personal uses should not be deemed reproductions, adaptations, or public distributions, performances, or displays within the meaning of the statute. Because Congress and copyright lobbyists alike assumed that copyright law reflected that distinction, nobody thought it necessary to enact express privileges for personal use of the sort included in the laws of other jurisdictions. Indeed, when pressed more recently, to consider explicit exemptions for personal use, some members of Congress expressed surprise that anyone would interpret copyright law to constrain reading, listening, or other personal uses.<sup>241</sup> Technological progress has made the difference between exploitation and enjoyment more difficult to draw. That difficulty is threatening for copyright owners, since they see technology's potential to undermine their opportunities to exploit the works they create. Copyright owners' loud voices on this subject have allowed many of us to overlook the same difficulty's potential to undermine copyright liberties to read, listen, view, and play. If reading is as central to copyright as writing, though, narrowing copyright liberties will be as destructive to the overall fabric of copyright law as undermining copyright incentives.

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241. See, e.g., *Hearing on H.R. 107*, *supra* note 197, at 45–63 (colloquy).



## VII. "All Rights Reserved"

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

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

In *Sony v. Universal Studios*, Justice Blackmun argued in his memoranda to the other Justices that the 1976 Copyright Act gave copyright owners the exclusive right to reproduce their works and that any reproduction not otherwise permitted by an explicit statutory exemption was therefore infringing.<sup>242</sup> Justice Blackmun looked at the history of Supreme Court cases interpreting the scope of copyright narrowly, and argued that Congress had intended, in enacting the 1976 Act, to dissuade courts from constrained readings of copyright rights.<sup>243</sup> There were no implicit copyright privileges or exemptions, Justice Blackmun argued, which meant that unauthorized uses that did not fall within an express statutory provision were unlawful unless they were fair use.<sup>244</sup> Fair use, further, was a narrow privilege limited to productive uses; as a general matter, copyright owners should not be forced to subsidize ordinary uses.<sup>245</sup> Justice Blackmun lost that argument and went on to write the dissent in *Sony*.<sup>246</sup> Copyright scholars, however, have by and large adopted Justice Blackmun's analysis of the meaning and structure of the 1976 Act. The statute is so long and so detailed that we deny the existence of implied privileges or exemptions.<sup>247</sup> Any reproduction or adaptation, any public distribution, performance, or display is a *prima facie* infringement unless it is covered by a specific exemption or limitation or privileged by fair use.<sup>248</sup>

That's not true, of course, unless one believes in a generous and expansive version of fair use that it would be hard to find in any recent judicial opinions. We all routinely engage in activity that would be unlawful under such an understanding. We back up our hard disks; we forward emails

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242. Memorandum of Justice Harry Andrew Blackmun to the Justices of the 1983 U.S. Supreme Court at 17–18 (June 1983) (on file with author).

243. *Id.*

244. *Id.* at 19.

245. *Id.* at 22–23.

246. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 457–500 (1984) (Blackmun, J., dissenting).

247. See Litman, *Technological Change*, *supra* note 20, at 349 (“[T]he language of the 1976 Act discouraged the courts from discovering implied privileges, by couching its multiplicity of express privileges in such specificity and detail.”).

248. See, e.g., SHELDON W. HALPERN, DAVID E. SHIPLEY & HOWARD B. ABRAMS, *COPYRIGHT: CASES AND MATERIALS* 201 (1992) (“[T]he structural approach of the Copyright Act is to define five broad basic rights and to provide a detailed list of specific exemptions, exclusions and compulsory licenses.”).

to friends. We read aloud to our children using funny voices for different characters; we play CDs on our car stereos with our windows open.

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

One significant harm that flows from conceptualizing the statute in that way is that, if it is inaccurate, it warps our thinking. It encourages copyright owners to expect too much, and copyright scholars to demand too little. It snookers judges into reinterpreting the language of the statute to give effect to the perceived intent of Congress, expanding copies to include RAM copies,<sup>249</sup> and commercial uses to include any use a copyright owner might otherwise charge for.<sup>250</sup> It shortchanges the readers, listeners, viewers, watchers, players, and builders at the heart of the copyright system.

Nothing in the legislative history of the 1976 Act suggests that members of Congress intended to transform copyright from a grant of limited exclusive rights into an expansive monopoly over all uses of copyrighted works. As recently as ten years ago, a suggestion that a literal reading of the statute in light of recent cases might give copyright owners control over reading, listening, and other personal uses seemed outlandish. Today, it increasingly seems to be inevitable, even though the underlying statutory language hasn't changed. Part of the blame belongs at our own doors. When scholars insisted that uses are unlawful unless expressly exempted, lawyers and courts may have believed us; we may have believed ourselves.

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249. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518–19 (9th Cir. 1993) (“Since we find that the copy created in the RAM can be ‘perceived, reproduced, or otherwise communicated,’ we hold that the loading of software into RAM creates a copy under the Copyright Act.”).

250. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912–15 (N.D. Cal. 2000), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001) (stating that Napster file sharing, though noncommercial in nature, adversely affects the copyrighted work’s potential market by decreasing music sales, depriving publishers of royalties, and harming the record company’s potential entry into the online market).