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COPYRIGHT VOLUME II

Edited by **CHRISTOPHER S. YOO**

Critical Concepts in Intellectual Property Law

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Copyright
Volume II

Edited by

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CRITICAL CONCEPTS IN INTELLECTUAL PROPERTY LAW

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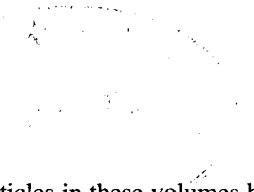

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ARTICLE

RECONSTRUCTING THE FAIR USE DOCTRINE

*William W. Fisher III**

The fair use doctrine, codified at 17 U.S.C. § 107, permits a court to excuse a putatively infringing use of copyrighted material when the circumstances surrounding the use make it "fair." In this Article, Professor Fisher criticizes the doctrine — and in particular the changes wrought by two recent Supreme Court decisions — and considers how it might be improved. The most serious of the many problems with current fair use jurisprudence, he maintains, is that it rests on considerations derived from four disparate philosophic traditions; this incoherent foundation makes the application of the doctrine unpredictable and aggravates the cacophony of contemporary legal argumentation. To alleviate these problems, Professor Fisher considers two alternative strategies for reconstructing the field. First, he examines fair use from an economic standpoint, arguing that, by comparing the various entitlements that might be accorded copyright owners in terms of the incentives they provide for creativity and the costs they impose on consumers, courts could employ the doctrine to increase efficiency in the use of scarce resources. Second, building on a discussion of the limitations of the economic approach, Professor Fisher deploys a "utopian" analysis of fair use, suggesting how the doctrine might be recast to incorporate particular conceptions of the "good life" and the "good society." So formulated, the fair use doctrine would contribute to the realization of a more just social order and a more integrated legal discourse.

INTRODUCTION

ARTICLE 1, section 8, clause 8 of the United States Constitution empowers Congress "to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." With regard to original works of art or the intellect, Congress has attempted

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* Assistant Professor, Harvard Law School. For financial support in writing this Article, I am grateful to the Harvard Law School Faculty Summer Research Program and to the Harvard Program in Law and Economics, which is funded in part by the John M. Olin Foundation. Access granted by Mead Data Central to the Lexis/Nexis services facilitated the research. Preliminary versions of Parts IV and V were presented to the Real Property Section of the American Association of Law Schools in January 1987. A more developed version of Part IV was presented to the Harvard Law and Economics Seminar in April 1987. The Article has benefitted considerably from the reactions of the participants at the two meetings. In addition, I am grateful for the comments and suggestions of Robert Clark, Gerald Frug, Wendy Gordon, Benjamin Kaplan, Louis Kaplow, Reinier Kraakman, Frank Michelman, Richard Posner, Margaret Jane Radin, Eric Rakowski, Steven Shavell, Richard Stewart, Cass Sunstein, Daniel Tarullo, Lloyd Weinreb, and David Westfall. Bibliographic research and perceptive criticism by Price Marshall substantially improved the argument of Part V. The secretarial assistance of Kathy Maloney was invaluable.

to fulfill its mandate by vesting in the creator of such a work an alienable property right, known as a copyright.

The current version of the governing statute[1] defines this property right through a combination of grants and reservations. Section 106 of the act vests in the "owner" of a copyright an extensive set of exclusive entitlements, including the right "to reproduce the copyrighted work in copies or phonorecords," the right "to prepare derivative works based upon the copyrighted work," and the right publicly to "perform" or "display" the work.[2] The succeeding twelve sections of the statute set forth "limitations" to the foregoing rights. Most of the enumerated qualifications are narrow or are limited to particular industries.[3] However, the first of the series, section 107, is expansive and potentially applicable to any of the copyright owner's entitlements. The backbone of section 107 is its sweeping proviso that, "[n]otwithstanding the provisions of section 106, the fair use of a copyrighted work . . . is not an infringement of copyright."[4]

The fair use doctrine, which section 107 is meant to codify, is the precipitate of a series of decisions, beginning in the mid-nineteenth century, in which federal courts held that conduct seemingly proscribed by the copyright statute in force at the time[5] did not give rise

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[1] 17 U.S.C. §§ 101–810 (1982).

[2] *Id.* § 106. The exclusive rights to "perform" and "display" copyrighted material apply respectively to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" and to "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work." *Id.* § 106(4)–(5).

[3] For example, section 108 accords libraries and archives certain limited rights to reproduce materials for specified purposes; section 111 prescribes an elaborate set of rules governing secondary transmissions of broadcasts embodying performances or displays of copyrighted works; and section 115 establishes a compulsory licensing system for phonorecords of nondramatic musical works. *See id.* §§ 108, 111, 115.

[4] The full text of the provision is:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. § 107.

[5] The first Copyright Act was adopted soon after the ratification of the Constitution. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124. Since that time the statute has been amended many times and has undergone four thorough revisions. *See* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, ch. 230, 16 Stat. 198; Act of March 4, 1909, ch. 230, 35 Stat. 1075; Copyright Revision Act of Oct. 8, 1976, 90 Stat. 2541.

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to liability.[6] In the early cases, the question whether the defendant's conduct constituted a "fair use" was not always clearly differentiated from the question whether it infringed the plaintiff's copyright.[7] In the mid-twentieth century, however, courts began more consistently to refer to "fair use" as a distinct legal issue — specifically, as an affirmative defense excusing putatively infringing behavior.[8] In 1976, when it overhauled the copyright law, Congress acceded to this emergent view and in section 107 for the first time acknowledged and lent its approval to the fair use defense. Congress' purpose was neither to alter nor to "freeze" the doctrine as it had been developed by the courts, but simply to legitimate it.[9]

Until recently, the lower federal courts molded the fair use doctrine without meaningful guidance from the Supreme Court. Prior to 1982, the Court granted certiorari in only two cases implicating the doctrine, and in both instances an equal division in the Justices' votes prevented the issuance of an opinion.[10] In the past few years, however, two important cases, *Sony Corp. v. Universal City Studios*[11] and *Harper & Row Publishers v. Nation Enterprises*,[12] provided the Court opportunities to sculpt and illuminate this area of the law.

This Article criticizes the Supreme Court's performance in *Sony* and *Harper & Row* and considers how we might construct a better fair use doctrine. Part I reviews the facts and holdings of the two

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[6] In developing the doctrine, the courts could and did rely on a substantial body of English case law, initiated by the decision of Chancellor Hardwicke in Gyles v. Wilcox, 2 Atk. 141, 26 Eng. Rep. 489 (1740). For a thorough review of these precedents, see W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–17 (1985).

[7] *See, e.g.*, Folsom v. Marsh, 9 F. Cas. 342, 345, 348–49 (C.C.D. Mass. 1841) (No. 4901) (holding that some activities inconsistent with the terms of the copyright statute nevertheless constitute "fair and bona fide abridgement[s]" or "justifiable use[s]" and therefore do not give rise to liability); Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); Twentieth Century Fox-Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944).

[8] *See, e.g.*, Holdredge v. Knight Publishing Corp., 214 F. Supp. 921, 924 (S.D. Cal. 1963); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 306–07 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Time v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968); Meredith Corp. v. Harper & Row, Publishers, 378 F. Supp. 686, 689 (S.D.N.Y. 1974).

[9] *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976) ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."); S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

[10] *See* Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court sub nom.* Columbia Broadcast Sys. v. Loew's, Inc., 356 U.S. 43 (1958); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975).

[11] 464 U.S. 417 (1984).

[12] 471 U.S. 539 (1985).

cases. Part II describes the doctrine that emerged from the Court's decisions and contends that it suffers from several minor defects and one fundamental problem: failure to identify and advance a coherent set of values. Part III briefly considers alternative ways in which copyright law might be reorganized so as to mitigate the problems engendered by the Court's current approach. Part IV pursues what to many readers will seem the most promising of those routes — redesigning the fair use doctrine with a view to maximizing efficiency in the use of resources. Part V proposes and defends a less conventional strategy: it first sketches a society more attractive and just than the one in which we now live, and then considers how copyright law might be reshaped to move us in the direction of that utopian vision.

[1698] IV. ECONOMIC ANALYSIS

It is important, at the threshold, to be clear regarding the species of "economic analysis" to be used. The method employed in the

following pages compares alternative legal rules on the basis of their capacity to promote "economic efficiency," which is defined as "that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before."[194] More specifically, the method takes as given the existing distribution of income and wealth in American society[195] and the monetary values[196] placed by each member of the society on different combinations of goods, services, and states of affairs. It then asks what legal rule governing unauthorized uses of copyrighted materials would yield the combination of production and dissemination of works of the intellect that is most efficient in the sense just described.

The ensuing discussion of the analytical paths a lawmaker might take in answering that question is divided into five sections. The first sets forth the economic rationale for the copyright system as a whole and shows the relationship between that rationale and the fair use doctrine. The second sketches a hypothetical fair use problem, simplifies it with a number of assumptions, and then outlines a method that a well-informed and underworked judge might use to identify its

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[194] Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 (1972). Among the aliases for this conception of efficiency are the "Kaldor-Hicks criterion," the "potential Pareto superiority test," and the "wealth maximization criterion." *See* Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice*, 8 HOFSTRA L. REV. 671, 671 n.2 (1980); Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 651–52 (1984); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119–35 (1979). For divergent treatments of the relationship between this definition of efficiency and the concepts of "Pareto superiority" and "Pareto optimality," see B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW xi–xiv (1975); Coleman, *supra*, at 649–52; Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 229–34 (1980); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488–91 (1980).

[195] No effort is made in this paper to consider the impact of alternative formulations of American copyright law on the production or dissemination of works of the intellect in other countries. For some speculations on that topic, see Adelstein & Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L. REV. L. & ECON. 209 (1985).

[196] Following the lead of most economic analysts of the law, this article will most often use "offer" rather than "asking" prices when the two measures diverge. In other words, when the amount of money a person would offer to purchase a good or service if he were not already entitled to it differs from the amount he would demand in return for surrendering the good or service if he were entitled to it, the former figure will be used. For discussion of when and why these two figures will differ, see, for example, Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979), and Spitzer & Hoffman, *A Reply to* Consumption Theory, Production and Ideology in the Coase Theorem, 53 S. CAL. L. REV. 1187 (1980). For a discussion of the problems attendant upon the (necessarily arbitrary) choice of one or the other measure, see Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975).

most efficient solution. The third pauses to consider the uses and lessons of the proposed method. The fourth discusses how the method might be refined to make it applicable to complex cases. The fifth distills from that more sophisticated approach a set of guidelines federal courts might practically employ.

A. Determining Optimal Levels of Copyright Protection

From an economist's standpoint, the trouble with works of the intellect is that they are "public goods."[197] Unlike most goods and services, they can be used and enjoyed by unlimited numbers of persons without being "used up." It is thus difficult to deny access to such works to persons who have not paid for the right to enjoy them.[198] These conditions create a risk that inventions and works of art that would be worth more to consumers than the costs of creating them will not be created because the monetary incentives for doing so are inadequate. Laws forbidding members of the public from copying or making other use of intellectual products without the permission of their creators are designed in part to eliminate this source of economic inefficiency. By granting inventors and artists a type of property right in their products, the law induces creative persons to develop and exercise their talents and thereby avoids the underproduction of useful ideas and original forms of expression.[199]

Unfortunately, this solution may foster economic inefficiency of a different sort. Granting an artist or inventor a property right in his creation may make him a monopolist, giving rise to familiar economic distortions. To the extent that consumers regard other intellectual products as only imperfect substitutes for a particular copyrighted or patented work, the holder of the copyright or patent will confront a downward sloping demand curve for the right of access to his work. Under such conditions, if he wishes to maximize his profits, he will continue granting access to his work only up to the point where the marginal revenue he reaps from affording access to an additional

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[197] For a general discussion of public goods and the special challenges they present to economic analysts and policymakers, see E. MANSFIELD, MICROECONOMICS 481, 489–95 (5th ed. 1985); Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609–25 (National Bureau of Economic Research 1962); Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

[198] The development of increasingly convenient and inexpensive copying technologies has exacerbated this difficulty. *See* Liebowitz, *supra* note 185, at 184; Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV 1329, 1337–38 (1987).

[199] *See* B.V. HINDLEY, THE ECONOMIC THEORY OF PATENTS, COPYRIGHTS, AND REGISTERED INDUSTRIAL DESIGNS 1–33 (Economic Council of Canada 1971); Gordon, *supra* note 185, at 1610–12.

consumer equals the marginal cost[200] — while at the same time charging a price substantially higher than his marginal cost.[201]

Adoption of the foregoing strategy by a copyright or patent holder will have two economic consequences. First, he will reap a monopoly profit; in other words, money that would have remained in the pockets

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[200] If the creator is in the business of manufacturing and selling physical embodiments of his work (e.g., the publication of copies of a book or the production of "floppy disks" containing a software program), this "marginal cost" will be a positive (and usually relatively stable) number. If the creator is merely granting permission to use his work (e.g., patent licensing or authorizing the copying of software programs), "marginal cost" will be zero. Most of the graphs and illustrations in this section treat marginal cost as positive and constant. None of the conclusions would change if marginal cost were zero or variable.

[201] This strategy may be represented graphically as follows:

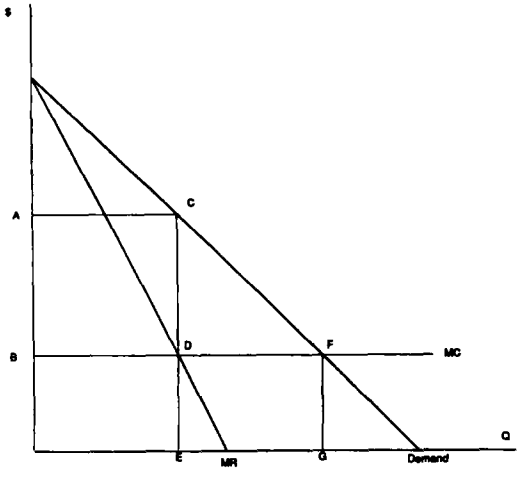

Figure 1

The level of output that will enable the monopolist to maximize his profits is indicated by point E; the corresponding monopoly price is indicated by point A. For more elaborate discussion of profit maximization by a monopolist, see J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 238–42 (3d ed. 1984).

The marginal revenue (MR) curve in Figure 1 declines more steeply than the demand (D) curve because, in order to sell an additional copy of the work, the copyright or patent holder ordinarily must lower the price charged to all purchasers of the work. To the extent that the copyright or patent holder is able to engage costlessly in price discrimination (adjusting the price he charges each consumer to match the value the consumer places on the work), the foregoing generalization does not hold, the marginal revenue curve will approach the demand curve, and the "deadweight loss," *see infra* p. 1702, ordinarily associated with the exercise of monopoly power will diminish. *See* J. HIRSHLEIFER, *supra*, at 255–61. The implications for the design of the fair use doctrine of the availability of opportunities for price discrimination are discussed at pp. 1709–10 below.

of consumers, had the work been priced at the level at which the marginal cost of producing it equalled the demand for it, will now go into the pocket of the copyright or patent holder.[202] Second, consumers who value the work at more than its marginal cost but less than its monopoly price will not buy it.[203] The former effect is usually thought to have no predictable impact on allocative efficiency.[204] The latter, however, results in a "deadweight loss," measured by the total of the consumer surplus that would have been reaped by the excluded consumers and the producer surplus that would have been reaped by the copyright owner had he sold the work to them.[205]

The degrees of market power enjoyed by different copyright holders[206] — and thus the severity of the dangers just recounted —

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[202] These so-called "monopoly profits" are represented by the rectangle ABDC in Figure 1.

[203] In other words, they will either go without intellectual products of that sort altogether, or they will shift to what they regard as less satisfactory substitutes.

[204] *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 256 (3d ed. 1986) (treating "the transfer of wealth from consumers to producers brought about by increasing the price from the competitive to the monopoly level . . . as a wash" for the purposes of the "economic . . . conception[] of welfare"). As Judge Posner acknowledges, *see id.*, at 257–59; Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 807–15 (1975), in some contexts the existence of these monopoly profits may lead to efficiency costs — for example, by reducing the monopolist's incentive to innovate. The magnitude and even the existence of these consequential losses are disputed, however, and the debate is especially inconclusive as regards patent or copyright monopolies. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 450–54 (2d ed. 1980).

The fact that, in the view of most economists, this transfer of wealth from consumers to producers by itself has no impact on efficiency does not mean that it need not be taken into account in an economic analysis of intellectual property law; on the contrary, it is the source of the monetary incentive emphasized in the preceding paragraph. Thus, much of the discussion in this Part of the Article will concern the relationships in various contexts between the magnitude of this transfer and the magnitude of the concomitant monopoly losses.

[205] In Figure 1, the lost consumer surplus is represented by the triangle CDF. Because, by hypothesis, marginal cost is constant, *see supra* note 200, the copyright holder whose activities are depicted in the figure forgoes no producer surplus by producing quantity E rather than quantity G. If marginal cost were not constant, the monopoly pricing strategy would result in a loss of producer surplus. For discussion of these effects, see Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 954, 991–96 (1981).

[206] Patent law differs from copyright law in several respects. For example, patent law has stricter standards of originality and creativity, *compare* 35 U.S.C. §§ 102(a), 103 (1982 & Supp. IV 1986) *and* Graham v. John Deere Co., 383 U.S. 1, 12–19 (1966) *with* 1 M. NIMMER, NIMMER ON COPYRIGHT §§ 1.06[A], at 1-37, 1.08[C][1], at 1-48, 2.01, at 2-5 (1987), protects ideas as well as the expression thereof, *compare* 35 U.S.C. § 101 (1982) *with* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936), and excludes the second of two persons to develop an idea independently, *compare* 35 U.S.C. § 102(g) (1982) *with* 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.01[A] (1987). These differences make it somewhat more likely that a patent holder will enjoy significant market power. However, the fact that many patented products and processes have what consumers regard as close substitutes means that even patent holders are not assured of such power. *See* Kitch, *Patents: Monopolies or Property Rights?*, in THE ECONOMICS OF PATENTS AND COPYRIGHTS, *supra* note 185, at 31–49.

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