APPLICATION OF THE FAIR USE LIMITATION WITHIN THE DUALIST COPYRIGHT SYSTEM: AN ARGUMENT IN FAVOR OF A FLEXIBLE APPROACH TO THE PUBLIC POLICY CONSIDERATIONS NATIVE TO ISSUES OF COPYRIGHT

ARTICLE

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Abstract

For some time now, an energetic debate over which public policy ideology should govern judicial interpretations of copyright issues has persisted and, in turn, caused inconsistencies in the development of the field's jurisprudence. This problem is most manifest when the fair use test is employed, because the test was originally introduced to serve one of these ideologies and its original rigid application is inconsistent with the test's statutory redesign into in 17 U.S.C. § 107. However, these inconsistencies can be eliminated by adopting a more flexible approach that, instead of applying a rigid ideological framework to all cases universally, incorporates the ideological debate into the fair use analysis by identifying the interests at stake in a suit for the parties, the medium the allegedly infringing copy is fixed to, and uses applicable to the copyrighted material object of the suit.

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The statutory language of the Copyright Act makes no reference to a specific public policy ideology that should guide judicial interpretations of the statute. The controversy over ideology verses on the various interpretations judges and jurists have given to the language of the Constitution when granting Congress the power over copyright.[1] It is my contention that the language employed in the copyright clause is clear and self-explanatory. The problem does not stem from an interpretation of the clause. It is instead the natural consequence of our own growth as a nation and of the evolution of our legal system. Public policy changes over time to meet society's needs. Recognizing this fact and addressing it with respect to the concerns present in the suit will lessen the unpredictability of the fair use test and guide the doctrine's development.

I. Introduction

Recently, the Puerto Rico Legislature passed a new law concerning the moral rights of authors, repealing and replacing most of the older statutes that dealt with these types of cases in the Commonwealth's Civil Code.[2] Notable among the changes brought on by the new law is the addition of a modified version of fair use, meant to operate as a limitation to the vindication of moral rights.[3] The law's legislative history indicates that one of the stated purposes behind the incorporation of the fair use limitation to moral rights cases was to addresses concerns over compatibility with Title XVII.[4]

Compatibility with Title XVII is a legitimate concern in light of the strain on U.S. copyright law caused by the resistance to incorporating moral rights or an equivalent into the federal copyright scheme. The difficulties of drafting and implementing such a potentially far-reaching cause of action into the already complicated federal copyright framework feed this resistance. This resistance is also nurtured by a debate over the compatibility of moral rights with the constitutional design of Congress's power over copyright issues.[5]

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[1] U.S. Const. art. 1, § 8, cl. 8, which reads: 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.

[2] 31 Laws P.R. Ann. §§ 1400-1402m (2012).

[3] *Id.*

[4] P.R. Sen. Civ. Jud. Comm. Rpt. on Sen. Project 2263, 16th Legis., 6th Reg. Sess. (November 8, 2011).

[5] Indeed, those commentators who disfavor more extensive protection of authors' moral rights cite a number of reasons, including the following, for their opposition: (1) moral-rights laws would be doctrinally inconsistent with American copyright law and property law that generally promote, rather than limit, commerce in information and property; (2) moral rights would threaten economic investment in the arts and thus stifle artistic creativity; and (3) moral rights would breed cultural conservatism, threaten editorial freedom, and grant artists unnecessarily broad aesthetic vetoes. *See* Dane S. Ciolino, *Moral Rights and Real Obligations: A Property Law Framework for the Protection of Authors' Moral Rights,* 69 Tul. L. Rev. 935, 957 (March 1995).

The debate centers on the notion that copyright law in the U.S. should be viewed in the context of a utilitarian principle, as opposed to a natural law principle. The utilitarian principle views copyright as an exclusive property right that is secured for a limited time in order to economically incentivize people to produce work.[6] This view understands that a public benefit is achieved by securing the exclusive right in exchange for allowing the work to fall into public domain once the limited time expires.[7]

The natural law principle, on the other hand, views copyright as a tool for an author to vindicate their ownership over their creation.[8] The natural law principle is considered to be the public policy concern that copyright law serves in other countries. It is also particularly identified as the ideology that justifies a cause of action to vindicate the moral rights of an author.

The fair use doctrine is often caught in the middle of this debate, because recognition of such a public policy concern can simplify the application of the test by suggesting to the fact finder what factors should carry controlling weight.[9] Such a notion, however, goes against the statutory redesign of the fair use limitation.[10] Fair use is also brought into this debate because it can evidence differences between the functions of copyright laws in the U.S. versus the function of copyright laws in other countries. The United States is the only country that currently incorporates the fair use limitation into their copyright scheme to operate as a flexible general purpose limitation to copyright infringement.[11]

Although many countries – especially other common law countries – employ a strict approach to limitations in their copyright enactments, others recognize general-purpose limitations to copyright infringement through different mechanisms or for different public policy concerns. In Spain, for example, specific limitations are found in the country's copyright enactments, but general limitations to copyright are also ap-

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[6] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S 417, 429 (1984). The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

[7] *Id.*

[8] *See* Pierre N. Leval, *Towards a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (March 1990).

[9] *See e.g.* Elliot M. Abramson, *How Much Copying under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 Temp L. Rev. 133, 166-167 (Spring 1988). The fundamental policy of the copyright scheme requires that the fair use analysis place primary importance upon the economic injury factor. Any weaker grading of this factor subverts the economic incentive principles underlying copyright.

[10] *See* Sen. Rpt. 94-437 at 72 (Nov. 20, 1975). Indeed, since the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

[11] *See* Craig Allen Nard, *et al*., *Fundamentals of United States Intellectual Property Law: Copyright, Patent, Trademark* 579 (3d ed., Kluwer Law International BV 2011). Among national copyright systems around the world, only the United States offers a doctrine of 'fair use' as a flexible, general-purpose exception to copyright infringement.

plicable through other laws (including limitations enacted in the country's civil code affecting the exercise of all rights, and limitations enacted in its unfair competition laws applicable to all forms of commercial exploitation).[12] Meanwhile, Mexico conditions the scope of copyright with a general-purpose limitation in the public interest for publishing or translating literary or artistic works when it is "necessary for the advancement of science and national culture and education."[13]

The strict approach to copyright limitations has also been criticized in many countries that do not have a general-purpose limitation to copyright infringement.[14] This criticism does not discredit the validity of the protections sought by the natural law principle. Rather it warns against the problems with taking an absolutist approach to copyright issues. An absolutist approach to the utilitarian view can be just as harmful as an absolutist approach to the rights of an author.

These ideological views are both native issues to copyright. They are not present exclusively in one copyright system or another, but present all copyright systems. The dualist approach to copyright, which advocates simultaneous yet separate treatment of economic rights and moral rights of authorship, best reflects the contemporary reality of copyright throughout the world.[15] This dualist theory can be put to work as a conceptual stating point when analyzing federal copyright statutes and state moral rights statutes, as it can be used to draw a line between the different causes of action.

The enforcement of exclusive copyright requires a balance between the interests of authors and the interests of the public at large. The fair use limitation balances these interests, but the analysis can be skewed when a conceptual line between the separate causes of action is not drawn. A moral rights case can often disguise itself as a copyright infringement case and vice versa. A dualist approach to the fair use limitation helps draw a conceptual line that can balance these competing interests as justly as possible.

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[12] *Copyright Throughout the World* § 35.21 (Silke von Lewinski *et al.* eds., 2d ed., West 2013). In general terms, fundamental rights (such as privacy, free speech, access to culture and to information, etc.) are already taken into account in the limitations that are expressly provided for in the T.R.L.P.I.. However, nothing precludes that other public interest concerns also impose some limitation upon the exercise of the exclusive rights granted to authors, such as competition law rules, the general doctrine of the abuse of right, (which applies to any subjective rights, including copyright), and the rules on consumer protection (which might annul a contractual clause aimed at restricting or vacating a statutory limitation).

[13] Article 147 of Mexico's Federal Law on Copyright from December 5, 1996, as amended, http://www.wipo.int/wipolex/en/details.jsp?id=3079 (Accessed on January 1, 2013).

[14] *See Copyright Throughout the World*, *supra* n. 12, at § 16:21 ("While the judiciary [in Germany] generally still adheres to the principle of restrictive interpretation of exceptions to copyright, it is being criticized in doctrine, and even the Federal Court of Justice has extended existing exceptions to new technologies.") and at § 22.21 ("...[In Japan] there is a debate as to whether or not to establish a general provision limiting rights on the basis that such strict interpretation cannot meet the needs of the real world."); *see also* Nard, *et al*., *supra* n. 11, at 579 (Mentioning how Australia officials have begun debating the enactment of a general-purpose limitation similar to fair use).

[15] *See* Ciolino, *supra* n. 5, at 938-940 (discussing the dualist and monist theories behind the development of moral rights).

The inclusion of the fair use limitation in the Puerto Rico statute presents a ripe opportunity to explore the effectiveness of fair use within the different ideological frameworks and dualist system. The goal of exploring this topic is to demonstrate the issues that arise when taking a rigid stance on copyright policy, and how adopting a flexible approach can resolve many of these issues.

Part II of this article discusses the history and development of copyright law and fair use. It focuses on the concrete historical events that rationally resulted in changes to the landscape of copyright. The study of these events debunks the notion that U.S. copyright law is incompatible with natural authors' rights, and also demonstrates the effectiveness of fair use in the context of these authors' rights. Part III consists of suggestions on how to address the problems related to fair use that can be caused by the resistance to recognize rights of authorship equivalent to moral rights in the federal copyright scheme. Part III also contains suggestions on how to address issues relating to fair use when litigating moral rights cases under state statutes.

II. Historical overview of copyright and fair use

The Constitution grants Congress the power: "[t]o 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."[16] As stated earlier, it is understood that this language conveys a utilitarian purpose in favor of stimulating intellectual development – either cultural or scientific – by allowing authors to reap the rewards of their intellectual efforts.[17] This utilitarian view is highly favored as the guiding ideological school when deciding matter of copyright in the United States.[18]

Many have argued that this utilitarian framework contrasts with the copyright framework employed in most European nations, where authorship is recognized as a natural moral right that can be exploited as a monopoly for the duration of the author's

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[16] U.S. Const. art. I, § 8, cl. 8.

[17] *See* Leval, *supra* n. 8, at 1108-1109 (March 1990); Diedré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 Case W. Res. L. Rev. 511, 514 (Winter 2012); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1555-1556 (March 2004).

[18] *Mazer v. Stein*, 347 U.S. 201, 219. "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 in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." (in dictum); *See also* Malla Pollack, *What is Congress supposed to promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754, 809 (2001) (Concluding that Congress's grant of power over copyright in the U.S. Constitution is conditioned by a mandate to promote the spread of knowledge, and not to facilitate monopolies for copyright holders.); and Leval, *supra* n. 8, at 1108-1110.

life.[19] Such a view presents a false dichotomy that mischaracterizes the function of copyright law and neglects thoughtful consideration of the historical development of copyright law. A brief analysis of the history of copyright sheds light on this issue.

A. Origins of Copyright Law

The Statute of Anne – an English law from 1710, which vested the publishing rights of a book, for a limited time, to the author or copyright holder instead of the publisher – is often identified as one of the roots of copyright when discussing fair use's utilitarian application.[20] From a literal reading of the law and its preamble, one could conclude that this piece of legislation was passed to establish a progressive and utilitarian intellectual property policy.[21] Although the first U.S. copyright enactments echoed statements similar to those in the Statute of Anne, the Statute of Anne is not the first relevant copyright statute in England and thus not the ideal starting point for an analytical investigation into the origin and purpose(s) of copyright law.

Copyright law concerns itself with forms of expression. The use of expression is deeply ingrained into our daily lives and we often take its significance for granted. Our ability to express ourselves through gestures, speech, drawing, and writing has developed over a vast period of time; its origin far pre-dating the invention of law. Expressing ourselves is part of what makes us unique; enabling us to move forward technologically and helping us bond as a society. For this reason, the valuable role expression has played throughout history should be given proper consideration when discussing copyright policy.[22]

However, the origin of expression is an ambitious starting point for an examination of the history of copyright law. A more workable moment in time would be around the 15th Century, when the Guttenberg printing press made feasible the mechanical printing and reproduction of writings into copies. This development revolutionized the spread of knowledge and ideas, changing the nature of writing for many authors.[23]

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[19] *Golan v. Holder*, 565 U.S. ___, 132 S. Ct. 873, 901 (2012) (Breyer, J., dissenting). "This utilitarian view of copyrights and patents, embraced by Jefferson and Madison, stands in contrast to the 'natural rights' view underlying much of continental European copyright law—a view that the English booksellers promoted in an effort to limit their losses following the enactment of the Statute of Anne and that in part motivated the enactment of some of the colonial statutes".

[20] Leval, *supra* n. 8, at 1105.

[21] *Id.* at 1109.

[22] An in depth account of the history of expression is beyond the scope of this article.

[23] *See* Stevan Harnad, *Post-Gutenberg Galaxy: The Fourth Revolution in the Means of Production of Knowledge*, Public-Access Computer Systems Review 2 (1): 39 – 53 (1991) http://eprints.soton.ac.uk/253376/2/harnad91.postgutenberg.html (Accessed on March 3rd, 2014) ("[W]ith the invention of moveable type and the printing press, the laborious hand-copying of texts became obsolete and both the tempo and the scope of the written word increased enormously. Texts could now be distributed so much more quickly and widely that again the style of communication underwent qualitative changes. If the transition from the oral tradition to the written word made communication more reflective and

The increase in potential readership changed the nature of writing for many authors.[24] Because expression is such a dominant aspect of society, this change had various impacts on the political, economic, social, and religious institutions of the time.

The statutes of the time evidence of the various effects felt with the onset of this change. Some statutes granted regional monopolies over printing and bookselling to local merchants.[25] There are inherent risks with the establishment of any business, printing is no different. A simple way to minimize these risks is to establish a monopoly or a cartel to dictate cost and demand for a given product. Copyright can be, and has been used as, a tool to establish such monopolies.[26]

Other statues required books to be registered and inspected by the local religious authority before foreign books could be legally bought or sold, or translated and then printed locally.[27] Dogmatic religious considerations were behind these types of statues.[28] Because books deteriorate and decay over time, their preservation requires reproduction, and their continuous and independent reproduction implies a risk of alteration. Books reproduced before printing were not copies, but rather manually and orally produced derivative works based on existing works, either original or derivative themselves.

The emergence of sacred texts from other regions became a concern for religious institutions. The public circulation of books containing inconsistencies with the official version from the respective authority was a legitimate copyright concern. The copyright issue in this instance is analogous to the problems that would arise if there were suddenly various conflicting versions of the Constitution or our laws or of important scientific books. It concerns the moral issue of integrity, which addresses one of the more long-term problems of copyrights rather than the immediate economic exploitation of a work.

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solitary than direct speech, print restored an interactive element, at least among scholars: and if the scholarly "periodical" was not born with the advent of printing, it certainly came into its own. Scholarship could now be the collective, cumulative and interactive enterprise it had always been destined to be. Evolution had given us the cognitive wherewithal and technology had given us the vehicle.").

[24] *Id.*

[25] *See e.g.* Joanna Kostilo, *Commentary on Johannes of Speyer's Printing Monopoly, Venice (1469),* in *Primary Sources on Copyright (1450-1900)*, http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_i_1469 (L. Bently & M. Kretschmer eds., 2008 www.copyrighthistory.org) (Accessed on February 25, 2014).

[26] *Id.* at § 5 ("It is in this intensely competitive book market that the system of book privileges eventually emerged. Once the printing of books far outstripped the demand, printers were likely to seek ways of re-imposing some form of scarcity. In other words, they sought to restrict the production of competing editions of specific texts that drove down prices and undermined the economic viability of many presses. This could be avoided by the provision of some form of copyright, a printing monopoly ensuring that each text was offered for sale by only one printer.").

[27] *See e.g.* '*Censorship Edict of the Archbishop of Mainz, Würzburg (1485)', in Primary Sources on Copyright (1450-1900)*, http://copy.law.cam.ac.uk/cam/tools/request/showRepresentation?id=representation_d_1485 www.copyrighthistory.org (L. Bently & M. Kretschmer eds., 2008) (Accessed on February 25, 2014).

[28] *Id.*

Another stand out issue that early copyright statutes addressed was the rampant theft of literary works.[29] Because copyright law governs expressions and because expressions affect many different aspects of life, the monarchies of the time took a different stance regarding this rampant theft than the governments of today. Instead of providing a forum for authors to vindicate their rights to their respective writings, the monarchies subjected the copyright protection of publications to the internal practices of licensed publishers. Monarchs also restricted the print trade through domestic patent privileges, and by granting exclusive printing privileges to nobles, religious institutions, and members of the court.[30]

Through this system of licenses and privileges, monarchies could economically protect the domestic publishing industry, control the public's access to foreign books, and censor local works that were deemed offensive to the crown.[31] This system of licenses and privileges built the foundation for the function of copyright as a private property right the 15th, 16th, and 17th Centuries.[32] This foundation served as the backdrop of the copyright landscape during the drafting of the Statute of Anne.

B. The Licensing Act of 1662 and the Statute of Anne

The last copyright statute in England enacted before the Statute of Anne was the lapsed Licensing Act of 1662, which was titled "An act for preventing abuses in printing seditious, treasonable and unlicensed books and pamphlets, and for

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[29] Martin Luther documented a famous early instance of intellectual property theft. Luther writes: "What do you mean by this, my dear Sirs ye printers, / that one steals and publicly robs the other of what is his, / and that you bring ruin on yourselves in this way? Have you too now become highwaymen and thieves? or do you imagine / that God will bless and nourish you / by such evil pieces of work and tricks?" For the full translated text go to: *Luther's Admonition to the Printers, Wittenberg (1525),* in *Primary Sources on Copyright (1450-1900)*, http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_i_1469 www.copyrighthistory.org (L. Bently & M. Kretschmer eds., 2008) (Accessed on March 31st, 2014).

[30] *See e.g.* Ronan Deazley, *Commentary on Early Tudor Privileges* in *Primary Sources on Copyright (1450-1900)*, http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_uk_1518 www.copyrighthistory.org (L. Bently & M. Kretschmer eds., 2008) (Accessed on February 25th, 2014) (Discussing early publishing related statutes in England).

[31] *Id.* at § 3 ("There is no doubt, however, that Henry's interest in supporting the domestic book trade was not concerned solely with national economic interests. Other legislative initiatives in the same year included the Act of Supremacy which established Henry's authority as Head of the Church of England, as well as the Treason Act which provided that anyone who might "slanderously and maliciously publish and pronounce, by express writing or words, that the King our Sovereign Lord should be Heretick, Schismatick, Tyrant, Infidel, or Usurper of the Crown" was to be adjudged a traitor, guilty of high treason, and subject to pain of death.") (citations omitted).

[32] *Id*. ("As such, these privileges provided the first of two proprietary models for protecting published works which prefigured the introduction of statutory copyright into Britain with the passing of the Statute of Anne 1709, the second being the 'stationers' copyright' that developed within the book trade itself following the incorporation of the Stationers' Company in 1557.") (citations omitted).

regulating printing and printing-presses."[33] The Licensing Act of 1662 was enacted shortly after monarchy was reinstated in 1660. It operated as a tool for oppression and censorship, and was considered the culmination of a century old system that granted a monopoly over the publishing industry to a guild of stationers in London favored by many royals.[34]

Almost a century before the Licensing Act of 1662, this guild of stationers had acquired the power to grant perpetual private property copyrights to anyone who registered a book with their guild.[35] The Licensing Act of 1662 turned their private property power into a full-scale monopoly, making it an offense and a violation of copyright to print a book without first registering it with the stationers' guild.[36] The statute allowed stationers to economically exploit the work for perpetuity, but revoked their previous power to personally police the publishing industry.[37] It also relaxed many of the more oppressive requirements of previous enactments and established the practice of depositing copies registered books with libraries and universities.[38]

The Statute of Anne was implemented with the specific goal of doing away with the built-in corruption of the stationers' copyright monopoly once and for all.[39] Through the implementation of several policies – such as: automatically vesting the ownership rights of a newly published book with the author or right's holder for a limited time instead of with the publisher for perpetuity, public access to the deposited books through the royal library and select university libraries, and the creating of the figure of public domain so that expired copyrights could not be picked up again and exploited for perpetuity – the Statute of Anne did away with the hold the stationers' guild had over the publishing industry.[40]

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[33] L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founder's View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 Emory L.J. 909, 914 (2003).

[34] *Id.*

[35] *Id.* at 913-914.

[36] *Id.* at 914-915.

[37] Deazley, *supra* n. 30. ("While the Act did secure the stationers position within the book trade, the company's role in the process of regulating the press was at the same time considerably diminished. Whereas the earlier Star Chamber Decrees had vested the responsibility for conducting searches in the Master and Wardens of the company alone, now they shared that role with 'one or more of the messengers of his Majesties chamber, by warrant under his Majesties sign manual, or under the hand of one or more of his Majesties principal secretaries of state'.") (citations omitted); Patterson & Joyce, *supra* n. 3, at 913 ("They were given the power, among others, to burn unlawful books and to destroy unlawful presses. These powers, combined with the usual authority of London companies to enact ordinances for their governance, gave the stationers the authority to maintain order within the company by rules providing who had the authority to print what, and thereby to create copyright as a private property of tradesmen.") (citations omitted).

[38] Deazley, *supra* n. 30, at § 5.

[39] Patterson & Joyce, *supra* n. 33, at 917-919 ("To avoid [the problem of copyright ownership being used as a tool for censorship], the legislators transformed copyright from a plenary property right that could inhibit learning into a limited property right that promoted learning.").

[40] *Id.* at 919-920.

The term for the expiration of copyrights was a much-debated issue during the drafting of the Statute of Anne.[41] The final term settled on was divided into two terms of fourteen years. At the end of the first term of fourteen years, the rights to the book would return to the author if the author was still living.[42] The term was designed to end the stationer's hold on publishing by drastically limiting the term for which a publisher could exploit their copyrights without extinguishing the right for the author.[43] This way, the problem created by the stationer was addressed without causing grave injury to economic interests of the author who had produced the work.[44]

In the function of a public purpose to end the stationer's monopoly, the Statute of Anne balanced the natural rights of authorship, which was a widely accepted concept at the time with many natural law philosophers of the time voicing their opinions on the subject, with the economic interests of the copyright holder. It was an imperfect product tailored to concrete problems of the time. Its enactment in turn caused many events to unfold, as authors lobbied to increase the limit and scope of their rights and publishers fought to regain their control over the property rights to written works.

During the decades that followed, the stationers repeatedly sued in the courts in an attempt to reacquire the rights that they had been stripped of through the Statute of Anne.[45] Although they were ultimately unsuccessful, their legal battles created a large body of jurisprudence relating to the nature of copyright in common law versus the natural rights of authors, often reflecting their ill-intentioned designs over the copyrights they sought to reacquire.[46] These legal battles, which at the time may have seemed innocuous, had a long lasting effect in the evolution of copyright law, laying the seeds for the debate over the public policy function of copyright laws that continues to this day.

C. Early copyright enactments in the United States

On May 2, 1783, the Continental Congress passed a resolution recommending the several States secure the copyrights of new books to their authors and publishers.[47] The

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[41] Deazley, *supra* n. 30.

[42] *Id.*

[43] *Id.*

[44] *Id.* ("Had they simply chosen to introduce a longer term, this would, in practice, have meant control of the work remaining with the owner of the book, who would more than likely be a bookseller. Rather, the use of the divided term, albeit reminiscent of the earlier statute, was designed to ensure that the control of the work would in fact return to the author if still alive. Given that this was the only section within the final Act to make reference solely to the author, it seems likely that the Lords fully intended to benefit the author and only the author. In any event, on 5 April 1710, the world's first copyright statute was passed.").

[45] Patterson & Joyce, *supra* n. 33, at 924-927.

[46] *Id.* at 927-928.

[47] *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, Copy. Off. Bull. (Copy. Off. Lib. Of Cong.) No. 3, 1 (July 1, 1973) http://www.copyright.gov/history/Copyright_Enactments_1783-1973.pdf (Accessed on October 13th, 2013).

states conceived their own frameworks for copyright in light of what they considered to be the needs that such legislation should address and subject to the minimum grants of rights agreed upon in Congress's resolution.[48] The varying enactments by each state reflected the diversity of opinions relating on the nature of authorship and the public policy behind copyright.[49]

Some states, such as Connecticut would recognize in their statutory language the natural right of the author, but then conditions the recognition of this right to the fulfillment of certain public interests concerns by: requiring deposit of the book with the Secretary of State to exercise the rights; creating a cause of action against the author for not furnishing sufficient copies of his work for sale, or for charging unreasonable prices for his published works; and – like the Statute of Anne – limiting the exclusive rights period of copyright to fourteen years initially and then automatically reverting the property of copyright to the original author of the book for an additional fourteen years in the event that such rights had been sold during the first term.[50]

Massachusetts and Rhode Island also recognized the natural right of an author in the preambles of their enactments, but their terms for these rights was for twenty-one years with no extension.[51] The only condition to enforce this right was the deposit of the book.[52] New Hampshire had the same treatment as Massachusetts and Rhode Island regarding the recognition of a natural right, as well as the requirements and remedies for securing copyrights, the only difference was that the term ran for twenty years.[53]

The Pennsylvania enactment did not incorporate language that reflected any kind of recognition of a natural right to authorship, but instead stressed a concern over piracy and the detrimental economic effects of piracy to the authors of pirated books and their families.[54] South Carolina's enactment also did not make any mention of a natural right of authorship, but provided varying penalties for different types of infringement such as the confiscation and destruction of the pirated works, and a fine per page for every infringing page confiscated while being published, sold or transported to be sold.[55] Additionally, the South Carolina statute contained exclusions

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[48] *Id.* at 1-21.

[49] *Id.*

[50] *Id.* at 1-2 ("Where it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that arise from the sale of his works, and such security would encourage men of learning and genius to publish their writing; which may do honor to their country and service to mankind.").

[51] *Id.* at 4, 9-10. ("As the principal encouragement [learned and ingenious persons] can make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such a security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind. . .").

[52] *Id.*

[53] *Id.* at 8.

[54] *Id.* at 10.

[55] *Id.* at 11-13.

from copyright – such as books published in Latin, Greek, or any other foreign language printed overseas – as well as the limitations Connecticut enacted to curb unjust exploitation of the property right caused by furnishing insufficient copies of the copyrighted work to the public or by charging the public excessively for the books.[56]

The enactments present a diverse list of examples of the ample range of policy concerns that copyright laws can address. The States could not agree on how to define the right to authorship, what remedy to provide, what penalties to enact, what limitations, if any, should there be on exclusive copyrights, and for how long should exclusive copyrights last and how they should behave.

Even when all statutes required a deposit of the copy prior to granting the holder the power to enforce the copyright, the States could not agree on what to do with the deposited copies.[57] These differences do not signify a conflict in the development of U.S. copyright law. They were part of the natural debate that copyright is prone to generate when governments have the freedom to draft legislation adjusted to meet the needs and realities of their citizens. This debate, which begun around the enactment of the Statute of Anne, became more and more complicated in the Nineteenth century, as copyright law expanded to include different kinds of intellectual properties and as the duration of the protections conferred increased.[58]

D. Early federal copyright statutes

As expressed in the Constitution, the exclusive rights of author's to their respective writing are not granted by the government but rather *secured*.[59] The language in the copyright clause implies that these rights exist independent of the any Congressional act, but that the promotion of progress in science and the useful arts requires them to be secured for a limited time. The lack of legislative history of the clause and the changes to federal copyright statutes over time has obfuscated this notion.[60]

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[56] *Id.*

[57] *See Id.* at 1-8.

[58] *See* Oren Bracha, *Commentary on the U.S. Copyright Act 183 in Primary Sources on Copyright (1450-1900)* (L. Bently & M. Kretschmer 2008). http://copy.law.cam.ac.uk/cam/commentary/us_1831/us_1831_com_2362008152849.html#_ednref51 www.copyrighthistory.org 2008 (eds L. Bently & M. Kretschmer) (Accessed on November 6th, 2013) (Discussing the influence that American scholar Noah Webster exerted over the drafting and passing of the Copyright Act of 1831); *See also* 7 Register of Debates 422-424 (1831) (House debate regarding the changes contained in the Copyright Act of 1831 debating whether public domain was a contractual obligation between an author and the public which was cause for the concession of exclusive copyrights or whether copyrights where a recognition of preexisting property rights of authors to reap the rewards of their labors).

[59] U.S. Const. art. 1, § 8, cl. 8.

[60] *See generally* James Madison, *Federalist No. 43*, http://www.constitution.org/fed/federa43.htm (Accessed on November 1st, 2013) (In the Federalist Papers, the copyright clause is only discussed in these five sentences: "The ***utility*** of [the power conferred in the Copyright Clause] will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The

The first copyright statute passed by Congress in 1790 was titled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned," and, as one can discern from the title, the act granted copyright protections to the authors and proprietors of maps, books, and charts.[61] Originally, the rights in federal copyright statutes only affected the printing and distribution of forms of expression.[62]

When musical compositions where assimilated in 1831, their copyrights only protected their reproduction in printed form.[63] It did not extend to the performance of works contained within them.[64] Due to the printable nature of music sheets, this was a protection that was already contemplated under the original statute.[65]

The limit of copyright's scope to printed works ended in 1856 when the Copyright Act of 1831 was amended.[66] In the 1856 amendment, Congress assimilated public performances of dramatic works into the copyright scheme; recognizing copyright protection to something other than the printing of an author's work for the first time.[67] The amendment allowed the authors' or copyright holders' exclusive right over public performances of a dramatic work to run parallel with their exclusive right to publish said dramatic work; meaning that a dramatic work generated two different exclusive copyrights simultaneously.[68]

The amendment expanded the scope of copyright far beyond the act of printing and copying works of authorship, and into the realm of interpreting and exhibiting a publishable work.[69] It is unclear from the legislative history of the 1856 amendment

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public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.") (Emphasis added).

[61] *The Public Statutes at Large of the United States of America from the Organization of the Government in 1789, to March 3, 1845* vol. I, 124 (Richard Peters ed., 1845) (found at: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=2 (Accessed on 11/10/2013)).

[62] Bracha, *supra* n. 58.

[63] *Id.*

[64] *Id.*

[65] *Id.* ("The report proposed recognizing musical works under the traditional framework of copyright as regulating the product of the press. It meant only to apply protection to printed sheet music against unauthorized reprints. There was little novelty in this [. . .] In the United States, some of the earliest copyrighted works under the federal and the state statutes were sheet music and such works were registered for protection on a regular basis.").

[66] *See The Public Statutes at Large of the United States of America from December 3, 1855 to March 3, 151* vol. XI, 139 (George Minot & George P. Sanger eds., 1859) (Accessed on 10/20/2013 from: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=011/llsl011.db&recNum=2).

[67] *Id.*

[68] *Id.* (The amendment recognized the exclusive right of the author of a dramatic work to "act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained. . .").

[69] Bracha, *supra* n. 58. ("The prevalent understanding of copyright gradually changed from a limited right of reprint to ownership of an intellectual work that entitled the owner to the market profits from any exploitation of the work, irrespective of changes of form and medium.").

whether or not Congress considered the collateral effects that such an enlargement of scope could produce. However, Congress had previously proposed such an enlargement of scope, albeit treating the issue differently.

In the 1840s, Legislation regarding public performance rights were proposed but not passed as part of a comprehensive reworking of copyright law.[70] Unlike the 1856 amendments that did pass, the proposed bills treated public performance rights as rights separate from copyrights.[71] The differences between the two legislative projects seem to be the result of the 1856 amendments being passed by a Congress amidst heavy lobbying and media pressure from playwrights.[72] The lobbyists argued that granting of such exclusive rights was in the best interest of national prestige, and that such a grant would be of great value to playwrights and the American theater community presenting little to no consequence to everyone else.[73] Congress accepted this argument and passed the 1856 amendments with little to no debate on the effects on copyright they would produce.[74]

The 1856 amendments marked a turning point in copyright law. A little over a decade later, Congress further expanded copyright law's scope to cover an even greater range of intellectual properties.[75] Throughout the years more and more forms of expression were awarded copyright protections, and the protections for these newly assimilated forms of expression had to be designed around their particularities;

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[70] *See* H.R. 9, 28th Cong., 1st Sess. § 1-29 (Jan. 3, 1844).

[71] *Compare* H.R. 9, 28th Cong., 1st Sess. § 2 (Jan. 3, 1844) (Defining copyright as ". . . the sole and exclusive right and liberty of printing, or otherwise multiplying copies of any subject to which the said word is herein applied. . ."); *Id.* at §§ 19-20 (recognizing an exclusive property right over the performance of dramatic, entertainment, or musical works to the author of said works provided that the work is not published or printed); *with The Public Statutes at Large of the United States of America from December 3, 1955 to March 3, 1859, to March 3, 1845 and Proclamations since 1791* vol. XI, 138-139 (George Minot & George P. Sanger, eds., 1859) (http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=011/llsl011.db&recNum=2 (Accessed on November 10th, 2013)) (recognizing public performance rights to authors of plays that are comprised within an author's exclusive publishing rights and run parallel with these rights).

[72] Bracha, *supra* n. 58 (citing Clement E. Foust, *The Life and Dramatic Works of Robert Montgomery Bird* 147-150 (Knickerbocker Press 1919)); Richard Fawkes, *Dion Boucicault: A Biography* (Quartet Books 1979); "Dramatic Copyright," (New York Daily Times, June 24, 1856); and "Dramatic Copyright," (New York Daily Times, August 1, 1856)).

[73] *Id.*

[74] *Id.* History has proved this argument to be erroneous. Few playwrights truly benefited from the law and the amendments had the opened the door for any form of expression to obtain copyright protection indistinctly of the manner in which it is reproduced or interpreted.

[75] *See The Public Statutes at Large of the United States of America from December 1863 to December 1865* vol. XIII, 540-541 (George P. Sanger 1866) (http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=013/llsl013.db&recNum=2 (Accessed on 11/10/2013)); *The Public Statutes at Large and the Proclamations of the United States of America from December 1869 to march 1871* vol. XVI, 198-217 (George P. Sanger 1871) (found at: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=016/llsl016.db&recNum=2 (Accessed on November 10th, 2013)).

including accounting for different possibilities in the commercial exploitation of each type of copyrightable property.[76]

The expansion of copyright's scope into new forms of expression is inherently troublesome. The cohesiveness of the law suffers when new and different forms of expression are assimilated. A new form of expression may require different treatment when addressing issues similar but not identical to those managed in prior copyrightable forms of expression (such as piracy in books versus the counterfeiting in paintings). New forms of expression may also require addressing issues foreign to the issues of prior copyrightable forms, which leads to more complexities in the statute and may require innovative forms of legal analysis (such as the copyright protection for software).[77]

As the legislation becomes more and more elaborate, it becomes apparent that safeguards are needed to ensure that exclusive rights are not abused. This, because the exclusive rights granted by copyright concern expressions, and expressions can be highly subjective in nature. Expressions are never wholly original; instead, they are the product of continuous learning and cultural growth. The harder it is to identify concretely the expression being granted copyright protection, the more difficult it becomes to enforce any kind of exclusive rights over that expression. Thus, safeguards are needed, not only to ensure the advancement of culture and ideas, but also to ensure that the exclusive rights granted by copyright do not become irrelevant or obsolete for being overly oppressive and unreasonable.

Fair use can serve as an excellent safeguard, but interpreting the limitation becomes more and more difficult when new forms of expression and new uses need to be contemplated.[78] We see this difficulty more and more as fair use is applied to an ever-growing range of expression under an unfathomable array of circumstances. The language of § 107 recognizes this problem, but defers its resolution to the courts out of an understanding that the key to issue lies somewhere within the body of jurisprudence generated by copyright.[79] An examination of the treatment of fair use in its original application illuminates the reason behind this deference.

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[76] 17 U.S.C. §§ 101-1332 (Current law includes an ample range of provisions from broadcast, to computer programs, architecture, industrial design, music videos, paintings, sculptures, musical theater, semi-conductors, etc.).

[77] *See e.g.* Computer Associates Int'l Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992) (elaborating a three-step test to determine whether substantial similarity requirement from *Nichols v. Universal Picture Corp.*, 42 F.2d 119 (2d Cir. 1930), is met when proving copyright infringement for non-literal elements of software).

[78] *See generally* Rpt. of the Register of Copy. on the Gen. Rev. of the U.S. Copy. Law, 24-36 (July 1961) http://www.copyright.gov/history/1961_registers_report.pdf) (Accessed on November 5th, 2013) (discussing the various effects of limitations to exclusive rights that the new revision to the copyright act produces within various industries and concerning multiple forms of expression).

[79] H.R. Rpt. 94-1476 at 5680 (Sept. 3, 1976) ("The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can [a]rise in particular cases

E. The Story of Fair Use

Folsom v. Marsh is the first known judicial opinion in the U.S. to recognize what would come to be known as fair use.[80] Justice Joseph Story authored the opinion in 1841. It is regarded as controversial, with jurists to questioning the unorthodox manner in which fair use was recognized and applied in *Folsom*.[81] Doubts have also been cast over the logic of the arguments used to support *Folsom's* holdings and the implications of Justice Story's familiarity with the object and parties of the suit.[82]

However, this criticism shouldn't overshadow the significance of the method utilized by Justice Story to apply fair use. Two important lessons regarding the application of fair use can be derived from a study of *Folsom*: 1) that a person's view on copyright issues is proportional to their interests in the copyrighted property, and 2) that an inquiry into the nature and validity of the exclusive right held by the copyright owner is required prior to the application of the fair use analysis. These lessons can be accidentally passed over if the study of *Folsom* is limited to its pronouncements on fair use, but understanding them can facilitate the adoption of a dualist approach to copyright.

The first lesson, regarding the correlation of person's view towards copyright issues with their personal interests with the copyrighted material, is expressed subtly in *Folsom* and requires some background information. Prior to the suit, Justice Story had been, at least to an extent, involved in the negotiations that led to the plaintiff's purchase of the letters that would later be the object of the suit.[83] Justice Story had personal knowledge of the facts surrounding the controversy and knew all of the parties involved, including the master assigned to the case.[84] Story's expressions in *Folsom* reflect a personal knowledge of the value of the letters.[85] There is ample evidence

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precludes the formulation of exact rules in the statute. 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. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.").

[80] *Folsom v. March*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[81] Bracha, *supra* n. 58.

[82] *Id.*; L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. Intell. Prop. L. 431, 433-440 (Spring 1998).

[83] Bracha, *supra* n. 58, at § 4 (discussing Story's involvement in the negotiation of the purchase of the letters by the plaintiff, Mr. Sparks) (citing sources).

[84] *Id.*

[85] L. Ray Patterson, *supra* n. 82, at 435-436 ("Story then addressed the defendants' objections, dealing first with the objection that the materials 'were designed by the author for public use, and not for copyright, or private property.' To this defense, Story said that 'President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington . . .' How President Washington's self-serving actions could be determinative of the legal status of his papers is not clear, but we have here a personal ulterior motive that was congruent with the jurisprudential

linking story to the book, and he is even thanked in the book's acknowledgement section.[86]

Regardless of Justice Story's involvement with the book, Story's personal view of copyright was – at least on a subconscious level – biased by the knowledge of the actual monetary value of the letters and biased with the knowledge of the monetary value of his own books. Story was a highly successful author and contributor to several books.[87] "By the time [Story] turned 65, on September 18, 1844, he earned $10,000 a year from his book royalties. At this point his salary as Associate Justice was $4,500."[88] Story also had a large collection of letters that he himself had authored over the years – letters in which could be deemed economically valuable in light of the unique historical insight they could provide. It should come as little surprise that, ten years after *Folsom*, Justice Story's son edited and published a two volume book containing these letters.[89]

This background suggests that Justice Story's view of the function of copyright laws was skewed by his interests in his own copyrighted works of authorship and prospective published works. There is nothing wrong with Justice Story's internal bias though. It is entirely possible that Justice Story convinced himself that such a view favoring extensive copy protections was correct regardless of the treasure trove of copyrightable properties that he owned. Any author in an analogous position would be biased in the same way.

As mentioned in subsection (A), expression is deeply ingrained into our way of life. It is something that generates internal biases in all of us, no matter how impartially we attempt to view an issue. Any author Justice Story's position would exhibit the same bias Justice Story did. Inversely, any non-author would exhibit a bias towards works falling quickly into the public domain. There are many other biases that can arise also. For example, authors interested in incorporating some part of a copyrighted property into their own copyrightable works of authorship would be biased towards limitations to copyright protections such as fair use, the extent of such biased conditioned by their property interests in their work. Authors who own less valuable copyrighted properties will generally exhibit a bias towards a moderate view, balancing their economic

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motive of enlarging the author's rights. Chief Justice Marshall and Sparks acquired the interest of Bushrod Washington, and 'the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit;' from which it followed that '[t]he publication of the defendants, . . . to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington.'") (citations omitted).

[86] Bracha, *supra* n. 58, at § 4 ("Two open letters that were published by Sparks in order to attract interest in the book were addressed to Story. In addition, Story remained interested in the project throughout the publication process and Sparks thanked him in the book's introduction for 'the lively interest he has manifested in my labors, and for the benefit I have often derived from his suggestions and advice.'") (citations omitted).

[87] *Id.*

[88] Ronald D. Rotunda & John E. Nowak, '*Introduction'*, in *Commentaries on the Constitution of the United States* by Joseph Story, p. xxiv (Reprint ed., Carolina Academic Press 1987).

[89] The book is titled *Life and Letters of Joseph Story* and was written in 1851.

interest with their interest to reach a wider audience. Authors who are interested in preserving their legacy would exhibit bias towards moral causes of action.

The possibilities go on and on. The point is not to favor one view over another, but to recognize that they exist. Because copyright issues are seen case to case, these views can be identified in any specific controversy and incorporated into the analysis for the resolution of that controversy without causing any collateral effects to the rest of the public. The following section discusses possible ways this can function. For now, we should turn our attention to the next lesson in *Folsom*: that an inquiry into the copy protection of the allegedly infringed work needs be done before the fair use analysis is conducted.

Folsom may be known for the introduction of fair use, but the opinion discusses many important copyright issues before fair use is considered.[90] The first issue in *Folsom* relates to the copyrightable nature or private letters. Justice Story looked at the pieces of the cause of action and determined whether they fell into the copyright scheme before doing anything else. In a landscape where the majority of copyright infringement involves the production of derivate works, this first step proves essential to a proper application of fair use.

A use may be fair but the lack of copyright protection of a certain element of the use obviates the need for the test. Likewise a use may be unfair but lack of copyright protection of a certain element of the use may lead to a confusing interpretation of the fair use test. Lastly, when copyright protection persists in the elements used by the infringing work, this step can assist the fact finder visualize the conceptual pieces of the case to facilitate the application of fair use. This attention to method is also elaborated on in the following section. The method in *Folsom* is our focal point at the moment.

Justice Story's first holding in *Folsom* decided that the authors of un-copyrighted private letters – and their heirs and representatives – had exclusive copyright protection over any letter they wrote, without exception to the person the letter was addressed to, unless the occasion required or justified the publishing of the letter by that person.[91] In dicta, Story limited the right to utilize private letters in lawsuits to establish a cause of action, and to rebut the writer in instances of public attacks or accusations but "no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach."[92]

Today, a copyright grant to an author over private letters may seem appropriate under most circumstances. At the time, however, the federal statute did not recognize copyright protection in this manner since procedural formalities were required for copyrights to subsist.[93] These formalities were not met regarding the letters themselves,

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[90] Many of these holdings from *Folsom* have since been overturned, which explains why scholars and legislative reports pass them over.

[91] *Folsom* 9 F. Cas. at 346.

[92] *Id.*

[93] L. Ray Patterson, *supra* n. 82, at 436-347 ("But at that time the author of private letters could have no copyright until he or she published them and complied with the provisions of the copyright statute.

but were met regarding the book in which the letters were first published.[94] This reasoning is inconsistent with our current copyright system; but, at the time, there was no comprehensive statute outlining the function of copyright protection. Since copyrights required procedural formalities in order to be enforced, the question over on who vested the copyright ownership of un-published letters was left unresolved.

Story took a stance on this issue and resolved it in favor of his natural bias, holding that copyright vests in the publisher of the letters. Holding otherwise would have implied that his friend, Mr. Sparks, had invested a considerable amount of money for letters in the public domain. In light of the much shorter period of copyright protection at the time, this seemed unfair. It also would have devalued Story's own letters, making investors less likely to offer large sums for them.

These types of uncontemplated situations appear all the time in contemporary copyright cases. Taking a stance on a particular unresolved issue allows for that issue to be addressed and debated. The common mistake is to look over this type of novel issue by attributing it to an unspecified derivate work right and skip ahead to the fair use limitation. Such an approach frustrates the development of copyright law as a whole. There is no wrong answer when taking a stance since these issues are resolved independently anyway. Once Story took a stance, it tricked down into the rest of his holdings.

Story negated defendant's argument that the letters were public in character because some had been written in an official capacity. This rejection is more troublesome, as it brushes aside the possibility of copyright protection not existing in some of the letters of the book because they only accounted for one fifth of the letters in defendant's book.[95] Although the dismissal of the argument is disappointing, Justice Story's consideration of the issue can be utilized here to illustrate how the various moving parts of a copyrighted work can affect the resolution of the dispute. One fifth of the book not infringing at all could have weight or it could not have weight depending on the other factors.

Another of defendant's defenses was the argument that the letters were public in character because the United States had bought them for $25,000.00, and had thus become national property. This argument did not persuade Justice Story either.[96] He

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The author of unpublished works had only a common law copyright. What Story chose to ignore was that logically the section protected only the author's right of first publication of his or her manuscript, for the author's right of continued publication was the function of statutory copyright. If another published a manuscript without permission, the author could get an injunction to stop the publication. But if the author himself or herself desired to publish the manuscript, he or she would have to comply with the terms of the copyright statute or the work would go into the public domain.").

[94] *Id.* at 437-438.

[95] *Folsom* 9 F. Cas. at 347; L. Ray Patterson, *supra* n. 82, at 436-440 ("[Justice Story] also said that it may be the duty of the government to publish [official letters], but this did not give private persons the right to publish them. He concluded, however, that it was not necessary to dispose of the point in this case 'because, of the letters and documents published by the defendants, not more than one fifth part are of an official character.' This was a curious conclusion since it meant that uncopyrightable material could have copyright protection merely because it was contained in a copyrighted work . . .").

[96] *Id.*; *Id*. at 438.

understood that the government bought the letters subject to the copyrights that the plaintiffs had acquired over them by virtue of publishing the letters in their book. Although this may seem unfair since the norm established by Story did not exist prior to the opinion, the case-by-case treatment of copyright infringement makes this type of holding possible. One can hold against transfer of copyright ownership to a non-party without adjudicating that non-party's rights. The ownership issue is only resolved between the parties in the suit, no one else.

After all these holding, Justice Story reaches the introduction of what we now know as fair use, a balancing test which consists of weighing four factors against each other. None of these factors have particular controlling weight. In *Folsom*, weight in the fair use test is assigned to each factor according to the how much a factor favors a finding of fair use or not. The results are then added up to draw a conclusion.

In *Folsom*, Justice Story found the purpose of the use to be educational and thus transformative, he found that the character of this use was consistent with the purpose.[97] Thusly, Justice Story implied that the first criteria likely weighed in favor of the defendants. He was quick to dismiss the significance of this elaborating on the next two factors of the test. He considered the two factors of "quantity and value of the materials used" together.

Assigning weight to the "value of the materials used" was much simpler in *Folsom* than it is today, having been replaced with a factor considering "the nature of" the copyrighted work. This factor weighed against fair use if what was taken from the copyrighted formed a central part infringing work. Its application was uncommon for the time:

> [I]n 1840, the rights of copyright were available only for a book as it was published; another author could abridge or translate the book without infringing the copyright. Story, aware of both doctrines, acknowledged the abridgment doctrine in *Folsom*, and held that the defendant's work was not an abridgment. He then proceeded to redefine infringement, which in his hands became any copying, duplicative or imitative, in whole or in part of the copyrighted work. This redefinition of infringement enlarged the copyright monopoly and became the basis for what was to become fair use.[98]

After rejecting the abridgement defense, Story weighed the factors in consideration of the quantity and value of the materials used overwhelmingly in favor of the

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[97] *Id*. at 348. The original use of the letters was as part of comprehensive twelve volume series of books based on the writings of George Washington. The defendants' use of letters consisted of developing an educational narrative for school children based on the life of George Washington from his first person perspective.

[98] *See* L. Ray Patterson, *supra* n. 82, at 431-432.

plaintiffs. Although defendants had only used about 3.5% of the letters found in the book and none of the author's original writings. That 3.5% of un-copyrighted letters amounted to the heart of the infringing book, as it constituted nearly one third of the book according to Story. He also highlighted the amount of letters that the defendants had used as a critical factor:

> [I]n the present case, I have no doubt whatever, that there is an invasion of the plaintiffs' copyright; I do not say designedly, or from bad intentions; on the contrary, I entertain no doubt, that it was deemed a perfectly lawful and justifiable use of the plaintiffs' work. But if the defendants may take three hundred and nineteen letters, included in the plaintiffs' copyright, and exclusively belonging to them, there is no reason why another bookseller may not take other five hundred letters, and a third, one thousand letters, and so on, and thereby the plaintiffs' copyright be totally destroyed.[99]

The last factor of the test, considering the effect of the infringing work on the market of the copyrighted work alluded to but not applied.

F. Statutory fair use

In 1976, Congress incorporated this test it into the statutory scheme of copyright law in an effort to save the legislation from being overly restrictive and unconstitutionally broad.[100] The sudden injection of fair use into the federal court system caused trouble from the beginning. The early leading cases that dealt with fair use were the result of numerous reversals and divided courts.[101] In *Campbell v. Acuff-Rose Music Inc.*, the Supreme Court attempted to develop a more balanced test to rein in fair use's overly restrictive results and highly arbitrary nature.[102] *Campbell* resolved some issues with the fair use application but left holes to deal with for many other problems.[103]

The legislative history of § 107 states:

> [C]ongress codified the fair use doctrine at least in part in order to encourage courts to render the doctrine more comprehensible. The House

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[99] *Folsom* 9 F. Cas. at 349.

[100] L. Ray Patterson, *supra* n. 82, at 450-451 (arguing that the policy mandate made found in the U.S. constitution meant that the 1976 act bordered on unconstitutionality had it not been for the incorporation of fair use).

[101] Leval, *supra* n. 7, at 1106-1107.

[102] *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

[103] *See* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 Colum. J.L. & Arts 467, 470-484 (Summer 2008) (Evaluating how the different circuits have treated the transformative factor of the test after the Supreme Court's expressions in *Campbell*, showing a wide range of inconsistency in how courts view transformative use and transformative purpose as a positive or negative factor when the transformative use of the taking does not coincide with a transformative purpose and vice versa).

> Report, for example, notes that the doctrine, as such, is not stated in the four factors themselves, but in the first sentence of § 107 — what has come to be referred to as the preamble. According to the House Report, '[t]hese criteria [the four factors stated in the statute] are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case.'[104]

Unfortunately, the codification of the fair use doctrine has not yet produced such a result.[105] Courts continue to apply the factors of the test rigidly; rarely considering additional factors. Because of the above, I agree with the view that additional factor should be considered in the cases where the infringing work does not in any way compete in the market against the copyrighted work.[106] The most important of these additional factors being the parties' interests, the qualities of the infringed right, and the qualities of the forms of expression affected.

A dualist approach to the consideration of these factors makes practical their assimilation into the balancing test for rights under both federal copyright statutes and state moral-rights statutes.

III. The dualist approach to fair use

Adoption of a dualist approach offers two distinct benefits. Firstly, it helps sniff out issues that have been inherited from obsolete copyright enactments; allowing the next generation of copyright legislation to move forward without being shackled by old practices. Secondly, it can be put to use to reign in the scope of 17 U.S.C. § 106(2) without having to declare the provision for the derivative work right unconstitutional for being overly broad.

Many cases, most notably those dealing with issues of fine art, have often applied the fair use limitation to what they understood to be derivative works yielding mixed results when there is difficulty identifying a specific derivative market. Courts have stretched the reach of the derivative work right by ruling for or against fair use in

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[104] Madison, *supra* n. 17, at 1597 (citing: H.R. Rpt. No. 94-1476, at 66 (1976); Sen. Rpt. No. 94-473, at 62 (1975); *see also* Reese, *supra* n. 103, citing footnote 330.

[105] *See The Public Statutes at Large of the United States of America from December 3, 1855 to March 3, 151* vol. XI, 139 (George Minot & George P. Sanger 1859) (Accessed on 10/20/2013 from: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=011/llsl011.db&recNum=2). (The amendment recognized the exclusive right of the author of a dramatic work to "act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained . . .").

[106] *See* L. Ray Patterson, *supra* n. 82, at 447 ("[M]odern courts continue to use the concept of fair use taken from *Folsom* to expand the copyright monopoly. The difference is that while *Folsom* enlarged a very narrow copyright, the modern cases enlarge a very broad copyright. Thus *Folsom* limited an author's right to use a copyrighted work, which respected the market boundary for copyright; indeed, the *Folsom* test was centered on the market impact of the competitive use. The modern view, promoted by copyright owners, is that the fair use doctrine limits the right of individuals to use a copyrighted work for their personal purposes regardless of market impact.").

cases where a copyright infringement action appears inappropriate in comparison to a moral-rights cause.[107] The dualist approach can curb this tendency. Likewise, it can also curb the tendency in moral-rights cases to blur the line between the moral-right to integrity and common copyright infringement. The following sections serve as a preliminary guide for this approach.

A. Identifying the exclusive right that has been infringed

The current copyright scheme grants exclusive rights to the copyright owner over a work that falls into one of several broadly defined categories that consist of modes of expression, without prejudice to the recognition of exclusive rights to a form of expression not specifically contemplated in the law.[108] The exclusive rights over these defined modes of expression are restricted to several broadly defined modes of economic exploitation of the work.[109] Many limitations to the scope of copyright protection are contemplated in the law.[110] The law also contemplates general limitations to the reach of the listed exclusive rights, as well as many specific limitations.[111]

Not every category of exclusive rights is compatible with every mode of expression, meaning some exclusive rights are of limited applicability. For example, sculptures or paintings cannot be performed but they can be displayed; likewise, stand-alone sound recordings can be performed through a digital transmission but cannot be displayed. These exclusive rights of limited applicability are less problematic when it comes to identifying the exclusive right that has been infringed. This is not only due to their limited applicability, but also because their nature requires the law to elaborate on the specifics of what actions it protects cover and what objects does this protection fall upon.

Although these specific rights are less problematic, they are not free from controversy altogether. Their design contemplates the rights' behaviors within the various industries specifically dedicated to the commercial exploitation of certain forms of media, as well as their behavior in the presence of specific government and public interests.[112] Their specificity ends there, as the legislation's many gaps begin to appear when these exclusive rights are exercised by and over objects that fall outside

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[107] *See e.g. Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (The creation of three sculptures in which the poses were taken from the caricaturized expressions of puppies in copyrighted photos was so substantial that it was found to violate the photographer's exclusive derivative work rights.).

[108] 17 U.S.C. § 102. Note: The use of the term "includes" suggests that the list is not a complete list of the modes of expression that fall under copyright.

[109] 17 U.S.C. § 106.

[110] 7 U.S.C. § 102(b), §§103-105, §§ 112-115, § 118, and § 120.

[111] 17 U.S.C. §§ 107-122.

[112] Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 879 (July 1987) ("A review of the 1976 Copyright Act's legislative history demonstrates that Congress and the Registers of Copyrights actively sought compromises negotiated among those with economic interests in copyright and purposefully incorporated those compromises into the copyright revision bill, even when they disagreed with their substance. Moreover, both the Copyright Office and Congress intended from the beginning to take such an approach, and designed a legislative process to facilitate it.").

the scope of traditional commercial exploitation of media. Even more gaps appear when the rights granted are exercised by and against parties that have nothing to do with these media industries.

My research indicates that this is no accident, but instead the result of a heavily negotiated piece of legislation where Congress compromised with those sides that lobbied their interests, and then left blanks in the legislation to be filled in later for those affected by the copyright scheme but absent from the legislative process.[113] As unfair as it seems, Congress was correct to leaving the blanks to be filled-in. Having inherited problems of the past, it was an unrealistic goal to attempt to draft a Copyright Act so perfectly uniformly that it accounted for all possible situations of competing interests. Congress could not have been less subtle with their deference of power and criteria the courts over these non-negotiated matters of copyright. A plain reading of the broad terms and definitions contained within Copyright Act shows the great deference federal courts possess over non-negotiated matters of copyright.[114]

The author or copyright owner "holds a bundle of exclusive rights in the copyrighted work."[115] But this should not be read to imply that a carefree attitude should be the norm when analyzing these rights and their infringement. Even when one can infringe multiple rights simultaneously, it is helpful to view these rights as being infringed through a hierarchy – with each infringement derived from a primary infringement. For example, one infringes on the derivative work right by creating a derivative work, then subsequently infringes on the reproduction right by reproducing the derivate work and then the distribution right by distributing the reproductions.

A break in the chain of the hierarchy can signify a separate violation. The hierarchy can also help identify if a moral issue is at heart of the conflict versus an issue over the economic exploitation of the work and vice versa. Even when the Puerto Rico statute recognizes four moral-rights – integrity, attribution, repudiation, and access – this hierarchical method can be useful for sifting out strictly economic causes of action, which would be preempted.

There are six broadly defined general types of exclusive rights recognized to the owner of copyright under 17 U.S.C. § 106. These rights are the copyright owner's right to either do or authorize, with respect to their copyrighted materials, any of the following: 1) reproduction in copies or phonorecords; 2) preparation of derivative works; 3) distribution of copies or phonorecords through sale or other form of transfer of ownership, or by rental, lease, or lending; 4) perform the work publicly, within a

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[113] *Id.* at 894 ("Congress, for its part, chose to balance these interests by seeking and then enacting a network of negotiated compromises. If courts were to interpret the statute by determining whether they could give those compromises effect, they would necessarily need to consider what the parties to the compromises believed their agreements meant. The resulting construction would, if nothing more, work Congress's will. Perhaps courts, commentators, or indeed Congress itself would thereafter conclude that the legislative process underlying the 1976 Act balances competing interests in an inappropriate or undesirable fashion.").

[114] H.R. Rpt. 94-1476 at 5680 (Sept. 3, 1976).

[115] *Stewart v. Abned*, 495 U.S. 207, 220 (1990).

defined range of modes of expression 5) display the work publicly, within a defined range of modes of expression; and 6) perform digital sound recordings publicly by means of a digital audio transmission.[116] Unlike the majority of lists found throughout Title XVII, this list is exclusive; meaning the court is not allowed to recognize any other rights over copyrighted materials not expressly stated within it or within any other statute in Title XVII.[117]

However, the language of the statute conditions the scope of these rights, and the limitations found in the subsequent statutes. The varying factors that condition the scope of each exclusive right do not always coincide with one another, and do lists of factors contemplated in other statutes condition themselves. Many of these other lists are non-exclusive; meaning that the court can recognize objects, actions, or circumstances not expressly stated in the list but included by either analogy or virtue of a general definition that the inclusion fits into. The non-exclusive nature of these lists hinders the process of identifying the infringed right because they can create the illusion that an exclusive right encompasses more than it actually does, resulting in the misidentification of the infringed right.

To resolve this conflict, I propose as a general rule of thumb: that these rights should be understood not only within the scope of their definitions and listed limitations or inclusions, but also within the scope of each other and the literal meanings of the words they define. Hence, the term reproduction, which is undefined in the law, should be read within the definitions of the terms the statute employs and understood not to encompass any actions or objects that clearly fall under any of the other rights in 17 U.S.C. § 106.

For example, even though art reproduction would appear to be covered under § 106(1) since it is a type of reproduction, its inclusion as one of the listed examples of what constitutes a derivative work excludes it the scope of § 106(1). Original works of art, by their nature, are inherently unique from their copies due to the involvement of the artist in the creation of the work. This means any reproduction of artwork in which an artist did not participate to her fullest capacity is not a true copy of the artwork but instead a reproduction, and thus a derivative work for being "a work based upon one or more preexisting works," the preexisting work being the original.[118] Meaning infringement § 106(1) with an art reproduction is derived from the infringement of § 106(2), requiring a different analysis than mere infringement under § 106(1).

The exclusive right of reproduction, which is not defined in § 101 or anywhere else, can be especially difficult to understand because of the sheer plenitude of forms in which an object can be reproduced. Defining the term is further frustrated by the large number of these forms of reproduction expressly stated in the law but then covered under other exclusive rights. However, within the context of the statute and definitions

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[116] 17 U.S.C. § 106.

[117] For the purposes of this article, this discussion will limit itself to the exclusive rights listed in chapter one of Title Seventeen.

[118] 17 U.S.C. § 101.

of its terms, we can understand that the exclusive right to reproduce work in § 106(1) refers to piracy; better yet to mechanical reproductions in a medium consistent with the original the copy was first "fixed" to requiring little intellectual intervention from another person.[119]

The definition above may seem inconsistent with some opinions that consider infringement of the exclusive right to reproduce in copies not limited to mechanical copying with little human intervention.[120] The definition may also be inconsistent with the language in 17 U.S.C. § 107 that considers fair use to include "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. . ."[121] However, I feel such a distinction is necessary in order to elaborate a coherent and workable doctrine for fair use limitations and for our own understanding of how copyright laws function in terms of reach and scope.

The incongruence between my proposed definition and the cited jurisprudence and statutes is minimal in comparison to the benefits such a definition could provide. A comment, criticism, news report, or course-pack could still be considered an infringement of the derivative work right, deriving from this infringement the infringements of the reproduction and distribution rights. Thinking of a course-pack as a blatant copying of a book skews the analysis; the reality is that a course-pack normally contains several excerpts from several copyrighted and un-copyrighted works belonging to a specific subject matter or theme that relates to the course. A course-pack is actually a derivative work; it is not a literal reproduction under my definition. This does not mean that the right to reproduction is not infringed through the derivative work right, but it does mean that a derivative work analysis is required before one can make a finding of infringement of the reproduction right.[122]

The courts and the parties need to rely on at least some form of working definition for these terms. Much of the confusion over the fair use limitation comes from not addressing, nor identifying, the exclusive right allegedly being infringed. Instead courts

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[119] *Id.* For the definitions of "fixed," "copies," and "phonorecords." It is my opinion that the fixation requirement for copies and vast range of mediums covered under copyright severely impedes the elaboration of a clear definition for the courts to work with when it comes to infringement of reproductions rights.

[120] *See Princeton U. Press v. Mich. Doc. Services*, 99 F.3d 1381, 1388 (9th Cir. 1996) (Denying the fair use defense for reproduction in copies of educational materials even though the language of 17 U.S.C. § 107 expressly authorizes such reproduction and stating that the preparation and sale of course-packs by copy-shop for students a violation of the exclusive right to reproduction, without mentioning the exclusive rights of distribution by sale or of preparation of a derivative work; even though preparation of the course-packs consisted of photocopies of selections of various copyrighted books).

[121] 17 U.S.C. § 107.

[122] It is my understanding that in *Princeton U. Press v. Mich Doc. Services* it was customary for copy-centers to pay license fees to publishers in order to compile course-packs containing their respective copyrights. I find such a scheme wholly consistent with my proposed analysis.

have shown a tendency to obviate or undervalue this process, in favor of the analysis required by the first factor of the fair use test that determining the transformability of the use and its purpose and character.[123]

The application and analysis of the fair use factors are conditioned by scope of the infringed right, making it doubly important to identify the infringed right prior to applying the balancing test.[124] Some rights by their nature imply greater or lesser degrees of transformative purpose and character.[125] For the most part courts have avoided the pitfall of over emphasizing this factor, focusing on the transformative purpose rather than the transformation itself, but the breadth of consideration that courts have given to this factor has caused many pertinent issues to be swept under the table, going undiscussed in lieu of non-legal considerations.[126]

The lessons learned from Justice Story's application of fair use are relevant here. The fair use exam should not be carried out without first discussing the infringement that triggers the exam. Having done this, the examination should then factor in the parties' interests and biases regarding the copyrighted material.

B. Identifying the parties' interests to the copyrighted work

In March of 1994, the Supreme Court decided *Campbell v. Acuff-Rose Music Inc.* in an attempt to rein in the inconsistent and often highly restrictive interpretations the courts were applying to the fair use factors.[127] *Campbell* is considered to be reference point for the fair use analysis, establishing that the fair use analysis involves a case-by-case approach, that the list in § 107 is meant as a guide and serves an illustrative

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[123] *See e.g. Cariou v. Prince*, 714 F.3d 694, 707-709 (Discussing the significance of transformative use of photographs in mixed media paintings; skewing the analysis of the derivative work right towards the fourth factor of the test specifically infringing on the exhibition market for those specific photographs instead of discussing the possibility of a derivative market for licensed use of the photographs with respect to how prevalent the photographs appeared in the mixed media paintings); *Castle Rock Entertainment Inc. v. Carol Pub. Group Inc.*, 150 F.3d 132, 143-146 (2d Cir. 1998) (Finding lack of transformative use of for unlicensed trivia game and book based on the popular television series, *Sienfeld*. Finding also that such lack of transformative use weighed against defendants and that such use usurped the market with respect to the fourth factor of the test even when plaintiffs showed little to no interest in creating or licensing such a derivative work.).

[124] *See* Reese, *supra* n. 103, at 468-469 ("Commentators have worried that the emphasis that *Campbell* placed on transformativeness in fair use analysis will affect the scope of the copyright owner's derivative work right to control forms in which her work is transformed. Since most derivative works within the scope of the copyright owner's derivative work right generally involve transformation of the underlying work, if that act of transformation itself weighs in favor of fair use, then most derivative works will have a stronger case for fair use. As a result, weighing transformation of a copyrighted work in favor of fair use could potentially mean that many ordinary derivative works, which would generally be within the copyright owner's exclusive right, will instead be judged as noninfringing fair uses.") (citing sources).

[125] *Id.*

[126] *Id.* at 494-495.

[127] *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

and not limitative function, and that the four statutory factors may not be treated in isolation and "all are to be explored, and the results weighed together, in light of the purposes of copyright."[128]

The opinion contains large sections explaining the nature and history of parody, as well as the treatment parody should have with respect to fair use. It resolves that parody should not have a different treatment than other forms of use under fair use, but rather that parody will be subjected to the same case-by-case analysis under fair use like any other form of expression.[129] A deeper discussion regarding how the law should treat parody is found in the concurring opinion.[130]

Campbell states that judicial analysis of fair use for a parody should limit itself to identifying whether or not the parody can be reasonably perceived and should not enter into the worth of the expression in question.[131] This statement may seem confusing in the context of the opinion due to the length and breadth of the Court's discussion of what constitutes parody, but sometimes a minimal amount of explanation of non-legal concepts is required for a legal analysis. The point is not to apply a strict legal analysis by pretending that certain literary devices do not exist, but instead to define and recognize the these literary devices – or artistic devices as the case may be – without entering into an analysis of their cultural value.

Fair use is a limitation on exclusive rights over forms of expression. Forms of expression are social and cultural constructions, so understanding these social and cultural constructions is required by for a fair result. If the form of taking is something normal and cultural that people do regularly, then the fact finder needs to know this and understand it so that weight may be assigned correctly in the test. Application of the test ignoring to these social nuances can lead to erroneous results. They key to identifying the parties' respective interests can often lie in understanding these social nuances. *Campbell* is no exception to this, and for reasons not strictly limited to parody.

The controversy in *Campbell* centered on 2 Live Crew's version of "Pretty Woman," which sampled Roy Orbison's "Oh, Pretty Woman" to ironically employ a reference to a semi-classic song with sexist overtones in order to create an overtly sexist rap song. The change of lyrics and rearrangement music in 2 Live Crew's "Pretty Woman" was significant. Impeding 2 Live Crew to release an original song because it referenced another song presented a freedom of speech concern. Underlying this freedom of speech concern, however, was the parties' interests in preserving the economic value of their respective copyrighted properties.

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[128] *Id.* at 577-578 (citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985); Leval, *supra* n. 8, at 1110-1111).

[129] *Id.* at 579-585.

[130] *Id.* at 596-600.

[131] *Id.* at 582-583, citing footnote 16 ("The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely "supersede the objects" of the original.").

Campbell contains no analysis of the exclusive right infringed because copyright infringement is not in controversy.[132] 2 Live Crew had unsuccessfully attempted to obtain a license from Acuff-Rose for the use of "Oh, Pretty Woman" in their song.[133] When 2 Live Crew released their version of "Pretty Woman," their album credited Roy Orbison and William Dees as the authors of "Pretty Woman" and Acuff-Rose Music as its publisher. 2 Live Crew sought protection from infringement from by obtain a compulsory license under 17 U.S.C. § 115, but could not do so because their song's arrangement changed the "basic melody or fundamental character of the original."[134]

Because Luther Campbell was not only a singer/songwriter but also a record label owner with large catalogue of popular copyrighted hip-hop music, it was against his interest to argue that the sampling of "Oh, Pretty Woman" for parody purposes did not infringe a derivative work right or any musical performance rights. Presenting such an argument would have prejudiced Campbell's rights over his label's own copyrights.[135] It would have also turned him into an industry pariah by setting jurisprudence against the customary industry practice of seeking permission and obtaining a license in order to publish sampled music. Thus, the only way for 2 Live Crew to avoid paying damages for copyright infringement was to argue fair use under parody in the hopes of forcing Acuff-Rose into a licensing agreement.

Copyright issues are handled case-by-case. Only the matters of the case are relevant to resolve. In the opening lines of Part II of the opinion and the accompanying footnotes, the court insinuated that it may have considered other arguments, if these other arguments had been raised.[136]

The copyright of a book or a song does not grant the copyright owner exclusive rights over all the individual words used throughout the book, or all the individual musical notes in the song. The copyright of a painting does not grant exclusive rights over a particular shape or brushstroke. Copyright grants exclusive rights over the original expressions of an author.[137] Although, copyright infringement may have been easier to argue in *Campbell* because of the use of the instantly recognizable opening drum and guitar riff along with the words "Pretty woman," a slight tweaking of the arrangement may have changed that.

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[132] *Id.* at 574 ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," . . . but for a finding of fair use through parody.").

[133] *Id.* at 572-573.

[134] *Id.* citing footnote 4.

[135] Campbell's label would end up transferring their ownership over their catalogue of copyright works this period in time to competitor Lil' Joe Records during a bankruptcy process; for more on this *see Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1299-1303 (11th Cir. 2007).

[136] *Campbell* 510 U.S. at 574-575 (citing footnote 5).

[137] *Mannion v. Coors Brewing Co.*, 377 F.Supp.2d 444, 450-451 (S.D.N.Y. 2005) ("It is well-established that '[t]he sine qua non of copyright is originality' and, accordingly, that 'copyright protection may extend only to those components of a work that are original to the author.' 'Original' in the copyright context 'means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.") (citing sources).

The matter of copyright infringement requires the fact finder to draw the line of where the original work and the infringing work meet. Drawing this line is simplified when one contextualizes with respect to the type of infringement, the mediums used by the original object versus those of the infringing object, and who the parties with respect to these objects. Had the infringing party in *Campbell* been someone other than a member of the music industry, the analysis would have changed; the discussion in the opinion would have focused on the first paragraph of § 107 instead of the four factors of fair use, and the subject of parody would not have been so central to the opinion or may have been totally dispositive of the matter.

However, because the parties were members of the music industry, both of whom relied on income from royalties over their respective copyrights, the analysis becomes more rigorous. One cannot claim fair use over a sample of another's copyrighted music and then expect to earn royalties when their own original copyrights are sampled. That would frustrate the whole scheme of copyright. In cases like *Campbell*, where both parties possess an author's natural rights along with economic monopolistic interests with relation to their creations, the analysis must be more rigorous. Had defendants been a small-unsigned band, selling a few hundred records at small shows and local stores, the analysis may have been far less rigorous.

The identification of the party and their relation to the object of the suit is the factor that determines the complexity of the case and the rigors to employ in the analysis of fair use. Expression is a social construct, which makes understanding the social structures between the two parties an essential element of the analysis. A court cannot justly resolve a case without being informed of what is customary for the parties in the situation or with respect to the object and the nature of the medium, and because what is customary in this wide range of situations is greatly diverse, a uniform doctrine is counter-productive to meet this end.[138]

Requiring courts to resolve copyright issues on a case-by-case basis does not imply that each case should employ wholly ad hoc approach. We might not be able to come up with solutions to specific problems in copyright, but we may be able to identify what questions to ask ourselves as we breakdown each case. Sometimes two utilitarian interests will be at stake. Sometimes one monopolistic interest will be at stake against a moral interest. Sometimes a wide range of combinations will be at stake.

These are the issues that should shape discovery in a copyright infringement suit. Expert evidence in this particular area, as well as evidence of industry practices and of

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[138] Madison, *supra* n. 17, at 1633-1642 ("The question is not whether the action of the individual is the result of individual intent or is constrained completely by social influences, but instead the character of the cognitive framework within which the individual is acting. To what extent are the individual's actions consistent with, inconsistent with, or otherwise connected to that framework? The cognitive perspective, including its linguistic component, confirms that social patterns can be identified and made relevant to analysis of social questions. The fact that courts have implicitly been doing much of this confirms that it can be done. Recognizing it explicitly means teaching courts to accept their role, and teaching lawyers to more systematically collect and introduce both expert and lay evidence that tracks the language, structure, and practices of a given pattern.").

normal uses of the object will assist judges and the parties alike in a achieving a just, speedy, and inexpensive resolution to the action.[139]

IV. Conclusion

Debating the underlying philosophical policy concerns that copyright law is supposed to serve is not conducive to elaborating a coherent doctrine. It may shed light into the roots of certain figures of copyright law, but it does little to guide us in the present day landscape. The 1976 revision of copyright law dramatically altered the landscape, but the changes have not stopped there.[140] New advances in technology, linguistics, and society overall have been rapid and ever growing since then, and, due to lobbying and international pressures, the revisions of the copyright act have continuously attempted to keep up to date with the times.[141]

A strict ideology in the interpretation of a law that was designed to be interpreted as flexibly as possible impedes that law's coherent development. Copyright issues are vast, with new problems emerging constantly. My recommendation here is to not only prepare a case to fit the fair use factors, but also bring to the courts attention any other pertinent factors, building an easy to understand checklist of sorts. Having the Copyright Office draft models for these checklists could also help refocus the copyright debate.

Insisting on a single function of copyright is naïve. The dualist approach proposed may be imperfect, but it at least improves upon the previous approach by providing a mechanism that acknowledging the existence of parallel and conflicting elements. This is useful for both copyright and moral rights cases.

For example, there are some concerns over the applicability of the economic factors of fair use when balancing interests in a moral rights case, specifically the factor that weights the effect of the market of the use.[142] A strict philosophical approach to a moral cause would impede this factor from consideration, because moral rights are personal in nature and theoretically separate from any economic interests in the work.[143] The

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[139] But *see Nichols,* 42 F.2d at 123 ("The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. It ought not to be allowed at all; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the defendant copied it, so far as the supposed infringement is identical.").

[140] David Lange, Mary LaFrance & Gary Myers, *Intellectual Property: Cases and Materials* 730 (3d ed., Thomson West 2007).

[141] *Id.*

[142] Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 Wash. & Lee L. Rev. 33, 36, 88-90 (Winter 1997).

[143] *Id.*

human mind does not operate as robotically though. When moral and economic interests fall onto the same person they should be considered.

The cause of action these interests shouldn't ignore their existence, but rather assign weight according to purpose for the action. Meaning a copyright infringement action can assign less weight to a moral concern than to an economic concern, and a moral cause of action can do the inverse; both as opposed to assigning no weight at all. For this to work conceptually, the breaking down of the cause of action into parts outlined in Part II (A) is needed, as it can be used to sift through concerns that really are indicative of conflicting and incompatible elements of the two causes of action.

Lastly, identifying the parties and their relation to the object allows us to determine what ideologies, natural rights view or utilitarian monopolistic view, are competing against each other. The case-by-case approach facilitates the resolution of the copyright problem specifically between the two parties. It would be odd to possess such a faculty and not apply it in function of the parties' interests, but rather on a strict ideological consideration that many not be an important factor to either party. The only difficulty I can envision to this method is how it could be employed in a work-for-hire situation of authorship, where the interests of the copyright holder would have to be presumed to function towards the corporate goals.[144]

[144] Such a discussion is beyond the scope of this article.

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