Copyright, Privacy, and Fair Use

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I. INTRODUCTION

When writing about copyright law, scholars and judges frequently focus on its ability to create economic incentives for creativity. This function derives from the constitutional purpose of copyright: "To promote the Progress of Science and useful Arts." To provide individuals with incentives to produce creative works, copyright grants authors a bundle of rights: to reproduce their works, to prepare derivative works, and to distribute copies. Creators of works that can be performed (e.g., literary or choreographic works) also have the exclusive right to perform their works, and makers of works that can be displayed (e.g., motion pictures and pictorial, graphical, or sculptural works) have that exclusive right as well. By granting authors this set of exclusive rights, copyright law enables them to license others (for a fee) to use their works, allowing authors to realize a return on the investment they make to create the works in the first place.

A less frequently emphasized function of copyright is protecting authors' privacy rights. In their seminal article, Warren and Brandeis described the ability of common law copyright to prevent the world from peering into the nonpublic aspects of individuals' lives. Under common law copyright, the author of an unpublished work had exclusive control over the work's publication. Copyrights, however, also allowed one

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2. 17 U.S.C. § 106(1)-(3) (1994). A description of the types of works entitled to copyright protection, described in § 2 of the Copyright Act, 17 U.S.C. § 102 (1994), is beyond the scope of this Article, except to note that copyright protection applies to a broadly defined class of original and creative works that includes literary and artistic works, computer programs, and the nonfunctional aspects of works of design.
4. Id. § 106(5).
5. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). For further discussion on the relationship between copyright and privacy, see infra part IV.A.
who had a catalog of private possessions to prevent the catalog itself from being distributed, notwithstanding the fact that the catalog had little or no intellectual substance. The purpose of this rule was to protect an individual's privacy, so that the world would not learn the content of one's possessions. Modern copyright, by enabling authors to control the sale, distribution, and production of derivative works based on their original creations, similarly allows authors to control the way their works are presented to the world.

The privacy-protecting role of copyright has consistently been subordinated in judicial opinion and commentaries to copyright's ability to provide economic incentives. As the Supreme Court describes it, "[T]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." Similarly, according to the Court, the limited grant of copyright protection "is intended to motivate the creative activity of authors and inventors by the provision of a special reward." In a more recent, well-publicized copyright infringement battle, a district court expressed a similar sentiment: "Copyright affords an incentive to authors, the guarantee that free-riders will not be able to appropriate the revenues needed to recoup the author's investment in creativity."

This Article argues that courts' focus on the incentive-generating aspect of copyright is both disingenuous and bad policy. It is disingenuous because a distinct line of copyright cases involving the doctrine of fair use demonstrates that copyright law responds to privacy-protecting interests as well as to economic interests. Specifically, courts have found

7. Id. at 201-05.
8. This aspect of copyright protection is known as the "moral right" or "author's right" and is codified in 17 U.S.C. § 106A (1994). Analytically this is a distinct purpose from protecting an author's privacy. The privacy aspect of copyright can be invoked to completely prevent any reproduction of an author's private work, while the ability to control distribution and the production of derivative works allows authors to specify that if a work is to be copied, it must be copied in such a way so as to avoid distortion, modification, or mutilation prejudicial to the integrity of the work and the author's reputation. See id.
9. See discussion infra parts II.B, III.
11. Id. (quoting Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984)).
in favor of expansive copyright protections in cases that implicate privacy interests when narrower protections would have clearly been dictated by the underlying economics. A purely economics-oriented approach to copyright law also creates bad public policy by improperly equating the drive for creativity with the desire for economic gain. Not all creative works are made with economic gain in mind. The ultimate goal of copyright, as recognized by the Supreme Court and leading scholars, is to increase the social store of creative works. In circumstances in which an author’s privacy is strongly implicated, an economic incentive-based approach to copyright, and more specifically fair use, threatens this objective by discouraging authors from engaging in creative activity.

By analyzing cases involving the doctrine of fair use, this Article hopes to bring to the fore the privacy-protecting role of copyright law. Fair use cases, I argue, highlight the essential role of privacy analysis in copyright law and demonstrate why privacy protection is important to copyright’s underlying policies. Part II of this Article examines the statutory basis of fair use and the Supreme Court’s recent fair use jurisprudence. The difficulties and inconsistencies of the Court’s approach to fair use point to the need for a clear theoretical understanding of the policies behind the doctrine. Part III explores the leading scholarly interpretations of fair use. It then tests these theories by applying them to fair use cases that involve works which implicate their creators’ privacy interests. The result is that the theories fail: Courts’ fair use decisions in a significant group of cases show that more is at play in fair use analysis than the economics-oriented analysis used by scholars and the Supreme Court. Part IV introduces a framework for including privacy analysis into the scheme of copyright and shows how courts’ fair use analyses fall within the framework. Finally, Part V discusses the benefits of incorporating privacy analysis in fair use cases and responds to some criticisms of this approach.

A secondary purpose of this Article is to reduce some of the uncertainty that currently attends courts’ application of the fair use doctrine. As Part II shows, fair use cases are unpredictable; courts with similar factual cases often reach opposite conclusions while appearing to engage in identical analyses. An underlying premise of this Article is that

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uncertainty in the effect of legal rules on private parties is bad for society as a whole. Uncertainty prevents parties from conducting their business efficiently, hampers private ordering, and spawns litigation. Hopefully, by illuminating the rationales underlying courts' fair use decisions and bringing to the fore the importance of privacy in courts' fair use analyses, this Article can help reduce some of the uncertainty that surrounds the fair use doctrine.

II. FAIR USE IN UNITED STATES COPYRIGHT LAW

A. An Overview of the Doctrine

Fair use is an affirmative defense to copyright infringement; accordingly, the scope of fair use reflects the limits of copyright protection. In essence, a defendant in an infringement action argues that, while he may have infringed the plaintiff's copyright, he did so in a way that is justified (begging the question, for now, of what justifies it). Paradigmatic examples of fair use are listed in section 107 of the Copyright Act and include criticism, comment, and news reporting. Courts, however, are not limited by these specified examples and have recently expanded fair use to include uses bearing little resemblance to the statutory categories. Courts have also refused to find fair use in cases where the use in question was one of the statutory uses.

In recent years, the significance of fair use within the overall scheme of copyright has increased dramatically. The question of what uses are fair has become increasingly important, as fair use has been

15. See ROBERT A. GORMAN, COPYRIGHT LAW 93 (1991) (describing fair use as "perhaps the most significant limitation on the exclusive rights held by a copyright owner").
invoked to protect a wide range of otherwise infringing activities, from photocopying portions of scholarly works for research purposes, to recording television broadcasts on VCRs for home use, to copying video game software in order to design other software compatible with a competitor's video game console units. A distinct group of cases have attempted to define limits for appropriate but unauthorized uses of unpublished letters in scholarship or news reporting.

The importance of fair use is demonstrated by the Supreme Court's willingness to take up four significant fair use cases in the last decade. Despite the relatively large number of fair use cases in the last several years, and despite Congress's relatively recent codification of the fair use doctrine in the Copyright Act of 1976, fair use remains one of the most troubling and confused doctrines in all of copyright law.

Fair use developed as an equitable rule at common law and was first incorporated into the copyright statute as section 107 of the Copyright Act of 1976, which reads:

21. Sega, 977 F.2d at 1510.
25. See Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (stating that fair use "is the most troublesome [doctrine] in the whole law of copyright"); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (describing fair use as being "so flexible as virtually to defy definition"); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (1994).
26. See generally WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995). Patry's book thoroughly traces the history of fair use, from its earliest applications to the present. Readers interested in this aspect of fair use are encouraged to consult it. Apparently, early fair use cases, which concerned abridgments (now called compilations), had little to say about the privacy interests of the authors whose works were compiled. As this Article focuses on the modern application of fair use, references to the development of the doctrine are intended to provide useful background only.
Notwithstanding the [exclusive rights granted to copyright owners], the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 27

Several things are worth noting about the statute. First, the four statutory factors are nonexclusive but mandatory. Courts must consider all of them in making a fair use determination, but the statute offers no guidance on how courts should consider them, how much weight they should give to any particular one, or how they should be balanced generally. Nor must courts rest a fair use determination solely on the four factors; courts are free to consider other factors, such as a defendant’s inequitable conduct or bad faith. 28 In addition, the paradigmatic examples listed in the first sentence of the statute—e.g., news reporting, criticism, scholarship—are not necessarily fair uses. A court could, after considering the four factors and anything else it likes, decide that a particular use of a work in scholarship or news reporting is not a fair use, notwithstanding that those uses are listed in the statute. 29

The vagueness of section 107 is the result of a deliberate effort by Congress to incorporate fair use into the Copyright Act in a way that would merely preserve the common law definition of fair use as it existed at the time the statute was written. Both the House and Senate

29. See supra note 18 and accompanying text.
reports addressing the 1976 Copyright Act note that section 107 does not purport to define fair use: "The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply . . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis."\(^{30}\)

**B. The Supreme Court's Fair Use Analysis: Focusing on Economics**

Of the four fair use cases ruled upon by the Supreme Court in the past decade,\(^ {31} \) three have played significant roles in the shaping of modern fair use law. In each of these cases, the Court has placed fair use within an analytical framework in which the outcomes of the cases turned on the role that fair use would play in copyright's scheme of economic incentives.

The Court's first major fair use case was *Sony Corporation of America v. Universal City Studios, Inc.*\(^ {32} \) In *Sony*, several movie studios that owned copyrights in works broadcasted on television sued Sony, the manufacturer of the first widely commercialized VCR. The studios alleged that Sony, by marketing the means by which individuals could make unauthorized copies of the studios' copyrighted works, was a contributory copyright infringer.\(^ {33} \) The Court disagreed, holding that Sony could not be liable as a contributory infringer if its VCRs were "capable of substantial noninfringing uses."\(^ {34} \) Sony's liability for contributory infringement therefore turned on whether VCRs could be used in a way that was noninfringing.

To make this determination, the *Sony* Court applied the section 107 four factor analysis to the use the district court had determined was the


\(^{31}\) See *supra* note 23.


\(^{34}\) *Sony*, 464 U.S. at 442.
predominant use of VCRs, time-shifting of broadcast programs for later home viewing. If time-shifting was a fair use, then Sony would not be liable as a contributory infringer, as VCRs would then be capable of noninfringing uses.\footnote{Id. at 442, 447.} In deciding whether this use was in fact fair use, the Court focused on the effect that time-shifting had on the potential market for the movie studios’ copyrighted works. “The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have.”\footnote{Id. at 450.} In analyzing section 107’s four factors, the Court noted that noncommercial uses, like time-shifting for home use, are presumptively fair because they do not carry an economic threat.\footnote{Id. at 449.} In the end, the Court affirmed the district court’s findings that the copyright owners had not adequately demonstrated actual harm or the threat of future harm, leading to the conclusion that time-shifting for home use was fair. Time-shifting, according to the Court, did not have a sufficiently adverse impact on the incentive system of copyright to constitute infringement.\footnote{Id. at 450-55.}

The Court next considered fair use in Harper & Row Publishers, Inc. v. Nation Enterprises,\footnote{471 U.S. 539 (1985).} in which The Nation’s unauthorized publication of excerpts from ex-President Ford’s soon-to-be-published memoirs caused Time magazine, which had purchased pre-publication rights to print excerpts of Ford’s work, to cancel its contract, creating a $12,500 loss for Harper & Row, Ford’s publisher.\footnote{471 U.S. 539 (1985).} The Nation offered a number of arguments to support the conclusion that its publication of the Ford diaries was fair use: The Nation’s use fell within the statutorily protected category of news reporting; Ford’s diaries were factual works deserving less copyright protection than works of fancy; The Nation copied an insubstantial portion of the diaries; and the impact on the market for the diaries was minimal.\footnote{Id. at 542-43.}

The Second Circuit accepted this argument,\footnote{Id. at 545.} but the Supreme

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35. Id. at 442, 447. Technically, time-shifting would still be an unauthorized use that would otherwise support a finding of infringement, but the use would be allowed because it was fair. The Court glossed over this point.
36. Id. at 450.
37. Id. at 449.
38. Id. at 450-55.
40. Id. at 542-43.
41. Id. at 545.
The Court disagreed.\textsuperscript{43} The Court’s analysis emphasized the economic incentives for the production of creative or historically valuable works inherent in copyright law.\textsuperscript{44} “[A] fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner’s consent poses substantial potential for damage to the marketability of first serialization rights . . . .”\textsuperscript{45} In making this argument, the Court implicitly acknowledged that the value of the prepublication rights to print excerpts from his biography figured into ex-President Ford’s decision to write his memoirs in the first place.\textsuperscript{46} Because the Court saw a direct connection between The Nation’s acts and a possible erosion in the incentive system of copyright,\textsuperscript{47} the Court found that The Nation was not merely engaging in news reporting but had created a newsworthy event by “exploit[ing] the headline value of its infringement.”\textsuperscript{48} To emphasize the primacy of economic incentives in fair use cases, the Court declared that the fourth fair use factor—the effect of the use on the value of the original work—is “undoubtedly the most important element of fair use.”\textsuperscript{49}

The Court’s most recent fair use case, \textit{Campbell v. Acuff-Rose Music, Inc.},\textsuperscript{50} can be read as backtracking some from the strong language of \textit{Harper & Row}.\textsuperscript{51} Nevertheless, the Court again stressed the importance of protecting copyright’s economic incentives for authors in cases raising fair use. Petitioner, the popular rap group “2 Live Crew,” had recorded a parody of Roy Orbison’s and William Dees’ rock and roll chestnut, “Oh, Pretty Woman.” Acuff-Rose, to whom Orbison and Dees had assigned their copyrights, sued 2 Live Crew for copyright infringe-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{43} \textit{Harper & Row}, 471 U.S. at 539-40.
\item \textsuperscript{44} \textit{Id.} at 546 (noting that the exclusive grant of copyright “‘is intended to motivate the creative activity of authors and inventors by the provision of a special reward’” (quoting Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984))).
\item \textsuperscript{45} \textit{Harper & Row}, 471 U.S. at 569.
\item \textsuperscript{46} \textit{See id.} at 542 (discussing in detail Ford’s negotiations with Harper & Row Publishers “to publish his as yet unwritten memoirs”).
\item \textsuperscript{47} \textit{Id.} at 566-69.
\item \textsuperscript{48} \textit{Id.} at 561.
\item \textsuperscript{49} \textit{Id.} at 566. It is significant to note that under the Court’s analysis, potential as well as actual harm to the market for the original copyrighted work would weigh against fair use. \textit{Id.} at 568.
\item \textsuperscript{50} 114 S. Ct. 1164 (1994).
\item \textsuperscript{51} The Court in \textit{Campbell}, unlike the Court in \textit{Harper & Row}, made no sweeping declaration of the preeminence of the fourth factor—effect on the market for the original—instead indicating that a more balanced approach was appropriate: “Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” \textit{Id.} at 1170-71.
\end{itemize}
\end{footnotesize}
ment, and the group responded by raising the fair use defense.\(^5\) In analyzing section 107's four factors, the Court noted that the Orbison-Dees original was a creative work that fell "within the core of... copyright's protective purposes."\(^5\) The Court also reemphasized its finding in Sony that a commercial use weighs against a finding of fair use.\(^5\) Regarding the third factor—the amount and substantiality of the portions taken—the Court noted that a parodist will by necessity copy those portions of the original work that make it recognizable. Thus, the determination whether the third factor weighs against fair use in parody depends largely on the analysis of the fourth factor.\(^5\) In light of this analysis of the first three factors, it is clear that the Court's fair use determination, as in Sony, came down to the fourth factor. Because 2 Live Crew had not presented evidence of the effect of its work on the market for nonparody rap versions of "Oh, Pretty Woman," and because Acuff-Rose had not presented evidence that the potential rap market for the song was harmed, the Court refused to rule on this all-important factor and remanded the case for additional fact-finding.\(^5\)

The Court's fair use decisions have been guided by a fear that overexpansive fair use would sap copyright law of its incentive effects. In every case it considered, the Court performed its statutory duty of analyzing each of section 107's four factors, but the Court has emphasized, as it is not required to do by the statute, that the fourth factor—the impact on the potential market value of the plaintiff's work—is to receive the most weight.\(^5\) While the Court often purports to use fair use "to avoid rigid application of the copyright statute when, on occasion,  

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52. Id. at 1168.  
53. Id. at 1175.  
54. Id. at 1174.  
55. See id. at 1176. In deciding whether the amount taken by the defendants was reasonable under the third factor of the fair use analysis, the court observed that "how much... is reasonable will depend... on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original." Id.  
56. Id. at 1178-79.  
it would stifle the very creativity which that law is designed to foster," in actuality the analysis always turns on the economic harm suffered by the plaintiff. As Professor Fisher describes it, "[t]he fair use doctrine enables the judiciary to permit unauthorized uses of copyrighted works in particular situations when doing so will result in wider dissemination of those works without seriously eroding the incentives for artistic and intellectual innovation."  

If the purpose of fair use is to protect copyright's incentive scheme, one must ask whether the four factors in section 107 provide the best framework for doing so. The answer is that they do not. As proof, one need only look at how the different courts reach contradictory results in almost identical factual settings. Even the Supreme Court's emphasis upon fair use's fourth factor and its attention to the competitive effect of a use do not always dictate the final disposition of a case. Courts can vary their results by changing the scope of their competitive inquiries under the fourth fair use factor, asking whether the allegedly infringing work fulfilled a market that the owner of the copyright in the original work had actually exploited or whether the second work fulfilled a market that the original copyright owner could have exploited.

Two song parody cases illustrate this difference. In Fisher v. Dees, the defendant infringed the plaintiff's song, "When Sunny Gets Blue," with his own commercial rendition, "When Sonny Sniffs Glue." Regarding section 107's fourth factor, the Fisher court directed its inquiry to whether the defendant's work "fulfills the demand for the original." The Ninth Circuit in Fisher concluded that the original and the defendant's works were not commercially substitutable because they were directed at different markets. Based on this analysis, the Ninth

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58. Stewart, 495 U.S. at 236 (quoting Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980)).  
61. To complicate matters, the Court's most recent fair use case has de-emphasized the importance of the fourth statutory factor. Campbell, 114 S. Ct. at 1177.
62. 794 F.2d 432 (9th Cir. 1986).
63. Id. at 438.
64. Id.
Circuit held the defendant's use to be fair.\textsuperscript{65}

\textit{MCA, Inc. v. Wilson}\textsuperscript{66} involved a similar infringement: a knock-off of "Boogie Woogie Bugle Boy of Company B," entitled, "Cunnilingus Champion of Company C." The Second Circuit in \textit{Wilson} differed from the \textit{Fisher} court in its analysis of the fourth factor, focusing not only on whether the defendant's work fulfilled the demand for the original, but also on whether the two works could be seen as competitors in a broader sense: "Both Bugle Boy and Cunnilingus Champion were performed on the stage. Both were sold as recordings. Both were sold in printed copies."\textsuperscript{67} Based on this analysis, the Second Circuit held that the use was not fair.\textsuperscript{68}

\textsuperscript{65} Regarding the first factor, the \textit{Fisher} court held that while the defendant's use was commercial, that need not be fatal to a fair use claim. A commercial use merely shifts the burden to the defendant to show that his use did not harm the value of the plaintiff's work, a question addressed under the fourth factor. \textit{Id.} at 437. The court did not explicitly analyze the second factor—the nature of the copyrighted work—but the work was clearly a creative work which, under common fair use analysis, is afforded greater protection than factual works. The court made a detailed discussion of the third factor, the amount and substantiality of the work taken, and found that this factor weighed in favor of fair use under the specific circumstances of the case. \textit{Id.} at 438-39.

\textsuperscript{66} 677 F.2d 180 (2d Cir. 1981).

\textsuperscript{67} \textit{Id.} at 185.

\textsuperscript{68} Unlike the \textit{Fisher} court, the \textit{Wilson} court indicated that, while a commercial use tends to weigh against a finding of fair use, a commercial use and fair use "can exist side by side." \textit{Id.} at 182. The court also noted that whether the copyrighted work was a creative original work was a factor to be considered in the fair use analysis. \textit{Id.} Regarding the third factor—the amount of the copyrighted work taken—the court suggested that "excessive" copying will preclude fair use and refused to overturn the district court's factual finding of excessive copying, while indicating that it might not have found the amount of copying excessive had it been analyzing the issue "de novo" instead of under a "clearly erroneous" standard. \textit{Id.} at 185.

It is possible to rationalize the conflicting opinions in \textit{Fisher} and \textit{Wilson} by resorting to rigid formalism. The \textit{Fisher} court analyzed "When Sonny Sniffs Glue" as a parody, while the \textit{Wilson} court explicitly held that "Cunnilingus Champion" was not. \textit{Fisher}, 794 F.2d at 439 n.5. While it may be true that fair use should be given wider scope in instances of social satire than in knock-off works made solely for their entertainment value, the works in question in these two cases are too similar for the difference in outcomes to rest on this distinction. Rather, the Ninth Circuit's decision to label "When Sonny Sniffs Glue" a parody in light of the Second Circuit's refusal to similarly label "Cunnilingus Champion" can be seen as a way for the Ninth Circuit to justify the fair use decision that it had already reached and a convenient way of distinguishing a remarkably similar case that reached the opposite conclusion. The ultimate insignificance of the label "parody" to the fair use analysis is further demonstrated by the fact that, although "parody" is one of the statutory fair uses, a finding that a work is a parody does not guarantee a finding of fair use. \textit{See supra} text accompanying notes 28-30. Also, while the \textit{Fisher} court labeled the defendant's work a parody, it still considered the fact that the defendant's work was commercial in holding that the first factor—the nature of the defendant's work—weighed against a finding of fair use. \textit{Fisher}, 794 F.2d at 436-37. Thus, to argue that \textit{Fisher} can be distinguished from \textit{Wilson} on the ground that one case involved a parody while the other did not begs the essential question: When is a commercial knock-
The result of the inherent flexibility in fair use analysis is an indeterminate body of case law in which judges can easily manipulate their analyses to reach the outcome they desire. As Judge Leval, who has written several fair use opinions, has noted, "[e]arlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns."

So what is a district court judge to do? Unfortunately, the answer is often unclear, and the results can be unpredictable. In *Ginn v. Joyce*, for example, the defendants, members of a musical group that was engaged in a widely publicized dispute with its record company, published a magazine designed to present their version of that dispute and to critique the commercial music industry generally, uses that arguably fall within section 107's presumptively favored categories of criticism, comment, or news reporting. The magazine reproduced several documents authored by the record company: letters, standard legal documents, two press releases, and a bumper sticker. The record company sued the group for infringing its copyrights in those works. After a cursory romp through section 107's four factors, the district court judge rejected the group's fair use defense, primarily because the group sold the magazine: "[T]he items were reprinted in a magazine and sold for profit. Even though the items held no commercial value for the plaintiffs, they delivered profit to the defendants. The fair use doctrine off of a popular song fair use?"

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is not a defense for copyright infringement.”

III. INCENTIVES AND FAIR USE: ATTEMPTS TO RATIONALIZE THE DOCTRINE

Courts and commentators have embraced two economics-based modes of analysis to describe fair use. First are microeconomic explanations that focus on transaction costs or other forms of market failures that prevent wealth-maximizing copyright owners and users from arriving at the “natural” state of affairs that would obtain in the absence of a fair use doctrine. Second is a macroeconomic public benefit model in which fair use is justified by social gain, sometimes at the expense of individual profit. For the reasons set forth below, however, neither of these approaches is adequate to explain fair use law as it presently exists.

A. Microeconomic Explanations of Fair Use

Starting from the premise that “[s]triking the correct balance between access and incentives is the central problem in copyright law,” Professor Landes and Judge Posner utilize an economic model to argue that fair use can be explained as one of the ways copyright law maximizes public welfare. Landes and Posner note that the cost of a copyright owner’s enforcement of his rights will often exceed either his own damages or the value that his would-be defendant obtains from making use of his work. The example they give is of A wanting to quote from B’s work. A might gladly pay B a royalty that B would accept, but the costs of negotiating such a transaction exceed the amount that would change hands. Limited classroom use of a copyrighted work would presumably fall into this category. Fair use enables parties to use copyrighted works without authorization under these circumstances. Landes and Posner also use transaction costs to explain why fair use may sometimes allow the widespread use of a copyrighted work where each individual use is of relatively little value to the user or of little

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73. Id. at 6-7.
74. See Gordon, supra note 14; Landes & Posner, supra note 13; Leval, supra note 69.
76. Landes & Posner, supra note 13, at 326.
77. See id. at 357-61.
78. See id. at 357-58.
79. Id. at 357.
detriment to the copyright holder: “Often, users are numerous, and this would make for a high cost of arranging compensation and a large number of legal proceedings.”80 Ultimately, Landes and Posner argue that fair use should be narrowly construed based on the transaction cost theory to situations in which “the benefits of the use exceed the costs of copyrighted protection.”81 Otherwise, they argue, fair use will sap the incentive effects of copyright.82

Professor Gordon undertakes a similar analysis of fair use, arguing that fair use should be found only: (1) if a market failure prevents the parties from effectively negotiating an appropriate license; (2) if the transfer of rights is socially desirable; and (3) if there is no substantial injury to the plaintiff’s creative incentives.83 The second and third factors are both standard ingredients in courts’ fair use recipes.84 Gordon’s primary contribution to fair use scholarship lies in her emphasis on the market failure aspects of fair use.

Gordon insists that market failure be a prerequisite to a finding of fair use. She offers three distinct categories of such failure—transaction costs, externalities, and antidissemination incentives.85 Her transaction cost analysis is similar to that of Landes and Posner.86 Her externalities argument works as follows: Because the full benefit of the use of a copyrighted work may not inure to the user of the work (i.e., some of the benefit goes to society at large and is therefore externalized), if the owner of the copyright insists on a royalty approaching the full value of the work to all users, no individual user will be willing to pay the royalty.87 The work will therefore go unused, and all will suffer by not having had the benefit of this use.88 Antidissemination incentives arise because certain uses of copyrighted works, namely criticism, are inherently disfavored by copyright owners, who are generally unwilling to allow their works to be used for these purposes.89

80. Id. at 358.

81. Id.

82. Id.

83. Gordon, supra note 14, at 1614.

84. See infra part III.C.

85. Gordon, supra note 14, at 1627-35.

86. Id. at 1628-30.

87. See supra text accompanying notes 76-82.


89. Id. at 1630-32.

90. Id. at 1632-34; see Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1178 (1994) ("[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").
B. Deficiencies of Microeconomics-Based Fair Use Theories

While appealing in the abstract, transaction cost or other market failure theories of fair use cannot adequately explain the doctrine as courts currently implement it. Transaction cost arguments, for instance, only justify individuals' reliance on the fair use defense when engaging in very limited sorts of otherwise infringing activities, like photocopying copyrighted works for classroom use. Consider a professor who wishes to distribute a copyrighted work in her class. Without fair use, she will not do so, either out of collegial respect for the original work of a fellow academic, or because of a fear that she will be sued for copyright infringement. Copyright without fair use could therefore exercise a chilling effect on the desirable distribution of copyrighted works. Fair use eliminates this chilling effect by telling the professor that it is all right for her to distribute the work, notwithstanding the fact that someone else owns the copyright.

Fair use functions in this context primarily on the mind of the copyright infringer, the professor handing out a work in class. In all likelihood, the professor could hand out the work without fair use and with impunity. By hypothesis in the Landes and Posner fair use model, the professor's use is one in which the potential plaintiff's costs of seeking out and enforcing the copyright exceed his possible losses, making a lawsuit very unlikely. Under these circumstances, where the costs of copyright enforcement exceed the plaintiff's potential gain from bringing suit, there is no need for a special doctrine in copyright law to say that the defendant's use is allowed. The plaintiff simply won't bother to sue, and the defendant will be able to continue the infringing use free from the threat of potentially costly litigation. If courts took seriously Landes' and Posner's suggestion to limit fair use to cases in which the benefit of the use accruing to an alleged infringer is outweighed by the costs of enforcement borne by the copyright owner, we would hardly expect to see any cases in which the fair use defense is successfully raised. The plaintiffs in those cases would lack the economic incentive to sue, and if a suit did occur, a defendant would be wiser to settle rather than raise an expensive defense like fair use. The fact that fair use is successfully invoked in a large number of suits in which the transaction cost rationale simply does not apply—e.g., where the defendant can

91. *See supra* text accompanying notes 78-82, 86-89.
easily identify the would-be plaintiff ex ante and would be willing to negotiate a license—indicates that courts view fair use as more than merely a means of avoiding costly negotiating.

Professor Gordon’s market failure analysis suffers similar shortcomings. Her externalities argument, which would find fair use when the benefits of a use are not internalized to the user, can be viewed as another type of transaction cost argument, with transaction costs existing as a barrier to negotiation between groups of users of copyrighted works rather than between users and owners of those works. Externalities cannot be captured under Gordon’s theory because they are diffuse. If all of those who benefit from a particular externality-creating use could band together, however, the externalities could be captured. Presumably, such banding is not possible because of the transaction costs inherent in bringing the users together or the collection costs of obtaining a fair royalty from each user.

It is unlikely that externalities play a significant role in actual fair use cases. If the use in question is extremely valuable to a group of would-be users, and the royalty that would be paid by them is sufficiently high, the users would likely band together and pool the necessary royalty. In short, for high value uses, externalities do not cause market failure. This leaves low value uses, which run into the same problem as Landes’ and Posner’s transaction cost argument: If the value of the use to the parties involved is low, an expensive lawsuit is unlikely, and an expensive and uncertain defense even less so.

Gordon’s observation that antidissemination incentives provide a limited justification for fair use is no doubt correct: without this aspect of fair use we would almost never expect to see critical reviews of artistic works that reproduce portions of the works or parodies that disparage a copyrighted work. Still, this rationale covers only particu-

92. See, e.g., Campbell, 114 S. Ct. at 1168; Salinger v. Random House, Inc. 811 F.2d 90, 92 (2d Cir.), cert. denied, 484 U.S. 890 (1987). In each of these cases, the defendant sought but was denied a license from the plaintiff. While the plaintiffs’ refusals to license their works may indicate that the defendants were not willing to pay enough, it is also possible that the plaintiffs simply preferred not to have their works used as the defendants wanted to use them. In economic terms, the plaintiffs were acting irrationally by not earning possible positive returns, creating a type of market failure that we would expect an efficiency-enhancing law to rectify by allowing the work to be put into use through the fair use doctrine. The fact that fair use was not allowed in Salinger and may not be allowed in Campbell on remand indicates that there is more going on in fair use analysis than efficiency-promoting cost-benefit analysis. See infra part IV.

93. Gordon, supra note 14, at 1633 (“Even if money were offered, the owner of a play is unlikely to license a hostile review or a parody of his own drama . . . .”) (footnote omitted); see also Campbell, 114 S. Ct. at 1178 (“[T]here is no protectable derivative market for criticism. The market
lar examples of fair use, such as criticism and parody. If this were all that there were to fair use, we would have to ask whether fair use is truly necessary—why have a broad and loosely defined doctrine that allows for inconsistent outcomes? Sections 107 through 120 of the Copyright Act contain detailed specific exemptions from copyright infringement. A specific exemption for criticism or comment would easily perform this function without all of the indeterminacy created by fair use.

C. Public Benefits Explanations of Fair Use

The Supreme Court, lower courts, and commentators have endorsed a public benefit model of fair use. According to this utilitarian conception, fair use is to be found when the public benefit created by an infringer's use of a copyrighted work exceeds the loss to the copyright owner created by that particular use. Since society benefits from the free flow of information, and because fair use encourages the dissemination of copyrighted works, fair use adds to the aggregate public good if the value to the public of a use outweighs the individual harm it creates. Courts frequently invoke this theory to justify findings of fair use in cases involving so-called "productive" or "transformative" uses, in which the defendant's work incorporates the plaintiff's in a way that creates a new and different work.

The difficulty with this model is that section 107's four factors do a poor job of focusing courts on public benefits of particular infringing uses. While the paradigmatic examples of fair use in the section's first

for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.

94. See supra text accompanying notes 60-69.
96. See, e.g., Campbell, 114 S. Ct. at 1171; Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968); Leval, supra note 69, at 1135-36.
97. See Gordon, supra note 14, at 1636 n.199.
99. See Campbell, 114 S. Ct. at 1177 (arguing that "transformative" uses of a work are less likely to result in diminution of value of the original work than mere copying); Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 478-79 (1984) (Blackmun, J., dissenting); Maxtone-Graham v. Burchell, 803 F.2d 1253, 1259 (2d Cir. 1986), cert. denied, 481 U.S. 1059 (1987). Judge Leval makes the question whether a particular use was transformative central to his proposed standard for fair use cases. See Leval, supra note 69, at 1111. But see Sony, 464 U.S. at 455-56 n.40 (noting that "[t]he distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the [fair use] balance, but it cannot be wholly determinative," and that "[t]he statutory language does not identify any dichotomy between productive and nonproductive time-shifting, but does require consideration of the economic consequences of copying").
sentence may be types of uses in which the public benefits often outweigh a copyright holder's losses, a finding that a use falls within one of these categories does little to alter the fair use analysis. Courts must still analyze each of the four factors, with hardly a presumption that these particular uses should be fair. Courts' heavy emphasis on the fourth factor—the potential impact on the market for the plaintiff's work—pushes the inquiry back into the private realm: How much is this plaintiff losing? The first factor—the purpose and character of the use—leans towards a public benefit analysis. However, courts' frequent emphasis on the second sentence of that factor, whether the use was commercial, again shifts the inquiry back into private realm: Is the defendant profiting financially from this use? The third factor also focuses only on the interests of the private litigants, asking how much of the plaintiff's work did the defendant take.

Only the courts' analyses of the second factor—the nature of the work—which frequently note that factual works are afforded less protection than fictional works or works of fancy, address an issue consistent with a public benefit approach: factual works are more likely to have public utility than fictional works. But this is already recognized in copyright law through the idea/expression distinction. One can copyright only the expression of ideas or facts, not the ideas or facts

100. The examples listed include criticism, comment, news reporting, teaching, and scholarship. 17 U.S.C. § 107 (1994).
101. See Harper & Row, 471 U.S. at 561 ("The fact that an article arguably is 'news' and therefore a productive use is simply one factor in a fair use analysis."); Quinto v. Legal Times of Wash., Inc., 506 F. Supp. 554, 560 (D.D.C. 1981) ("Use of copyrighted material in a news story may constitute a fair use, but only if the court deems it so after considering the four factors listed in the statute.").
102. See supra note 57 and accompanying text.
103. See, e.g., Ginn v. Joyce, No. 92-6692 (C.D. Cal. Sept. 14, 1993) (order denying fair use defense primarily because defendant's use was commercial). Courts' emphasis on the commercial nature of the work in their analyses of the first factor is likely to diminish following Campbell, in which the Court emphasized that the commercial nature of a work is only one factor to be weighed in the balance. Campbell, 114 S. Ct. at 1174. Campbell's ability to refocus courts on more public benefit-oriented aspects of the fair use inquiry is not certain, however, because it can be read as emphasizing the public benefits of parody and criticism, and thus limited accordingly. Id. at 1173, 1178.
105. See Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 496-97 (1984) (Blackmun, J., dissenting) ("Informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.").
themselves. The second fair use factor recognizes that separating protectable expression from underlying ideas is especially difficult when the underlying work is a factual work. Still, courts should engage in this inquiry in determining what parts of the plaintiff's work deserve copyright protection, not when in determining whether the defendant's use of plaintiff's work was fair.

Rather than balancing public benefits against private losses, courts engaged in section 107's four factor fair use analysis use the doctrine's flexibility to mix private and public benefits with private and public harms. The result is the indeterminate, unpredictable body of fair use law. Even if courts focused on public benefits and private losses, their analyses would be problematic because of courts' inability to properly quantify and compare these values. Private loss is usually the easier of the two to compute, but even it is frequently speculative. Placing a dollar value measure on the public benefit of a use is nearly impossible to do with confidence.

D. Complicating the Puzzle: A Wider Perspective on the Caselaw

There is yet another reason to discount the predictive value of economics-oriented fair use theories: they simply cannot explain some of the caselaw. In several cases, courts have rejected a fair use defense while acknowledging that the plaintiff was unlikely to have suffered any real diminution in the value of his copyrighted works as a result of the defendant's infringement. In Salinger v. Random House, Inc., for example, the reclusive author J.D. Salinger was able to enjoin publication of a biography that included fragmented excerpts from his personal letters. Similar cases have arisen around attempts to publish excerpts of letters and diaries from various public figures, including Church of Scientology founder L. Ron Hubbard, composer and conductor Igor Stravinsky, and New York literary figure Gordon Lish. What

107. 17 U.S.C. § 102(b) (1994); Feist, 499 U.S. at 344 ("That there can be no valid copyright in facts is universally understood.").
108. See Francione, supra note 69, at 578-79.
109. See Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir.) (holding that only a slight degree of market impairment was likely), cert. denied, 484 U.S. 890 (1987); Lish, 807 F. Supp. at 1104 (holding that plaintiff had failed to establish the necessary likelihood of harm to prevail on the fourth factor).
puts these cases even more at odds with the public benefit paradigm is that, in each case, the use in question was either one of scholarship or news reporting, uses which are likely to have significant public benefits. According to the public benefit model, these are ideal cases for the application of fair use: the public benefits from the scholarly or news generating nature of the use and the plaintiff suffers little harm. For example, in Lish, the district court specifically found that Lish suffered no actual or potential economic harm, and in Salinger, the court declared that any potential harm was minimal. Nevertheless, the courts ruled against fair use.

It should also be noted that cases like Lish and Salinger cannot be explained by the Landes and Posner or Gordon microeconomic fair use theories. The transaction costs in these cases were by no means prohibitive; the parties were as identifiable as any who negotiate a license, and there were no apparent obstacles to prevent them from negotiating a mutually beneficial royalty, other than the copyright owners' intransigence. While such intransigence can be viewed as an example of Gordon's antidissemination incentives, courts have been inconsistent about finding fair use in these circumstances. Moreover, each case appears to be ideally situated for an application of Professor Gordon's market failure analysis. Although Harper's printing of Lish's letter was held to be news reporting, it was at least arguably a kind of criticism and social comment. All of these uses are ones that Lish certainly did not intend to license, making a finding of fair use particularly appropriate. The same can be argued for Salinger.

Economics-oriented analyses of fair use, then, do not paint the

114. For a more detailed discussion of these cases, see infra part IV.A.
115. 807 F. Supp. at 1104.
116. 811 F.2d at 99.
117. See supra part III.A.
118. See Gordon, supra note 14, at 1633.
119. Compare Salinger, 811 F.2d at 90 (ordering issuance of preliminary injunction barring publication of an unauthorized biography of reclusive author J.D. Salinger, containing a number of his copyrighted, unpublished letters) with Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966) (finding in favor of dissemination of information about Howard Hughes over Hughes' apparent objections through lifting of injunction restraining publication of Hughes' biography), cert. denied, 385 U.S. 1009 (1967).
120. See supra text accompanying notes 83-90.
121. See Lish, 807 F. Supp. at 1097.
122. 811 F.2d at 96; see Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 HARV. L. REV. 1137, 1147-48 (1990) (discussing Professor Gordon's antidissemination motive as a market failure that makes a finding of fair use particularly appropriate in cases like Salinger).
whole picture of fair use. While a public benefit/utilitarian description may be more complete, it is also so general that it loses all predictive force, making it comfortable for scholars but not very helpful for those who would like to know ex ante whether a particular use will be considered fair. Some scholars, realizing this limitation, simply argue for the doctrine to be applied equitably, but courts and private party litigants still need guidance about how this should be done.

IV. ADDING PRIVACY TO THE FAIR USE INQUIRY

The murkiness of the fair use doctrine is attributable in large part to the fact that the defense has been invoked in a wide variety of contexts bearing little resemblance to one another, such as commercial software copying, song parodies, and scholarly use of unpublished letters. The leading Supreme Court cases are of little guidance in many of these areas because they arose in extreme and unusual fact patterns. Both *Harper & Row, Publishers, Inc. v. Nation Enterprises* and *Sony Corp. of America v. Universal City Studios, Inc.* centered around unique commercial disputes: one involved outright piracy of the scoop value of the publication of the Ford diaries—Victor Navasky with a purloined manuscript; the other potentially determined the future of a multi-billion dollar industry. The Court’s most recent fair use case, *Campbell v. Acuff-Rose Music, Inc.*, invloved a musical parody, the value of which has been explicitly recognized by the courts.

These cases provide a framework for applying section 107's four

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123. See Weinreb, *supra* note 122, at 1150-61 (arguing against a strictly utilitarian conception of fair use in favor of a "fairness"-based approach).

124. See id. at 1161 (noting that such an equitable approach to fair use "calls for the exercise of great judicial skill, or art").


130. See id. at 1171-72; Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986) (holding that plaintiff’s “When Sonny Sniffs Glue” was a parody of “When Sunny Gets Blue” deserving fair use protection and recognizing that “‘[d]estructive’ parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author” (quoting Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 *Harv. L. Rev.* 1395, 1411 (1984))); Elsemere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 745 (S.D.N.Y.) (holding that Saturday Night Live’s use of plaintiff’s song “I Love New York” to create the parody “I Love Sodom” constituted fair use and acknowledging that “[i]t has been held that an author is entitled to more extensive use of another’s copyrighted work in creating a parody than in creating other . . . works”), aff’d, 623 F.2d 252 (2d Cir. 1980).
statutory factors, but lower courts can manipulate this framework to reach any result they desire. For instance, a common refrain of fair use cases since *Harper & Row* has been that the fourth statutory factor—the potential impact of the use on the market for the copyright owner’s work—is to receive the most weight. This pronouncement makes great sense in a commercial context, but it is of little value when the original work in dispute in a fair use case has little commercial value to begin with, as in *Lish*, or where the allegedly infringing use is not intended solely to usurp the “scoop-value” for the original, as in *Salinger*.

A. Recognizing the Privacy Component of Fair Use

Cases like *Lish* and *Salinger* suggest that simple commercial impact or cost-benefit analyses of the fair use doctrine are inadequate to explain fair use as courts employ it. Instead, I argue in this section that courts also employ fair use to protect an author’s privacy by giving him the ability to control the reproduction and dissemination of works that can be viewed as extensions of his personality.

While scholarship and the vast majority of judicial opinion discussing fair use have focused almost exclusively on the role of fair

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131. See *Harper & Row*, 471 U.S. at 566; supra note 57 and accompanying text.

132. See *Sony*, 464 U.S. at 450 ("[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create."); see also *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) (holding that where an allegedly infringed-upon work has no value to its owner, the fourth factor of § 107 “weighs entirely in the defendants’ favor”). Occasionally, courts draw the negative inference from *Sony* and *Harper & Row* that if a use does not reduce the value of the copyrighted work, it must be fair. See *N.A.D.A. Servs. Corp. v. Business Data of Va.*, 651 F. Supp. 44, 48 (E.D. Va. 1986) (“A use which does not materially impair the marketability of the copyrighted work will be deemed fair.” (citing *Harper & Row*)); cf. *Francione, supra* note 69, at 543 (“In the context of factual works, there is particular confusion as courts attempt to weigh as a fair use factor the ‘public interest’ involved in the dissemination of factual works, or the ‘necessity’ of a particular use . . . .”).


134. See *Salinger*, 811 F.2d at 96 (“The proposed use is not an attempt to rush to the market just ahead of the copyright holder’s imminent publication, as occurred in *Harper & Row*.”).

use in copyright’s scheme of incentives, incorporating privacy into the fair use analysis is consistent with copyright’s long tradition of protecting individual privacy. In their seminal article, The Right to Privacy, Warren and Brandeis noted that common law copyright provided individuals with an absolute right to prevent the unauthorized publication of their unpublished works. The basis for this right was not to protect property interests, to which the economic incentives of copyright respond, but to protect the privacy of the individual and her ability to decide how and when to publicly disclose information that would reveal aspects of her personality: “The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.” Thus, common law copyright allowed individuals to enjoin publication of letters, diaries, or property lists.

Judicial opinion has also recognized the personality-protecting aspect of copyright. As early as the turn of the century, Justice Holmes, in Bleistein v. Donaldson Lithographing Co., noted that “[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.” The Supreme Court’s recent decision regarding whether telephone white pages directories may be copyrighted in Feist Publications, Inc. v. Rural Telephone Service Co., continues this tradition, suggesting that the originality requirement of copyright law contains an element of protection for the identity of an author as expressed through his original works. The two requirements for originality are that a work be produced independently (i.e., not copied) and that it “display some minimal level of creativity.” Both requirements guarantee that copyright is extended only to works that reflect their creator’s unique creative abilities, thereby

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136. See supra part III.A.
137. Warren & Brandeis, supra note 5.
138. Id. at 198-200.
139. Id. at 205.
140. Id. at 198-203.
141. 188 U.S. 239 (1903).
142. Id. at 250.
144. See id. at 346-47 (discussing how the originality requirement of copyright depends upon the work having a “creative component” that reflects the author’s personal conceptions).
145. Id. at 358.
displaying, at least in some small sense, their creators’ personalities.\textsuperscript{146} In contrast, works that reflect only their creators’ “sweat of the brow,”\textsuperscript{147} but which lack a small spark of creativity, cannot be said to reflect their author’s individuality, and are therefore not protected by copyright.\textsuperscript{148} Further evidence of copyright’s tendency to protect individuals’ privacy can be found in analyzing the doctrine’s “moral right.”\textsuperscript{149}

While not common among scholars and judges, the view that copyright responds to privacy interests is now shared by at least some members of the Supreme Court\textsuperscript{150} and commentators.\textsuperscript{151} Recent fair use cases have also implicitly recognized the privacy-protecting aspect of copyright law. The strongest statement is Chief Judge Oaks’ concurring opinion in \textit{New Era Publications International v. Henry Holt & Co.},\textsuperscript{152} where he comments that \textit{Salinger} “involved underlying, if latent, privacy implications.”\textsuperscript{153} Under current fair use jurisprudence, specifically within the analytical framework of the second statutory factor—the nature of the copyrighted work—courts frequently note that the fact that a plaintiff’s work was unpublished weighs against a finding

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  \item \textsuperscript{146} See id. at 361 (“[D]id Feist, by taking 1,309 names, towns, and telephone numbers from Rural’s white pages, copy anything that was ‘original’ to Rural?”).
  \item \textsuperscript{147} Id. at 360. The “sweat of the brow” theory determined if a work merited copyright protection by the amount of time and effort put in by the creator. For a thorough discussion of the “sweat of the brow” doctrine, see Lisa M. Weinstein, Comment, \textit{Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case}, 43 Am. U. L. Rev. 1637 (1994).
  \item \textsuperscript{148} Feist, 499 U.S. at 351-61.
  \item \textsuperscript{150} See Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 555 (1984) (O’Connor, J.) (acknowledging that the right to control first publication “implies not only [an author’s] personal interest in creative control but his property interest in exploitation of prepublication rights”); id. at 597 (Brennan, J., dissenting) (asserting that greater protection afforded unpublished works protects the “deliberate choice on the part of the copyright owner to keep expression confidential”).
  \item \textsuperscript{151} See 3 NIMMER & NIMMER, supra note 25, § 13.05[A], at 13-174 (“The scope of the fair use doctrine is considerably narrower with respect to unpublished works that are held confidential by their copyright owners.”); Jane C. Ginsburg, \textit{Creation and Commercial Value: Copyright Protection of Works of Information}, 90 Colum. L. Rev. 1865, 1883-84 (1990); William F. Patry & Shira Perlmutter, \textit{Fair Use Misconstrued: Profit, Presumptions, and Parody}, 11 Cardozo Arts & Ent. L.J. 667, 685 (1993) (“[I]n appropriate circumstances, courts may examine [in copyright cases] the public interest, the First Amendment, privacy concerns, or additional equitable factors.” (emphasis added)). \textit{Contra} Leval, supra note 69, at 1129 (“The occasional attempt to read protection of privacy into the copyright is . . . mistaken.”).
  \item \textsuperscript{152} 873 F.2d 576 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).
  \item \textsuperscript{153} Id. at 585 (Oaks, C.J., concurring).
\end{itemize}
of fair use.\textsuperscript{54} This statement is often made without reference to the underlying policy of the fair use exception. Instead, it is simply one factor among four, but one that is apparently given undue weight in rare cases.

The courts' opinions that uses were not fair in cases like \textit{Lish} and \textit{Salinger} is best viewed as a means by which the courts protected Lish's and Salinger's privacy by preventing others from placing into public circulation works that their authors intended only to be read by a limited audience. Indeed, dicta in both \textit{Lish} and \textit{Salinger} reveal that the courts in those cases were very concerned with protecting the privacy rights of the respective authors. In \textit{Lish}, the district court noted that Lish's writing workshop is "conducted in an atmosphere of great privacy,"\textsuperscript{155} and that "next to his family the thing [Lish] cherishes the most and holds most dear are the words that he writes."\textsuperscript{156} Similarly, the Second-Circuit in \textit{Salinger} noted that Salinger had never authorized publication of his letters while he was alive,\textsuperscript{157} that he "ha[d] chosen to shun all publicity and inquiry concerning his private life,"\textsuperscript{158} and that he immediately sought to prevent the publication of the biography once he learned that it contained excerpts from his unpublished letters.\textsuperscript{159}

This analysis indicates that copyright law responds not only to economic interests, but to individual privacy interests as well. Exposing and making explicit the role of privacy analysis in fair use cases is important for two reasons. First, it helps rationalize and add predictability to a murky, confusing, and indeterminate doctrine. Second, by recognizing the privacy protecting role of copyright and its application in fair use cases involving unpublished works, this analysis lays the foundation for expanding the role of privacy in copyright cases involving published works as well.

\textsuperscript{154} See, e.g., Harper \& Row, 471 U.S. at 564 ("Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works.").


\textsuperscript{156} Id. at 1105.


\textsuperscript{158} Id. at 92.

\textsuperscript{159} Id. at 93. The \textit{Salinger} court's emphasis on privacy concerns has not gone unnoticed or escaped criticism by other commentators. See, e.g., Vincent Peppe, Comment, \textit{Fair Use of Unpublished Materials in the Second Circuit: The Letters of the Law}, 54 BROOK. L. REV. 417, 425 (1988) (arguing that the \textit{Salinger} court's emphasis on privacy was an improper break with precedent that will have a chilling effect on the publication of biographies).
B. Expanding the Role of Privacy in Fair Use Cases

The personality-protecting aspect of copyright law, which so far has influenced courts' decisions in cases involving private letters, can and ought to play a role in the fair use inquiry for all types of copyrighted works.160 Any original work of authorship is entitled to copyright protection, be it a personal letter, a diary, a historical work, a press release, a sculpture, song lyric, or novel.161 Each different type of work varies in the extent to which it incorporates or reflects personality traits of its author. News reports, for example, while no doubt expressing a point of view, are written to present "objective" representations of events. The same is true for press releases, which are usually intended to disseminate information. For works of this nature, the factual content of the work is its essence, and the relationship between the personality or identity of the work's author and the work is limited. Personal diaries are at the opposite end of this spectrum. They record not only the events of their author's lives, but also feelings and thoughts that may not be intended for public dissemination. A diary entry is much more likely to capture its author's identity than will a press release. Copyright law generally, and fair use in particular, reflects this difference.

The relationship between the amount of "personhood" (to use Professor Radin's term)162 that inheres in a copyrightable work and the type of work can be displayed diagrammatically as shown in Figure 1. The amount of "personhood" that inheres in a copyrighted work varies with the type of work. Any type of work, or any individual work of a given category, will fit somewhere along this continuum.163

160. See Ginsburg, supra note 151, at 1884 ("Logically, the property-in-personality notion [of copyright protection] can be extended beyond the privacy right, which controls disclosures about oneself contained in one's unpublished writings, to the literary property right, which controls published manifestations of oneself as revealed in one's writings.").
163. For an extreme extension of this argument, see Alfred C. Yen, When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law, 62 U. COLO. L. REV. 79, 103 (1991) (arguing that the economically irrational refusal of some authors to sell parody rights at any price can be explained by the fact that they "value their emotional tranquility in a manner similar to their limbs").
Personhood and Copyright

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<tbody>
<tr>
<td>Commercial Design (Advertisements)</td>
<td>&quot;High Art&quot;</td>
</tr>
<tr>
<td>Press Releases</td>
<td>Diaries</td>
</tr>
<tr>
<td>Newsreports</td>
<td>&quot;Pop Art&quot;</td>
</tr>
<tr>
<td>Personal Letters</td>
<td></td>
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</tbody>
</table>

**FIGURE 1**

The extent to which a copyright owner's privacy interest deserves protection through copyright law is a function of both the personhood inherent in the work and a number of other factors. Also relevant is whether the original author still owns the copyrights: the purchaser of the copyright in another's diary has hardly any claim to privacy in seeking to prevent unauthorized use of the diary, whereas the diary's creator, while retaining exclusive rights to the diary, has a much stronger claim. Courts can also look to the method by which the copyrights were transferred. Privacy interests may survive a transfer by will to a family member or confidant, they are unlikely to survive an arms-length sale. Finally, courts may look to whether the person whose privacy interests are at issue is alive or dead.

In analyzing fair use, courts ought to respect the privacy-protecting role of copyright law by balancing it against the traditionally analyzed economic interests. This already occurs in fair use analyses of unpublished works. Where the amount of personhood in a work is high and the author clearly desires to protect her privacy, as in *Salinger* and *Lish*, courts will find no fair use, even where the defendant's use has little or no impact on the value of the plaintiff's work. On the other hand, when a work does not capture or express its creator's identity,

164. See Craft v. Kobler, 667 F. Supp. 120 (S.D.N.Y. 1987) (denying fair use of composer Igor Stravinsky's works, which had been bequeathed to his close confidant upon the composer's death).
courts are more likely to find fair use, even when the defendant’s work does impinge on the commercial value of the plaintiff’s work. For example, in *Diamond v. Am-Law Publishing Corp.*, a case remarkably similar to *Lish*—the author of a previously unpublished letter sued *American Lawyer* magazine, arguing that the magazine’s unauthorized publication of his letter was infringement. The Second Circuit accepted *American Lawyer*’s fair use defense, largely because of the factual nature of the letter, which did not implicate its author’s privacy. In contrast, in *Lish*, Gordon Lish’s words were strongly connected to his personality; they were the thing next to his family that he “cherishes the most and holds most dear.”

The way in which courts ought to balance protecting authors’ privacy and economic interests through copyright law can be displayed as follows:

![Figure 2](image)

168. 745 F.2d 142 (2d Cir. 1984).
169. Id. at 146.
170. Id. at 146, 148. Diamond’s original suit also alleged invasion of privacy, but this state law claim was dismissed along with the federal claim of copyright infringement. Although the Second Circuit did not explicitly address whether or not the work at issue implicated the author’s privacy interest, the letter in question was primarily factual as opposed to expressive or creative. Id.
171. 807 F. Supp. at 1105.
When the level of privacy implicated in a particular copyrighted work is high, courts can give greater weight to considerations of privacy, and less weight to the economic interests that form the mainstay of most courts' fair use analyses. On the other hand, when a work has little to do with its creator's personality, courts can focus primarily on the economic aspects of copyright law and base their fair use decisions largely on the extent to which the infringing work competes with the original.  

The four statutory factors of section 107 all figure into this analysis. The second factor—the nature of the copyrighted work—allows courts to consider the amount of personhood at stake in the case. Courts frequently note that predominantly factual works, like news reports, are entitled to less protection than creative works; therefore defendants in fair use cases have wider latitude when they use factual or utilitarian works. In contrast, courts have afforded defendants much less leeway in cases involving works of art or personal letters, both of which capture more of their creators' personalities. And, as discussed above, courts also consider whether a work was or was not published as part of the fair use analysis.  

The remaining three factors all relate to the amount of competition the defendant's work creates for the plaintiff's work, thereby measuring the impact that the infringement has on the original author's creative incentives. As the Supreme Court has noted, a commercial use under the first factor is likely to compete with the plaintiff's work, or at least has that potential; accordingly, commercial uses are presumptively unfair. The third factor—the amount copied—also bears on competi-
tion—the more copied, the more likely the defendant's work will usurp the market for the original work.\textsuperscript{179}

Courts can modulate the amount of competition they will allow while still finding fair use by varying the amount of evidence of direct competition they require. Currently, courts differ in the extent to which they require proof of direct competition or loss to a plaintiff under their analysis of the fourth fair use factor. Some courts focus on whether the defendant used the plaintiff's work in a way in which the plaintiff had exploited the work in the past, thereby actually fulfilling the market for the original work.\textsuperscript{180} Other courts simply assume that because the defendant's use was commercially profitable, the plaintiff could have exploited her work in that way, and that the defendant's use therefore had the effect of decreasing the value of the plaintiff's work by satisfying a demand for the work that the plaintiff could have exploited.\textsuperscript{181}

To protect an author's privacy by limiting the scope of fair use of works that strongly implicate the copyright owner's privacy, courts ought to adopt the test of whether the use is one which the plaintiff could have exploited. The answer will invariably be yes, causing this factor to weigh against finding of fair use. Where courts can be less concerned with

\textsuperscript{179} In its most recent statement on the issue, the Court has backed away from Sony's strong presumption that commercial uses are unfair. "If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of \textsection{} 107 . . . ." Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1174 (1994). Still, a commercial use "is a separate factor that tends to weigh against a finding of fair use." Id. (quoting Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 562 (1985)). This led the Court in Campbell to remand the case for a determination of the impact of the defendant's work on the market value of the original copyrighted work (the fourth of \textsection{} 107's factors).

\textsuperscript{180} Campbell makes clear that market substitution is the type of injury copyright protects against. 114 S. Ct. at 1177.

\textsuperscript{181} See, e.g., Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 61 (2d Cir. 1980) (finding that defendant's use fulfilled market for plaintiff's work, as evidenced by plaintiff's unsuccessful efforts to license his work to defendant for the use in which the defendant ultimately made); New Line Cinema Corp. v. Bertlesman Music Group, Inc., 693 F. Supp. 1517, 1527 (S.D.N.Y. 1988) (noting that plaintiff was negotiating to license the "Freddy Krueger" character from the \textit{Nightmare on Elm Street} series when defendant produced his own rap song based on "Freddy"); see also Paul Goldstein, \textit{Derivative Rights and Derivative Works in Copyright}, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 232-36 (1982) (arguing that courts tend to focus on competition in the market for which the original work was intended to compete or in closely bordering markets).
protecting an author’s privacy, they could instead require actual proof that the defendant’s use did in fact compete with a use the plaintiff had exploited or intended to exploit. This would enable courts to avoid relying on hindsight-aided hypotheses in drawing their conclusions as to what plaintiffs could have done. The result would be that low-privacy copyrights would be subject to liberal fair uses, while the fair use of high-privacy copyrights works would be much more restricted.

C. Applying the Privacy/Competition Matrix

The preceding discussion indicates that courts are already sensitive to the privacy-protecting aspects of copyright in the context of unpublished works. This part aims to demonstrate how courts operate within the privacy/competition matrix, both for cases in which privacy concerns are most obvious, such as *Salinger v. Random House, Inc.*, and for cases in which privacy plays a more latent role.

Several cases reveal how the privacy-protecting aspect of copyright law has influenced fair use decisions. As already discussed, *Salinger* demonstrates that, in extreme situations, courts have explicitly responded to copyright owners’ privacy interests to prevent unauthorized publication of personal material. Several other cases are also illustrative: in *Rogers v. Koons*, the Second Circuit affirmed a district court’s rejection of a fair use defense for the unauthorized adaptation of a photograph by a renowned modern artist; in *Maxtone-Graham v. Burtchaell*, the same court upheld the district court’s finding of fair use for the unauthorized excerpting of a book about women who have had abortions by the author of a second commercially sold book critical of the abortion rights movement; and in *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, the court rejected American Broadcasting Companies’ (“ABC”) fair use defense for its broadcasting of eight percent of a twenty-eight minute student-produced documentary about a wrestler competing in the Olympics.

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182. See Goldstein, supra note 180, at 232-36.
185. See *supra* text accompanying notes 155-59.
188. 621 F.2d 57 (2d Cir. 1980).
These four cases can be placed in the privacy/competition matrix as follows:

![Privacy/Competition Matrix](image)

**FIGURE 3**

In *Salinger*, the works in question were personal letters that strongly implicated J.D. Salinger's personhood. Furthermore, his privacy interest was clear from his behavior: he was a recluse, shunned publicity, and made it abundantly clear that he did not want his personal letters excerpted in a biography.\(^{189}\) Accordingly, the Second Circuit rejected Random House's claim of fair use despite finding that the competitive effect on the market value of the letters was not particularly great.\(^{190}\)

*Rogers v. Koons*\(^{191}\) provides another example of a court's restrictive application of fair use involving artistic works. In *Rogers*, the work in question was a photograph by a successful California photographer

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190. *Id.* at 99 ("[T]he [biography] would not displace the market for the letters . . . . [M]ost of the potential purchasers of a collection of the letters would not be dissuaded by publication of the biography."). Despite the above findings, the court concluded that some market displacement was likely and therefore that the all-important fourth factor in the fair use analysis "weigh[ed] slightly in Salinger's favor." *Id.*

that had been licensed for reproduction on notecards. One of those notecards was used by a renowned modern artist as the basis for a sculpture, three copies of which were sold to collectors for a total of $367,000. In rejecting the artist's fair use defense, the court emphasized the amount of creative work that the photographer put into his photograph. "Rogers drew on his years of artistic development. He selected the light, the location, the bench on which the [subjects were seated and the arrangement of the [subjects]. He also made creative judgments concerning technical matters with his camera and the use of natural light." This was not just a snapshot, it was a work of art in which the artist had invested his skills and training. Thus, the court viewed the photograph, which the defendant saw as "typical, commonplace and familiar," as an extension of its creator, embodying a high degree of the photographer's "personhood." To find the use unfair, the court needed no evidence that the sculpture had any competitive impact on the plaintiff's work or that it would in any way reduce plaintiff's incentives to take, produce, and disseminate artistic photographs.

Rogers contrasts with Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.—a case in which it was alleged that ABC improperly included excerpts from a locally produced documentary during its broadcast of the Olympics. Unlike Rogers, there is no indication in the Iowa State court's discussion of the documentary that it was any more than a pedestrian home-made film about a local athlete; it was not a work personal to its creator. Accordingly, in denying ABC's claim of fair use, the court focused primarily on the fact that, by broadcasting portions of the film during its Olympic broadcast, ABC foreclosed what was likely the most significant potential market for the work. That ABC's activity directly competed with

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192. *Id.* at 304.
193. *Id.* at 305.
194. *Id.* at 304.
195. *Id.* at 305.
196. See supra note 162 and accompanying text.
197. Rogers, 960 F.2d at 312 (finding without evidence that a competitive effect of the defendant's work on the plaintiff's work was "not implausible"). I place this case to the right of *Salinger* on the privacy/competition matrix only because the plaintiff had licensed his works, and the particular work in question, for other uses, indicating that a competitive effect was not as unlikely as the court suggests. See supra FIGURE 3.
198. 621 F.2d 57 (2d Cir. 1980).
199. *Id.* at 58.
200. *Id.* at 62.
plaintiff is demonstrated by plaintiff’s attempt to license the documentary
to ABC for precisely the same use to which ABC ultimately put it. 201

Finally, Maxtone-Graham v. Burtchaell 202 demonstrates how the
privacy interests implicated by a copyright may differ from the amount
of personhood inherent in the work at issue and how this affects the fair
use analysis. 203 In a book chronicling the experiences of women who
had undergone illegal abortions, Katrina Maxtone-Graham included
excerpts from seventeen interviews with women who had aborted their
pregnancies before abortion became legal. James Burtchaell, a Catholic
priest who wished to “critique the published accounts of ‘abortion veter-
ans,” 204 included in his anti-abortion book excerpts from the interviews
included in Maxtone-Graham’s book. Maxtone-Graham, as owner of the
copyrights in the interviews, 205 alleged copyright infringement, but the
court found that Burtchaell’s use was fair. 206

Maxtone-Graham illustrates the importance of distinguishing the
privacy interests of the copyright owner from those of the original author
of a work. The interviewees, having obtained illegal and potentially
stigmatic abortions, clearly had very strong privacy interests at stake in
the way their stories were told. Their interests had already been protected
by Maxtone-Graham in her original publication—she changed their
names to protect their identities and their privacy. 207 Maxtone-Graham,
the actual copyright holder, had little of her own privacy at stake in the
publication of these interviews, and the court therefore had no trouble
finding that Burtchaell’s use was fair under the four factor analysis. 208
Had the interviewees retained the copyrights to their interviews and sued
Burtchaell themselves, this case would likely have been decided in much
the same manner as Salinger; with the privacy interests of the intelli-
viewees outweighing the other aspects of the fair use analysis. 209

201. Id. at 59, 61.
203. See id; supra notes 163-65 and accompanying text.
204. Maxtone-Graham, 803 F.2d at 1256.
205. The interviewees had assigned their rights in the interviews to Maxtone-Graham. Id.
206. Id. at 1255, 1265.
207. Id. at 1256.
208. Id. at 1260-65.
209. Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir.) (“Salinger has a right to
protect the expressive content of his unpublished writings for the term of his copyright, and that right
V. BENEFITS OF INCLUDING PRIVACY PROTECTION IN FAIR USE ANALYSIS

A. Fulfilling Copyright's Constitutional Purpose

Courts and commentators widely agree that the purpose of copyright is to increase the social store of original works of authorship.210 Accordingly, copyright provides economic incentives for authors to create works. Not all authors write in response to economic incentives, however,211 and, by allowing authors to control the distribution of their works, copyright encourages the production of personal works that authors do not intend to distribute or use to generate income. A fair use analysis based on both economic and privacy interests adequately protects the incentives to create all types of works by responding to the different interests that lead people to create. Personal works are protected under this analysis to a greater extent than nonpersonal ones, thereby assuring authors who create for noneconomic reasons that their privacy will be respected. Works created for economic reasons, on the other hand, are protected to the extent necessary to ensure that authors realize the economic benefits to which they are entitled.212

A fair use analysis based solely on the economic aspects of copyright would protect the latter category of works, but it would threaten works that implicate their authors' privacy by allowing these works to be used without their authors' consent. The effect would be either to decrease the rate at which these works are produced or to provide the owners of such works incentives to conceal or even destroy them to prevent them from falling into the hands of would-be fair users.213 In addition, a wide scope of fair use for highly personal works


211. But see Campbell, 114 S. Ct. at 1174 ("[N]o man but a blockhead ever wrote, except for money."") (quoting 3 Boswell's Life of Johnson 19 (G.B. Hill ed., L.F. Powell rev., 1934))). Apparently J.D. Salinger and all the diarists among us are blockheads.

212. See Harper & Row, 471 U.S. at 597-98 (Brennan, J., dissenting) (arguing that ex-President Ford's "'confidentiality' interest" in preventing unauthorized prepublication of his memoirs "is no more than an economic interest in capturing the full value of initial release of information to the public, and is properly analyzed as such").

213. Cf. Timothy J. Brennan, Copyright, Property, and the Right to Deny, 68 Chi.-Kent L. Rev. 675, 706 (1993) (noting that "the threat that copyright would not protect creations from being
may reduce the amount of access authors of such works grant to the public.\textsuperscript{214}

At the same time, providing wider latitude for fair use of works that do not implicate an author’s privacy is consistent with the purposes of copyright. Most of the works that will fall into this category are utilitarian works, such as news reports and compilations, and society’s interest in the free flow of information is promoted by encouraging the dissemination of these types of works. If fair use is routinely allowed for works of this type, authors of such works will have an incentive to capitalize them to prevent market diminution. If they do not, others should be allowed to. Still, by giving authors the first opportunity to exploit their works, copyright preserves the economic incentives necessary to foster creativity.

The argument that fair use should respond to privacy interests is not without its critics. Judge Leval, who was the district court judge in both \textit{Salinger} and \textit{New Era Publications International v. Henry Holt & Co.},\textsuperscript{215} offers three reasons against considering privacy in fair use cases: (1) the law’s policy of favoring free speech weighs against using privacy to muzzle speech;\textsuperscript{216} (2) it would distort the current “delicate balance of interests achieved under our privacy law” by allowing privacy protection to extend through the life of a copyright rather than ending at death\textsuperscript{217} and also possibly by causing federal copyright law to preempt state law’s privacy protection;\textsuperscript{218} and (3) copyright law is “grotesquely inappropriate to protect privacy” because it protects only expression, not facts.\textsuperscript{219}

Judge Leval’s first explanation is not particularly persuasive in light of cases like \textit{Salinger} and \textit{Lish}, which clearly favored privacy interests over free speech. His second argument depends upon a conception of

\begin{itemize}
  \item \textsuperscript{214} In several fair use cases, scholars had access to personal writings that had been donated to university libraries on condition that they not be reproduced. See \textit{Wright v. Warner Books, Inc.}, 953 F.2d 731, 734 (2d Cir. 1991); \textit{Salinger v. Random House, Inc.}, 811 F.2d 90, 95 (2d Cir.), \textit{cert. denied}, 484 U.S. 890 (1987); \textit{Norse v. Henry Holt & Co.}, 847 F. Supp. 142, 144 (N.D. Cal. 1994).
  \item \textsuperscript{216} Leval, supra note 69, at 1129.
  \item \textsuperscript{217} \textit{Id.} at 1129-30. The term of a copyright for most works is the life of the author plus 50 years. 17 U.S.C. \textsection 304 (1994).
  \item \textsuperscript{218} See \textit{Leval, supra note 69}, at 1130. Section 301 of the Copyright Act declares that state interests concurrent with interests created by the Copyright Act are preempted. 17 U.S.C. \textsection 301 (1994).
  \item \textsuperscript{219} \textit{Leval, supra note 69}, at 1130.
\end{itemize}
privacy interests in copyright law that is identical to the privacy interests protected under state law. The privacy interests described in this Article, however, are unlike those addressed by state law, as most state laws protect only against the unwarranted disclosure of private facts.\textsuperscript{220} In contrast, the privacy interests implicated by recent fair use decisions extend beyond facts to include the copyrighted expression that was central to the personhood of each author.\textsuperscript{221} Because this interest is different from those protected by state law, it need not be treated identically. As already discussed, a number of factors determine the extent or amount of a copyright owner’s privacy at stake in a given case,\textsuperscript{222} including whether the author is living, and courts can use these factors when making equitable fair use determinations. Thus, recognizing privacy interests in fair use cases will not require courts to automatically extend the state law right to privacy to the term of an author’s copyright. It simply does not raise the preemption issue Judge Leval anticipates.\textsuperscript{223}

The distinction between state law of privacy and copyright law of privacy also highlights the fallacy of Judge Leval’s final argument against recognizing privacy interests in fair use cases. The privacy interests implicated in copyright stem first from the nature of the work, not from the facts contained therein. While the factual nature of a work will be relevant to this inquiry, the privacy inquiry does not end there.\textsuperscript{224}

\textbf{B. Solving the Problem of Unpublished Works}

Adding privacy analysis to the framework through which fair use is analyzed also helps clarify the way copyright ought to treat unpublished works. Unpublished works pose a problem for current fair use analysis because of their status prior to the passage of the 1976 Copyright Act. Until the 1976 Act became effective, statutory copyright only vested in works upon publication. Unpublished works were protected instead by

\textsuperscript{220} See \textsc{Restatement (Second) of Torts} § 652A (1977).

\textsuperscript{221} See supra notes 155-59 and accompanying text.

\textsuperscript{222} See supra text accompanying notes 162-65.

\textsuperscript{223} Specifically, statutory preemption under § 301 of the Copyright Act, 17 U.S.C. § 301 (1994), does not occur if the state law claim that might be preempted contains an “extra element” in addition to the elements that would have to be proven to make out a claim of infringement under the Copyright Act. 2 \textsc{Goldstein}, supra note 98, § 15.2.1.2. Each of the state law privacy rights listed in \textsc{Restatement (Second) of Torts} § 652A (1977) contain elements that would not have to be proven in a copyright claim and are therefore not subject to statutory preemption under the copyright laws.

\textsuperscript{224} See supra text accompanying notes 162-65.
common law copyright, which provided wide-ranging protection for an individual's privacy. Under common law copyright, for example, the owner of a collection of paintings could obtain an injunction to prevent the unauthorized publication of a catalog describing the paintings, or even a listing of their existence. There was no concept of fair use; protection was absolute against the world and based largely on the concept of the privacy of the individual invoking the protection.

By vesting copyright protection in the creators of original works of authorship upon the work's fixation in a tangible medium of expression, the Copyright Act of 1976 subsumed under statutory copyright protection almost all of the protection that had previously been afforded under common law copyright. As a result, fair use became a defense for the first time to infringement in cases of unpublished works. The language of section 107, which requires courts to consider the four statutory fair use factors, compels judges to analyze fair use in contexts where there is little common law history and where the concept of fair use is in fundamental conflict with a plaintiff's privacy interests.

How then should courts deal with fair use for unpublished works? One option is simply to extend the common law limitation and apply fair use in a manner consistent with the privacy interests of the author. This approach would involve analyzing the nature of the work and the circumstances of its public use, as well as the extent to which the use interferes with the author's right to control access to and distribution of the work. Alternatively, courts could adopt a different approach, such as applying a more restrictive standard for unpublished works or deferring to statutory factors that favor the author's privacy interests. In either case, the key issue is to strike a balance between the competing interests of the author and the public in accessing and using creative works.

225. See Warren & Brandeis, supra note 5, at 198-200.
226. Id.
228. See Roberta R. Kwall, Copyright and The Moral Right: Is an American Marriage Possible?, 38 VAND. L. REV. 1, 1 n.1 (1985) ("Perhaps the most significant reform of the 1976 [Copyright] Act is the adoption of a unitary federal system of copyright protection in lieu of the prior system under which federal law protected published works and state law governed unpublished works.").
229. See generally Andrea D. Williams, The Fair Use Doctrine and Unpublished Works, 34 HOW. L. J. 115 (1991) (discussing the application of the fair use doctrine in cases involving unpublished works, such as Harper & Row and Salinger).
230. For a discussion of how courts, Congress, and interested parties, such as publishers and the computer industry, view this problem, see Jonathan Band & Laura L.F.H. McDonald, The Fair Use Bill: A Funny Thing Happened on the Way to Congress, COMPUTER LAW., March 1993, at 9. The common way that courts deal with this history is to consider that the work was unpublished under their analysis of factor two—the nature of the work—and to note that this weighs against fair use. See, e.g., Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), cert. denied, 484 U.S. 890 (1987). As it was originally conceived in Justice Story's famous opinion of Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass 1841) (No. 4,901), however, factor two could not have embraced the published/unpublished distinction because unpublished works were not subject to the fair use inquiry at all. See PATRY, supra note 26, at 533, 536. Rather, this analysis seems to follow from the Supreme Court's recent attempt to expand the fair use defense to uses of unpublished works following passage of the 1976 Copyright Act. See, e.g., Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 564 (1985). Under traditional fair use analysis (which only applied to uses of published works), the inquiry under the second fair use factor addressed whether the work was a factual work or work of fancy. See, e.g., id. at 563.
use only in cases involving published works. This approach, however, has two significant problems. First, it is clearly contrary to the plain language of section 107, which requires courts to consider the four statutory factors in addressing whether or not a use is fair. Courts could avoid this problem by establishing as a threshold test whether or not the work was published before engaging in any fair use analysis. Such a fundamental shift, however, would require overturning a significant body of caselaw and would be virtually impossible to justify given the statute’s clear language.

The second flaw is that publication is itself a hard concept to define. In large part, the reason the 1976 Act extended statutory copyright protection to unpublished works is that modern technology had rendered the determination of when a work was first published problematic. By making the threshold for copyright protection fixation in a tangible medium of expression, Congress sought to eliminate the uncertainty pervasive under the publication test whether a work was protected by the statute. Reestablishing publication as a governing principle in copyright law in fair use cases would be a step backward as it would destroy the certainty gained by doing away with the test in the first place.

Instead of making a strict published/unpublished distinction, courts ought to ask whether the unpublished nature of the work reflects the creator’s privacy interest, as opposed to her economic interest in capitalizing on prepublication. Recent caselaw involving fair use of

231. In addition to the arguments presented here, which are primarily doctrinal, others have argued that eliminating the possibility of fair use for unpublished works is contrary to copyright’s goal of increasing society’s store of knowledge. See Robin Feingold, Note, When “Fair Is Foul”: A Narrow Reading of the Fair Use Doctrine in Harper & Row, Publishers v. Nation Enterprises, 72 CORNELL L. REV. 218 (1986); Lisa V. Merrill, Note, Should Copyright Law Make Unpublished Works Unfair Game?, 51 OHIO ST. L.J. 1399 (1990). Applying the privacy/competition matrix to fair use cases involving unpublished works avoids the shortcomings of a categorical prohibition against fair use of unpublished works.


233. See 17 U.S.C. § 107 (1994) (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . .”) (emphasis added); supra text accompanying note 27.

234. See Paul S. Bilker, Note, The Showdown Continues at the Circle C Ranch: Non-Preemption of State Copyright Protection for Unfixed Improvisational Works, 18 SW. U. L. REV. 415, 419-20 (1989) (“The proliferation of twentieth century methods of communication . . . has caused varied interpretations of ‘publication’ as applied to these new forms of dissemination, leading to unpredictable results in individual situations.” (footnote omitted)).

235. See id. at 420 (noting that the tangible/intangible test for statutory protection created by the fixation requirement provides a clearer dividing line than the published/unpublished test that it replaced).
private, personal unpublished works suggests that courts have been focusing primarily on the privacy aspects of copyright protection in denying fair use to defendants who tried to use those works without licenses. There remains the problem of a fair use defense in a case involving the infringing use of an unpublished nonprivate work, like an unpublished yellow pages directory. Consistent with the privacy/competition analysis, works of this type ought to be subject to liberal fair use: Before finding against fair use, courts should require clear evidence of direct competition in the potential market for the unpublished work coupled to a finding that the owner of the unpublished work intends to publish the work. This analysis allows the creators of such works the opportunity to exploit them commercially, but it also protects society’s interest in the dissemination of works of this type by giving wider scope to fair use analysis. If the creator of a socially valuable work is not willing to exploit the work on her own, society should be allowed to enjoy the work’s benefits through liberal fair use.

VI. CONCLUSION

While copyright law has long been recognized as serving a variety of competing economic and noneconomic interests, judicial opinion and academic scholarship analyzing fair use has focused almost exclusively on the economic impact of fair use and its relationship to the production and dissemination of copyrightable works. The result has been a muddled doctrine and a series of hard-to-reconcile cases. This Article has aimed to clarify fair use by exposing how courts engaged in fair use inquiries are often responsive to the privacy interests of the copyright plaintiffs before them. Courts’ use of fair use to protect individual’s privacy is consistent with copyright’s longstanding tradition of responding to privacy concerns. In addition, privacy analysis can aid courts in dealing with fair use of unpublished works, avoiding unnecessary application of rigid and possibly overbroad rules.

By incorporating both privacy and economic interests in fair use analysis, as illustrated by the privacy/competition matrix, courts can apply fair use in a way that furthers the ultimate goal of copyright. Contrary to Samuel Johnson’s Supreme Court-endorsed quip that “[n]o

236. See supra notes 152-59 and accompanying text.
237. See supra part V.A.
man but a blockhead ever wrote, except for money, 238 some copyright-ed works are not produced with economic incentive in mind. Scholars' and courts' emphases on economics in fair use analysis threatens to lead fair use down a path that would create disincentives for the creation of private personal works. So far courts have resisted this trend, but they have done so by manipulating section 107's four factors rather than by expressly acknowledging the privacy interests that they are actually seeking to protect. Making explicit the role of privacy in fair use would enable courts to promote effectively the purposes of copyright: encouraging the creation of creative and useful copyrightable works.

The privacy/competition matrix does not eliminate all or even most of the ambiguity from fair use. At its core, fair use remains a flexible doctrine that courts can use to promote ostensibly utilitarian ends 239 or, simply, to balance equities. 240 What the matrix does, however, is to highlight the importance of privacy as a factor to be weighed in courts' balancing tests.


239. See Dratler, supra note 69, at 245-47; Fisher, supra note 59, at 1687-88; Leval, supra note 69, at 1105-10.

240. See Weinreb, supra note 122, at 1161.