# CONSUMERS AND CREATIVE DESTRUCTION: FAIR USE BEYOND MARKET FAILURE

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## ABSTRACT

For almost twenty years, the concept of market failure has defined the boundaries of fair use under copyright law. In this article Professor Ku challenges this interpretation of fair use by offering an alternative economic interpretation of the doctrine. This Article argues fair use is justified when consumer copying creatively destroys the need for copyright's exclusive rights in reproduction and distribution. This occurs when: 1) the consumer of a work makes copies of it, and 2) creation of the work does not depend upon funding derived from the sale of copies. Under these circumstances, exclusive rights in reproduction and distribution, which are conventionally justified by the need to prevent the underproduction of creative works due to free riding, are unnecessary. When both conditions are satisfied, copying does not lead to the underproduction of creative works because consumers distribute the work themselves, eliminating the need for content distributor middlemen while continuing to fund the creation of those creative works. Professor Ku argues that recognizing the process of creative destruction as fair use is not only consistent with an economic interpretation of copyright, but represents the most coherent interpretation of the consumer copying decisions handed down by the Supreme Court.

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## I. INTRODUCTION

Described as the most "troublesome" doctrine in copyright,[1] the doctrine of fair use is at the heart of the debate over the role digital rights management ("DRM") technologies should play in protecting creative works.[2] Some believe that DRM eliminates the need for continued recognition of the doctrine.[3] Others argue that DRM must accommodate fair use.[4] On one level, the parties to this debate disagree over the relative merits of the commons versus commodification as a means of promoting creation.[5] On another level, the debate represents a fundamental disagreement over the definition of fair use and the activities that should be considered fair. In particular, is consumer copying fair?[6] Or as Chief Justice Burger

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1. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

2. This article does not provide a detailed discussion of DRM technologies, but instead addresses the claim that restrictions upon certain consumer uses of copyrighted works made possible by DRM are justified because those uses would otherwise infringe copyright. I leave the task of outlining the technical and ever changing world of DRM to other participants and articles in this symposium. For a non-legal, non-technical discussion of DRM, see BILL ROSENBLATT, BILL TRIPPE, & STEPHEN MOONEY, DIGITAL RIGHTS MANAGEMENT: BUSINESS AND TECHNOLOGY (M&T Books 2002).

3. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX, 195-237 (Hill & Wang 1994); Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 564-67 (1998); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL. F. 217, 236, 241-42 (1996); *see also infra* Part II.B.

4. *See, e.g.*, Dan Burk & Julie Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J. L. & TECH. 41 (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L. J. 519 (1999).

5. For extended discussions of this debate, its origins, and its implications, see GOLDSTEIN, *supra* note 3; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Random House 2001); JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001) [hereinafter LITMAN, DIGITAL COPYRIGHT]; SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (NYU Press 2001).

6. Copying of this nature is often referred to as private or personal copying. *See, e.g.*, A&M Recording, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000) (concluding that the vast sharing of music over the Internet could not be considered pri-

once asked, is it copyright infringement when individuals make copies of copyrighted works for either their own use or to share with others?[7] How one weighs openness against commodification will substantially impact how one answers the former Chief Justice's question—perhaps the most troublesome question within this troublesome doctrine.

The casual observer might conclude that this question was answered when the United States Supreme Court held that home videotaping of copyrighted television programs was fair use,[8] or when Congress explicitly recognized the right of consumers to make home recordings of music.[9] However, more recent decisions[10] and legislation[11] cast considerable doubt on the validity of even those activities, let alone the copying and file sharing facilitated by the Internet and peer-to-peer networks.[12]

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vate use), *aff'd*, 239 F.3d 1004 (9th Cir. 2001); GOLDSTEIN, *supra* note 3, at 129-164 (discussing private copying under copyright). Throughout this article, I use the term "consumer copying" rather than private or personal copying because it better captures the range of activities that have been considered fair in the past. Moreover, fair use does not distinguish between private or personal copying and public copying, but rather distinguishes between consumer copying and copying for financial gain. Describing this copying as private or personal erroneously suggests that fair use is based upon a right to privacy. *See infra* Part II.B.

7. *See* GOLDSTEIN, *supra* note 3, at 117-119 (describing the exchange between Chief Justice Burger and counsel during the oral arguments for Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975)).

8. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

9. *See* Audio Home Recording Act, 17 U.S.C. § 1008 (2000) (forbidding certain infringement actions based upon the noncommercial copying of digital or analog musical recordings by consumers).

10. *See* Princeton Univ. Press v. Mich. Document Serv., 99 F.3d 1381 (6th Cir. 1996) (concluding that the creation of photocopy course packs was not fair use); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (holding that a corporation's photocopying of copyrighted articles for its researchers was not fair use); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530-34, 1547 (S.D.N.Y. 1991) (same).

11. *See* Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. & Supp. 1999) (prohibiting, among other things, the circumvention of technologies restricting access to copyrighted works); Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (concluding that circumventing technological measures designed to restrict access to copyrighted works was illegal even if the circumvention was for the purposes of making fair use of the work); *see also* S. 2048, 107th Cong. (2002) (proposing to require copyright security systems for all digital media devices); H.R. 5211, 107th Cong. (2002) (proposing to immunize copyright holders from liability for "disabling, interfering with, blocking, diverting, or otherwise impairing" files sharing on peer-to-peer computer networks).

12. *See* A&M Recording, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding that peer-to-peer sharing of copyrighted music not fair use); UMG Recordings, Inc. v.

While the forces and motivations behind the movement towards eliminating fair use are varied and complex,[13] the intellectual justification offered is quite straightforward. In one of the seminal works on fair use, Wendy Gordon argued that a market-based analysis of copyright's limits would clarify fair use given copyright's underlying economic rationale.[14] The Ninth Circuit concluded that fair use should not be recognized when owners of videotape recorders recorded copyrighted television programming because the copying merely facilitated the ordinary or intrinsic use of the work.[15] Criticizing this, Gordon argued that fair use should be understood as a doctrine justifying unauthorized copying in circumstances of market failure regardless of whether the copying is for ordinary or productive uses.[16] Under this approach, fair use is an exception to the otherwise exclusive rights of copyright justified by the presence of market barriers such as high transaction costs, externalities, non-monetizable benefits, or anti-dissemination motives.[17] Thus, consumer copying and distribution of copyrighted works, such as the photocopying of scientific journals and the videotaping of television programming, could be fair use because the transaction costs associated with negotiating permission for and enforcing copyrights against such uses outweighed the benefits derived by the user and copyright owners. Treating these uses as non-infringing, fair use prevented the underutilization of these works that would otherwise have occurred.[18]

Seizing upon Gordon's work, subsequent courts and commentators have argued that consumer copying should no longer be considered fair use.[19] A central component of the market failure approach is the premise that the potential for market cures, including copyright damage awards, should be sufficient to defeat a finding of fair use. By using technological

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MP3.COM, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (concluding that the copying of music to allow owners of that music to enjoy the works from different locations was not fair use); *see also In re* Aimster Copyright Litigation, 2002 WL 31006142 (N.D. Ill. 2002) (holding that noncommercial sharing of music by consumers represented direct copyright infringement).

13. *See generally* LITMAN, DIGITAL COPYRIGHT, *supra* note 5 (discussing some of the forces and motivations behind efforts to expand copyright).

14. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Fair Use*]; *see also infra* Part III.

15. *See* Sony Corp. v. Universal City Studios, Inc, 659 F.2d 963, 971-72 (9th Cir. 1981).

16. Gordon, *Fair Use*, *supra* 14, at 1652-55.

17. *Id.* at 1627-35.

18. *Id.* at 1628-30.

19. *See infra* Part II.B.

measures to restrict access and monitor uses of copyrighted works, DRM arguably eliminates the market failure created by burdensome transaction and enforcement costs.[20] If fair use is justified by market failure, DRM eliminates the need for fair use as well. We are told that DRM not only will, but should, transform creative works into private goods distributed through a system of "fared use" in which users pay for every use and every copy of a work.[21]

Not only are the conclusions and arguments offered to restrict fair use contrary to the Supreme Court's only opinion on this issue,[22] any approach that focuses exclusively on market failure overlooks the fundamental change in the economics of creation and distribution brought about by advances in technology. Elsewhere I have argued that the economics that justified copyright in the age of the printing press no longer justify a right to prohibit the consumer copying of music in the digital age.[23] Digital technology and Internet networking have creatively destroyed[24] copyright with respect to consumer sharing of music because the denial of access to music is not necessary to prevent the inefficiencies associated with free riding on the investments and efforts of others to distribute music.[25] In the digital world, the computing public internalizes the costs of creating and distributing digital music without the need for copyright's monopoly privileges or its costs.[26] Under these circumstances, consumer copying is an example of the market overcoming the public goods problem rather than market failure.

The creative destruction of copyright is not unique to the Internet. Other technologies such as the photocopier and the VCR have also led to the creative destruction of copyright. With respect to the doctrine of fair use, this observation is critical because it suggests that the Supreme Court's decisions regarding these technologies are best understood as recognizing creative destruction as fair use rather than seeing fair use as a

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20. *Id.*

21. *See* Bell, *supra* note 3, at 567-69, 579-83 (describing "fared use").

22. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 450-56; *see also infra* Part III.B.

23. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002).

24. "Creative destruction" was a term used by Joseph Schumpeter to describe what he considered to be the most important form of competition in capitalist markets, a process that "strikes not at the margins of profits and the outputs of existing firms but at their foundations." JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (Harper Perennial 1976).

25. Ku, *supra* note 23, at 293-306; *see also infra* Part IV.

26. Ku, *supra* note 23, at 293-306.

product of market failure. Moreover, concluding that creative destruction is fair use challenges the claim that the right to control copyrighted works through DRM technologies should extend "into every corner where consumers derive value from literary and artistic works."[27] In the context of this debate, although DRM may be used to limit consumer copying, it is simply inaccurate to claim that greater restrictions upon access to works are compelled by the logic of copyright. While some copyright owners may wish to expand their monopoly privileges in much the same way that members of the consuming public may want all information to be free,[28] such an expansion is not supported by either the economic theory that justifies copyright or the doctrine of copyright itself.[29]

Part II introduces the reader to copyright and the doctrine of fair use. Part II.A outlines the basics of copyright and why the monopoly rights associated with copyright are considered necessary and beneficial. Part II.B then discusses fair use and its past application to consumer copying. Specifically, Part II.B discusses the only two Supreme Court cases involving consumer copying: *Williams & Wilkins Co. v. United States*[30] and *Sony Corp. v. Universal City Studios, Inc.*[31]

Part III.A then describes Gordon's market failure interpretation of fair use. Next, Part III.B explains how the theory that fair use is only legitimate in the face of market failure has been adopted and adapted. As this discussion illustrates, more recent decisions have distinguished the Supreme Court's consumer copying precedent and restricted fair use by relying upon the market failure approach.

Part IV sets forth what I have described as the creative destruction of copyright, and argues that the two cases in which the Supreme Court addressed consumer copying are best understood if one recognizes creative destruction as a type of fair use—not that fair use is only justified by market failure. Accordingly, consumer copying—regardless of the existence of DRM technologies—should be considered fair use when two conditions are satisfied: 1) the copy is made by the consumer of the work; and 2) the

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27. GOLDSTEIN, *supra* note 3, at 236.

28. *Cf.* Bell, *supra* note 3, at 558-59 (arguing that the true meaning of the popular Internet slogan "information wants to be free" is "people want information for free").

29. Of course, there may be other justifications expanding the protection offered to creative works, including those based upon principles of unfair competition or the moral and natural rights of authors. A discussion of those justifications, however, is beyond the scope of this article.

30. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

31. 464 U.S. 417 (1984).

creative endeavor does not depend upon funding derived from the sale of copies.

Although the presence of market failure should still be considered in determining whether a use is fair, it should not be the exclusive justification for—or explanation of—fair use. As Terry Fisher recognized, the argument that copyright owners should be entitled to revenues generated by new markets, including those created by infringers, is quite powerful and may be rebutted "[o]nly on the basis of a conception of a 'market' more restrictive than a 'group of persons who would . . . be willing to pay to see' the work."[32] According to Fisher, Justice Stevens failed to provide such a conception in *Sony*.[33] While I do not purport to defend the adequacy of the majority opinions in either *Sony* or *Williams & Wilkins*, a coherent economic approach towards fair use based upon creative destruction does emerge from these decisions without having to abandon the decisions themselves. As developed in Part IV, recognizing creative destruction as fair use is important not only because it is more consistent with the consumer copying decisions, but also because it represents an important competing conception of the market that teaches a profoundly different lesson regarding the dividing line between fair and foul.[34]

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32. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1670-71 (1988) (recognizing the power of the argument that copyright owners should be entitled to exploit future markets including those created by infringers).

33. *Id.* at 1670-71.

34. In this respect, I disagree with Stacey Dogan who recently argued, "*Sony* is about preventing copyright holders from interfering with consumers' ability to make non-infringing uses of technology." Stacey L. Dogan, *Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies*, 52 HASTINGS L. J. 939, 942 (2001). While *Sony* limits the right of copyright holders to interfere with the development and adoption of new technologies, it does so by limiting the types of consumer uses of technology that can be considered infringing. Similarly, I disagree with Jane Ginsburg, who suggests that the *Sony* decision is best understood as a response to the Court's perception that the copyright holders were attempting to block rather than participate in the market made possible by the VCR. *See* Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001). For a different critique of Gordon's fair use approach, see Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975 (2002) (arguing that unauthorized copying should be considered fair when the net benefit received by society outweighs the loss generated by the copying).

## II. COPYRIGHT & THE DOCTRINE OF FAIR USE

### A. Copyright Basics

The United States Constitution empowers Congress, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[35] With regard to music, books, and movies, Congress has chosen to promote progress through the law of copyright.[36] Copyright law grants authors certain exclusive rights in their works including, as the name describes, the right to copy.[37] As the Constitution provides, copyright does not protect a natural right of authors in their works, though it is influenced by the fact that content is produced by the author's labor.[38] In-

35. U.S. CONST. art. I, § 8, cl. 8.

36. *See* 17 U.S.C. § 102 (1996) (listing the types of works protected by copyright).

37. Section 106 of the Copyright Act provides:

> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> to reproduce the copyrighted work in copies or phonorecords;
> to prepare derivative works based upon the copyrighted works;
> to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1996).

38. *Sony Corp. v. Universal City Studios, Inc.* states:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

464 U.S. 417, 429 (1984); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts."); Mazer v. Stein, 347 U.S. 201, 219 (1954) (recognizing the "economic philosophy" behind copyright); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("Copyright law . . . makes reward to the owner a secondary consideration."). *But see* Wendy J. Gordon, *A Property*

stead, copyright law represents a bargain between the public and the author in which the public grants authors certain exclusive rights in exchange for access to their creations.[39] This access takes two forms: access to the work during the period of exclusive rights on terms generally dictated by the author or her assigns; and unfettered access to the work after those exclusive rights have expired.[40]

This bargain is considered necessary because works of authorship share some of the characteristics of a public good. Public goods are generally defined by two traits: they are non-rivalrous, meaning that "it is possible at no cost for additional persons to enjoy the same unit of a public good";[41] and non-exclusive, meaning it is difficult to prevent people from enjoying the good. Thomas Jefferson described the public goods nature of ideas when he wrote:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea . . . . [T]he moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it.[42]

Jefferson considered these traits beneficial because "[h]e who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."[43]

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*Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (arguing for a natural law justification for protecting intellectual property). *See generally* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. J. 517 (1990) (discussing the rejection of an absolute property right in intellectual property under Anglo-American law, and proposing an alternative interpretation of natural law).

39. *See* LITMAN, DIGITAL COPYRIGHT, *supra* note 5, at 77-86.

40. *See* Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 967-68 (1990) (describing dimensions of the public domain); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 33 (1996) ("We want members of the public to be able to learn from them: to extract facts and ideas from them, to make them their own, and to be able to build on them.").

41. *See, e.g.*, RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 79-81 (1996); LITMAN, DIGITAL COPYRIGHT, *supra* note 5, at 17; Harold Demsetz, *The Private Production of Public Goods*, 13 J. L. & ECON. 293, 295 (1970); William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988).

42. SAUL K. PADOVER, THE COMPLETE JEFFERSON, 1011, 1015 (Duell, Sloan & Pearce ed., 1943) (quoting letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813).

43. *Id.*

Today, we tend to be more cautious about these traits, even skeptical, because while they facilitate the widespread dissemination of ideas, they also subject public goods to "free riding." In other words, the non-rivalrous and non-exclusive characteristics of a public good increase the likelihood that some people will enjoy the benefits of the good without internalizing the costs of its production.[44] If the funding of public goods is left to the market, free riding may lead to underproduction of the good. As Gordon notes, "[i]f the creators of intellectual productions were given no rights to control the use made of their works, they might receive few revenues and thus would lack an appropriate level of incentive to create."[45] Likewise, "[f]ewer resources would be devoted to intellectual productions than their social merit would warrant."[46] Unauthorized copying, therefore, may create disincentives for investing in and distributing creative works.

Astute readers will note that, while the preceding description of public goods may describe ideas, songs, or poetry, it does not precisely describe CDs, books, or sculptures. While ideas may be non-exclusive, I can certainly keep people from reading my book or listening to my CD. As such, the CD is a private good.[47] Nonetheless, we have traditionally protected not only the song, but the CD as well. The justifications for this protection are the obvious public benefits of embodying works of authorship in a tangible medium and the threat that copying poses to the initial distributor. While a song or story may spread by word of mouth, fixing those works in tangible form facilitates the dissemination of those works to larger portions of the public while preserving the artist's original expression. However, once copies are available, it is usually inexpensive for subsequent users to copy the work. If competition from copiers drives the price of a work down to the marginal costs of the copier, it threatens the incentives to distribute the work in the first place.[48] If distributors have no incentive to make new works available, the public's access to those works will be significantly reduced. In other words, even though a CD or book is a pri-

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44. Gordon, *Fair Use*, *supra* note 14, at 1611.

45. *Id.* at 1610.

46. *Id.*

47. BETTIG, *supra* note 41, at 80.

48. LESSIG, *supra* note 5, at 133; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); *see also* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 927 (2d Cir. 1994) ("Ultimately, the monopoly privileges conferred by copyright protection and the potential financial rewards there from are not directly serving to motivate authors to write individual articles; rather, they serve to motivate publishers to produce journals, which provide the conventional and often exclusive means for disseminating these individual articles.").

vate good, copying still threatens the markets for these goods because their content is so easily disseminated.

Copyright, therefore, is designed not only to protect the author, but to preserve the incentives of the distributor as well. This is accomplished by granting authors a bundle of legally enforceable rights in their works similar to property rights in tangible property. Copyright owners utilize these rights to control copying, distribution, and other uses of the protected works. For instance, the author can assign or license the right to distribute to a distributor, which serves to protect the interests of both the author and the distributor. Granting copyright holders exclusive rights promotes a private market by artificially creating scarcity and exclusivity in works that would otherwise be public goods.

### B. Fair Use and Consumer Copying

Since first recognized in the United States, copyright has been limited by the doctrine of fair use.[49] Often described as an "equitable rule of reason,"[50] fair use exists in part because courts have simply refused to literally construe the exclusive rights conferred by Congress.[51] As suggested by one court, given copyright's incentive-based rationale, courts have concluded that many uses of copyrighted works do not infringe copyright "because not every use of a work undermines this underlying rationale" and because the literal application of copyright could weaken other values and stifle the very progress it is supposed to promote.[52]

How one determines whether a use is fair and therefore not infringing has bedeviled courts and commentators for hundreds of years. Consistent with the equitable nature of the doctrine, whether any particular use is considered fair or unfair is decided on a case-by-case basis. While courts may consider any number of factors, four came to dominate the inquiry and were eventually codified by Congress in 1976.[53] These factors in-

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49. *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1529 (S.D.N.Y. 1991) ("Coined as an 'equitable rule of reason,' the fair use doctrine has existed for as long as the copyright law."); *see also* Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permissions Systems*, 5 J. INTELL. PROP. L. 1, 13-15 (1997) (outlining the historical origins of fair use beginning with the English doctrine of fair abridgement).

50. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984).

51. *Id.* at 791 n.29.

52. Nat'l Rifle Ass'n v. Handgun Control Fed'n, 15 F.3d 559, 561 (6th Cir. 1994).

53. The four factors were first articulated as such by Justice Story. *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) ("In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the mate-

clude: 1) the purpose and character of the use, including whether the use is commercial or for non-profit educational purposes; 2) the nature of the copyrighted work itself, which typically involves evaluating whether the work is factual, scientific, or artistic in nature; 3) the quantitative and qualitative amount copied; and 4) the effect of the use upon the potential market for and value of the work.[54] According to Congress, § 107 was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[55] As such, the codification did little to clarify fair use—though it did lend congressional authority to the doctrine's legitimacy. Given the case-by-case determination of fair use and lack of guidance with respect to the interpretation, weight, and application of the non-exclusive factors,[56] fair use is unsurprisingly "troubling" and "unpredictable."[57] Nonetheless, as Lloyd Weinreb noted, even though the analysis "calls for the exercise of great judicial skill, or art," principled decision-making is possible.[58] The cases dealing with consumer copying illustrate the difficulty and disagreements that make fair use such a troubling doctrine.

### *1. Photocopying*

The first consumer copying case to reach the Supreme Court was brought by Williams & Wilkins, a publisher of medical journals and books.[59] The publisher sued the National Institute of Health (NIH) and the National Library of Medicine (NLM) for unauthorized photocopying and distribution of articles from its journals.[60] The libraries owned and operated multiple photocopying machines and maintained a policy of photocopying articles requested by NIH personnel, library patrons, or through interlibrary loan.[61] In 1970, NIH's in-house photocopying department filled 85,744 requests from NIH personnel for photocopies of journal arti-

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rials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

54. 17 U.S.C. § 107 (1976).

55. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted at* 1976 U.S.C.C.A.N. 5659, 5680; S.REP. NO. 94-473, 62 (1975).

56. *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (recognizing that "[c]ourts and commentators disagree on the interpretation and application of the four factors").

57. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 662 (2d Cir. 1939).

58. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1161 (1990).

59. Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975), *aff'g*, 487 F.2d 1345 (Ct. Cl. 1973).

60. *Williams & Wilkins*, 487 F.2d at 1346-47.

61. *Id.* at 1348-49.

cles representing approximately 930,000 pages.[62] Similarly, in 1968, NLM filled approximately 120,000 interlibrary loan requests by photocopying single articles from journals.[63] While individuals requesting copies were allowed to keep them, both libraries had policies limiting excessive copying; the only general prohibition was against the copying of entire journals.[64] The Court of Claims concluded this copying was fair use, and an equally divided Supreme Court affirmed the judgment.

Two factors stand out in the Court of Claims' decision. First, the "customary facts of copyright-life"[65] clearly influenced the majority's fair use analysis. According to the court, prior to the invention of the photocopier, scholars could freely copy articles by hand or have them typed for their "personal use and files" without infringing copyright.[66] Similarly, the majority expressed great skepticism that individuals infringe copyright when making a copy on a photocopying machine for themselves or to give to others.[67] In part, the court perceived a distinction drawn by earlier copyright statutes between copying and printing books.[68] Prior to 1909, only printing, reprinting, and publishing infringed copyrighted books, while mere copying of other works, such as photographs and drawings, infringed these copyrighted works.[69] While the 1909 Act eliminated this distinction, the court believed that "there is a solid doubt whether and how far 'copy' applies to books and journals, [which] must be taken into account in measuring the outlines of 'copying' as it involves books and articles."[70] In conducting its fair use analysis, the court considered the libraries' facilitation of the photocopying as simply a more efficient means of making copies that would have otherwise been permissible since no clear history or authority prohibited the practice.[71] Consequently, the court treated the photocopying as presumptively fair absent a showing of genuine harm to the publisher or a clearer dictate from Congress.

Second, in evaluating the publisher's allegation that NIH and NLM injured Williams & Wilkins' business, the court limited the relevant or po-

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62. *Id.* at 1348.
63. *Id.* at 1349.
64. *Id.* at 1348-49.
65. *Id.* at 1350.
66. *Id.*
67. *See id.* at 1351-52, 1353, 1355.
68. *Id.* at 1350.
69. *Id.* at 1350-51.
70. *Id.* at 1351.
71. *Cf.* Whalen v. Roe, 429 U.S. 589, 606-07 (1977) (Brennan, J., concurring) (recognizing that a practice is "not rendered [unlawful] simply because new technology makes the State's operations more efficient").

tential market to the market for medical journals. In so doing, the court explicitly rejected the district court's and publisher's positions that the relevant market includes the market or potential market for individual medical articles.[72] Measuring market harm by lost licensing opportunities for individual articles, according to the court, assumes that the publisher of the journal has the right to license those uses in the first place; this is precisely what the fair use inquiry is supposed to determine.[73] Because the authors of the medical articles are typically not paid for their contributions, but rather assigned their copyrights in return for the opportunity to be published, the copying did not threaten their incentive to write.[74] The court instead examined whether the publisher would continue to have sufficient incentive to publish the journals in their entirety.

The court also found no evidence that the copying of individual articles discouraged the publication of the journals themselves. The court found that Williams & Wilkins' subscriptions and revenues actually grew in the relevant time period, despite the copying.[75] Moreover, the majority concluded that the publisher failed to demonstrate that the libraries or researchers would have purchased additional journal subscriptions, reprints, or back issues in lieu of copying.[76] Instead, it was quite possible that researchers "might expend extra time in note-taking or waiting their turn for the library's copies of the original issues" or simply do without the articles.[77] Contributing to the fact that journals were not substitutes for the photocopies (and vice versa) were the limited budgets of the libraries and researchers, and the fact that publishers like Williams & Wilkins maintained only a small number of back issues and typically did not provide reprints of individual articles.[78] In any event, publishers would not be demonstrably better off if copying were prohibited, and arguably the state of medical research would suffer.[79] Because the copying was not a disincen-

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72. *Williams & Wilkins*, 487 F.2d at 1356-57.

73. *Id.* at 1357 n.19.

74. *See id.* at 1359 ("The authors, with rare exceptions, are not paid for their contributions . . . . Indeed, some of the authors of the copied articles involved in this case testified at the trial that they favored photocopying as an aid to the advancement of science and knowledge.").

75. *Id.* at 1357.

76. *Id.* at 1356-57.

77. *Id.* at 1358.

78. *Id.* at 1356-57.

79. *Id.* at 1358. The opinion states:

> In the absence of photocopying, the financial, time-wasting, and other difficulties of obtaining the material could well lead, if human experience is a guide, to a simple but drastic reduction in the use of the many articles (now sought and read) which are not absolutely crucial to the

tive to publishing medical journals, the copying was ultimately considered fair. Because an equally divided Supreme Court affirmed *Williams & Wilkins*, the fair use status of consumer copying would remain in doubt until a decade later when the Court decided *Sony*.

*2. The VCR*

In *Sony*, Universal City Studios and Walt Disney Productions brought a copyright action against Sony Corporation and related entities for manufacturing and distributing the Betamax videocassette recorder (VCR).[80] The plaintiff studios owned the copyrights to various broadcast television programs, and argued that Sony was guilty of contributory copyright infringement because the VCR enabled millions of consumers to copy the plaintiffs' programs without authorization.[81] According to the district court's findings of fact, the average member of the public used the VCR to playback televised programs at a time subsequent to their broadcast, a practice described as "time-shifting."[82] In a five to four decision, a majority of the Supreme Court concluded that consumer videotaping of television programming for the purposes of time-shifting was fair use. Specifically, the Court held that Sony was not a contributory infringer because unauthorized time-shifting was fair and the VCR was capable of substantial non-infringing use under the staple article of commerce doctrine.[83]

Recognizing the relationship between copyright and technological change, the majority's fair use analysis was influenced by an important interpretive principle: when advances in technology challenge the application of copyright, courts should construe the fair use doctrine in light of its basic purpose to encourage creativity as a means of promoting "broad public availability of literature, music, and the other arts."[84] In light of this

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> individual's work but are merely stimulating or helpful. The probable effect on scientific progress goes without saying, but for this part of our discussion the significant element is that plaintiff, as publisher and copyright owner, would not be better off. Plaintiff would merely be the dog in the manger.

*Id.*

80. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 419-20 (1984).

81. *Id.* at 419-20.

82. *Id.* at 421.

83. *Sony* addresses other important issues including whether the staple article of commerce doctrine from patent law should apply to claims of contributory copyright infringement and its relationship to authorized time-shifting. *Id.* at 439-41. For the purposes of this discussion, however, this article only addresses the decision regarding unauthorized copying.

84. *Id.* at 432 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

principle, the majority rejected the studios' and dissenters' three principal arguments against fair use.

First, the Supreme Court rejected the argument that time-shifting was commercial because consumers derived economic value from the use. The studios and dissent argued that home taping was a commercial use because even if the consumer did not sell the tape, the tape was a substitute for one that may be sold by the copyright holder.[85] For example, Laurence Tribe argued, "jewel theft is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold."[86] In rejecting Tribe's argument, the Court relied upon the distinction between tangible property and the public goods nature of creative works. Justice Stevens argued that the theft of tangible property denied the owner the right to possess the property as well as the right to sell it.[87] In contrast, given the public goods nature of creative works, time-shifting deprived the owner of neither possession nor the right to sell the program to broadcasters or, for that matter, to consumers.[88]

Because time-shifting was considered a non-commercial use, the studios bore the burden of demonstrating the existence of some meaningful likelihood of future harm to their existing or potential markets.[89] Relying upon the district court's findings of fact, the Supreme Court concluded that the studios failed to make such a demonstration. According to the district court, "[h]arm from time-shifting is speculative and, at best, minimal."[90] In fact, time-shifting could benefit the studios and their advertisers by expanding the size of the viewing audience.[91] Lastly, the evidence demonstrated that television productions were more profitable than ever before and use of the VCR would not injure the studios' existing financial picture.[92]

Additionally, the studios and the dissent argued that in addition to the traditional markets for their works such as theatrical exhibition and broadcasting, home taping harmed their ability to exploit what would be a sizable market for time-shifting.[93] According to the dissent:

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85. *See id.* at 450 n.33.
86. *See id.*
87. *See id.*
88. *Id.*
89. *Id.* at 451.
90. *Id.* at 454.
91. *Id.*
92. *Id.*
93. *Id.* at 485-86 (Blackmun, J., dissenting).

> [T]he Studios . . . demonstrate that the advent of the VTR technology created a potential market for their copyrighted programs. That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTRs and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders.[94]

As in *Williams & Wilkins*, the possibility of licensing and a new market for time-shifting was irrelevant to the majority's fair use analysis. Instead of rejecting the argument as circular, Justice Stevens addressed this argument rather obliquely in his discussion of the staple article of commerce doctrine. In that discussion, Justice Stevens argued that recognition of copyright liability for harm to a market for time-shifting was the functional equivalent of suggesting that copyright gave copyright holders a monopoly over the VCR.[95] The studios' willingness to license merely represented a willingness to license this claimed monopoly interest in the VCR.[96] In other words, accepting the studios' "extraordinary" argument would be the equivalent of granting all copyright owners a patent right in any technology that may be used to reproduce their works. According to the majority, such a result would extend the studios' monopoly beyond the limits conferred by copyright.[97]

Lastly, the majority rejected the argument that ordinary uses of copyrighted works could never be considered fair use. The court of appeals concluded that "when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use."[98] According to Justice Blackmun's dissenting opinion, the categorical denial of fair use for ordinary uses is appropriate because:

> The scholar, like the ordinary users, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes

94. *Id.*
95. *See generally id.* at 441.
96. *Id.* at 441 n.21.
97. *Id.*
98. Sony Corp. v. Universal City Studios, Inc., 659 F.2d 963, 972 (9th Cir. 1981).

> use of a prior work, not only does his own work suffer, but the public is deprived of his contribution of knowledge. The scholar's work, in other words, produces external benefits from which everyone profits.[99]

Ordinary uses, according to the studios and dissent, create no additional public benefits to outweigh a copyright owner's interests in compensation. In rejecting this argument, the majority reasoned that the distinction between "productive" and "unproductive" uses is helpful, but not conclusive.[100] While the scholar may have a stronger claim, this tendency does not bar the possibility that ordinary uses might also be fair.[101] According to Justice Stevens, fair use is a nuanced inquiry in which neither all copyrights nor all uses are fungible.[102] If the social value in scholarship or criticism may not be dismissed, so too the social value of personal enrichment should not be ignored.[103] As such, the Court rejected a "two-dimensional" approach that categorically excludes ordinary uses from the fair use analysis.[104] In light of the Court's conclusions that time-shifting was non-commercial and did not harm the copyright owners, time-shifting was considered fair even if non-productive.

Long before Shawn Fanning created Napster and Internet peer-to-peer networks began the viral distribution of music,[105] the Supreme Court confronted the question of whether widespread copying, facilitated by certain "new" technologies (the photocopier and the VCR) could be considered fair. In both instances, consumer copying was ultimately considered fair use. Unfortunately, aside from addressing the four statutory considerations, neither majority opinion clearly articulated why consumer copying

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99. *Sony*, 464 U.S. at 477-78 (Blackmun, J., dissenting).

100. *Id.* at 455 n.40.

101. *Id.*

102. *Id.*

103. *Id.* The opinion states:

> A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote.

*Id.*

104. More recently, the Court reiterated its reluctance to establish categorical rules within an otherwise equitable rule of reason by rejecting the claim that all commercial uses are presumptively unfair. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

105. *See generally* Ku, *supra* note 23 (discussing the file sharing facilitated by Napster).

should be considered fair. In *Williams & Wilkins*, an equally divided Supreme Court let stand a divided decision from the Court of Claims, and in *Sony*, a five-Justice majority reversed the Ninth Circuit in an opinion that has been roundly criticized and that could easily be limited to its facts.[106] As discussed in Part II, any lessons that might be learned from these decisions (as unsatisfactory and cryptic as they may be) have been largely ignored.

## III. SONY RECAST: THE RISE OF FAIR USE AS MARKET FAILURE

### A. Fair Use as Market Failure

In one of the seminal works on fair use, Wendy Gordon argued that fair use is best understood in terms of market failure.[107] According to Gordon, courts should conclude that a defendant's use is fair when: "(1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed."[108] Gordon suggests that the facts of *Sony* and *Williams & Wilkins* represented instances in which there were reasons to distrust the market. I emphasize that this approach is based upon the facts of those prior decisions, because not only did Gordon's article precede the Supreme Court's decision in *Sony*, her approach is both inconsistent with and critical of the type of approach taken by the majorities in both cases.

Under Gordon's approach, the presence of market failure is a "necessary precondition for premising fair use on economics grounds."[109] According to Gordon, market failures include market barriers, externalities,

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106. *See, e.g.*, Jay Dratler Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 260-88 (1988) (criticizing *Sony*); Fisher, *supra* note 32, at 1664-92 (same); Weinreb, *supra* note 58, at 1153-54 ("Justice Stevens' arguments in favor of fair use, purportedly applying the four statutory factors, are hopelessly inadequate.").

107. Gordon, *Fair Use*, *supra* note 14. For other interpretations of fair use, see Fisher, *supra* note 32, arguing that fair use should be used to increase efficiency in the use of scarce resources or create a more just world order, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990), arguing that fair use should only be recognized when it promotes the production and dissemination of new creative works, Weinreb, *supra* note 58, arguing that many of the proposals for interpreting fair use unduly restrict a doctrine appropriately focused on fairness.

108. Gordon, *Fair Use*, *supra* note 14, at 1601.

109. *Id.* at 1615.

and anti-dissemination motives.[110] More recently, Gordon has described these as "technical failures."[111] Technical market failures preventing perfect competition include "endowment effects, high transaction costs between owner and user, transaction costs that prevent a user from internalizing the social benefit she generates, indivisible products, and strategic behavior."[112] The presence of such technical failures questions the market's ability to allow socially beneficial uses to occur. As a result, a judicial finding of fair use might be appropriate.[113]

With respect to new technologies, Gordon identified high transaction costs and low profits as problems when determining whether a particular use should be considered fair or infringing.

> Consider, for example, the impact of the photocopy machine or the tape recorder. Each makes it possible for individuals to make use of copyrighted works in new and potentially valuable ways. From the point of view of the individual user, the anticipated "profit" is likely to be small, so his use will be easily discouraged by transaction costs. Also, the technology's novelty may mean that the participants have no established market channels to rely on, so that the purchase of permission is likely to be cumbersome and expensive. High transaction costs and low per-transaction profits will converge. From the point of view of the copyright owner, the costs of enforcement against a diffuse group of individuals might outweigh anticipated receipts.[114]

Under Gordon's approach, the photocopier and VCR represent examples of new technologies presenting high transaction costs and low profits. Even if the researchers in *Williams & Wilkins* and the time-shifters in *Sony* wanted to obtain permission to copy the works in question, the transaction costs to obtain that permission arguably outweigh the value of that use to the individual.[115] Correspondingly, the costs of identifying and enforcing copyright against individual copiers arguably outweigh any anticipated returns to the copyright holders.[116] In light of the transaction and policing

110. *Id.* at 1627-35.

111. Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1037 (2002) [hereinafter Gordon, *Market Failure*] (describing the other category of market failure as one that "addresses all the normative reasons why we might not want to rely on the market, such as dissatisfaction with the pursuit of economic value").

112. *Id.*

113. *Id.*

114. Gordon, *Fair Use*, *supra* note 14, at 1628-29.

115. *Id.* at 1648-49, 1655.

116. *Id.*

costs, Gordon argued that photocopying and time-shifting were candidates for fair use. Identifying the presence of market barriers such as burdensome transaction costs, however, is not the end of the market failure inquiry.

Under Gordon's approach, if there are reasons to distrust the market, courts should consider next whether market cures other than fair use would evolve in response to the new technology. In determining whether a copyright owner's incentives would be substantially impaired, Gordon argued that courts should consider the loss of revenues from the use in question and monetary relief as an alternative to a finding of fair use.[117] Under these circumstances, relief could be limited to damages, reasonable royalty payments, or a share of the defendant's profits.[118] Not only might damage awards themselves represent a cure for market failure, they might also create incentives for defendants and copyright owners to establish institutions and agents that might reduce future transactions costs.[119] According to Gordon, courts should consider damage awards as an alternative because a premature finding of fair use might make permanent otherwise curable market failures and insulate new and valuable uses "from the stimulus of consumer demand."[120] Underlying this approach is the premise that "fairness to the copyright owner and economic efficiency demand that the assessment of his injury include the loss of revenues he would receive in the market were his entitlement to be enforced."[121] Courts should, therefore, consider the difficult factual questions of whether market cures will evolve, whether they will be practicable, and what the judiciary's role should be in bringing about such cures.[122]

With Gordon's analysis in mind, it should be no surprise that Gordon was particularly critical of the majority in *Williams & Wilkins* for not considering whether the defendants' copying threatened the potential market for licensing individual articles.[123] Presumably, Gordon would be critical of the Supreme Court's conclusions in *Sony* as well. As the following discussion demonstrates, subsequent commentators and courts have taken to heart Gordon's approach and criticisms.

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117. *Id.* at 1623 n.126.
118. *Id.* at 1622-23.
119. *Id.* at 1655-56.
120. *Id.* at 1620-21.
121. *Id.* at 1651.
122. *Id.* at 1656.
123. *Id.* at 1651, 1655-56.

## B. The Elimination of Market Failure and Fair Use

The majorities in *Williams & Wilkins* and *Sony* did not use the fair use as market failure approach and thus implicitly or explicitly rejected it. Nonetheless Gordon's approach has come to dominate the fair use doctrine. Seizing upon the potential for the licensing of new uses and DRM technologies to cure market failure, commentators, policymakers, and courts have argued for a drastic reduction, if not the wholesale elimination, of fair use.[124]

For example, building upon Gordon's work, scholars have argued that DRM should significantly narrow the fair use doctrine because DRM will help copyright owners commodify intellectual properties, making them more like private goods, which in turn will reduce the transaction costs associated with both bargaining and copyright enforcement.[125] For example, Tom Bell and Trotter Hardy argued that the Internet, online contracts, and technological measures designed to control access to copyrighted works reduce transaction costs to the point of eliminating most instances of market failure.[126] Bell posits that, trusted systems "radically reduce[] the transaction costs of licensing access to copyrighted works," and "[i]nsofar as it responds to market failure, therefore, fair use should have a much reduced scope."[127] The reduction in transaction costs will benefit the public by increasing the value of copyrighted works, thus encouraging greater production and improving distribution.[128] Correspondingly, Hardy

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124. For an excellent discussion on the role of bargaining institutions in facilitating the licensing of intellectual property rights, see Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

125. *See, e.g.*, GOLDSTEIN, *supra* note 3, at 224 ("The capacity of the celestial jukebox to post a charge for access, and to shut off service if a subscriber does not pay his bills, should substantially reduce the specter of transaction costs. As these costs dissolve, so, too, should the perceived need for safety valves such as fair use."); Bell, *supra* note 3, at 579-80 (arguing that "automated rights management will sharply lower transaction costs for regulating the use of copyrighted materials"); Hardy, *supra* note 3, at 236 (arguing that a principal characteristic of property rules—that we rely on them in situations of low transactions costs—applies to cyberspace, because cyberspace lowers the costs of communicating); *see also* Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian World of On-line Commerce"*, 12 BERKELEY TECH. L.J. 115, 130 (1997) (recognizing that "because the contemporary fair use doctrine is predicated on a market failure rationale, and because an electronic exchange potentially eliminates this market failure for digital content, fair use law will significantly shrink, or an alternative basis for fair use will be rediscovered").

126. Bell, *supra* note 3, at 581-84; Hardy, *supra* note 3, at 236-42.

127. Bell, *supra* note 3, at 583-84.

128. *Id.* at 589.

argues that because transaction costs in cyberspace "appear to be falling quite rapidly," a private property regime for intellectual works in cyberspace would best promote the development and usefulness of cyberspace by minimizing the inefficiencies of liability rules and group bargaining costs.[129]

In addition to influencing the academic discourse, the idea that fair use is justified only in response to market failure has had a profound impact on copyright policy. Most notably, through its "White Paper," the Clinton administration championed (and Congress passed) the Digital Millennium Copyright Act,[130] which, among other things, made it illegal to circumvent DRM technologies even to make fair use of copyrighted works.[131] The White Paper justified these restrictions based on the assumption that "technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine."[132] In support of this position, the White Paper erroneously characterized the Supreme Court's decision in *Sony* as predicated upon market failure.[133]

Fair use as market failure has also had a dramatic impact on judicial determinations of fair use. Beginning with *Basic Books, Inc. v. Kinko's Graphics Corp.*,[134] courts began to distinguish *Williams & Wilkins* in the context of academic photocopying. These courts rejected claims of fair use by pointing to the existence of "market cures," including document delivery services that paid royalties to publishers, the emergence of licensing institutions such as the Copyright Clearance Center, and the ability to negotiate licenses directly with individual publishers.[135] According to one decision from the Second Circuit, the presence of licensing mechanisms and institutions demonstrated the existence of a market for licensing individual academic articles, and "since there currently exists a viable market for licensing these rights for individual articles, it is appropriate that po-

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129. Hardy, *supra* note 3, at 259-60.

130. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

131. 17 U.S.C. §§ 1201-1205 (2000).

132. Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, 82 (Sept. 1995) [hereinafter WHITE PAPER].

133. *Id.* at 79 ("In *Sony*, the absence of any market for home taping licenses . . . led the Court to conclude that there was no cognizable harm.").

134. 758 F. Supp. 1522 (1991) (holding that a copy services production of photocopied course packets at the request of professors for use by students was not fair use).

135. *See* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1388 (6th Cir. 1996); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994).

tential licensing revenues for photocopying be considered in a fair use analysis."[136] Firmly embracing fair use as market failure, the court rejected the circularity argument in *Williams & Wilkins*, arguing that "it is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use."[137]

The *Sony* decision has fared no better than the *Williams & Wilkins* decision. In *A&M Records, Inc. v. Napster*[138] and *UMG Recordings, Inc. v. MP3.COM, Inc.*,[139] courts rejected fair use claims with respect to the copying and distribution of digital music.[140] Napster created a peer-to-peer network that allowed users to copy their own or other people's music through the Internet.[141] MP3.COM provided its subscribers with a service that allowed them to listen to music they owned from anywhere they had Internet access.[142] In both cases, the courts concluded that the underlying use of the copies—even for listening to music one already owned from a different location (i.e., "space-shifting")—was not fair because the digital copies were substitutes for a developing market for digital downloads.[143] In *Napster* the court concluded that "[h]aving digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads."[144] Similarly, the fact that MP3.COM's service actually led to an increase in CD sales—both consumers and the company had to purchase CDs for the service to function—was irrelevant because "[a]ny allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of plaintiffs' copyrighted works."[145] From the perspective of these courts, the music industry's willingness to license to third parties and consumers the opportunity to make and use digital music files demonstrated that market failure

136. *Am. Geophysical Union*, 60 F.3d at 930.

137. *Id.* at 931.

138. 239 F.3d 1004 (9th Cir. 2001).

139. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

140. For a more detailed discussion of these decisions and the copying facilitated by digital technologies including MP3s, see generally Ku, *supra* note 23.

141. *See Napster*, 239 F.3d at 1011-13.

142. *See MP3.COM*, 92 F. Supp. at 350.

143. *Napster*, 239 F.3d at 1017 (holding that the record supports the district court's finding that the copyright holders had expended considerable funds and effort to commence Internet sales and the licensing of digital downloads).

144. *Id.*

145. *MP3.COM*, 92 F. Supp. 2d at 352.

was not present, and the absence of market failure weighed heavily against fair use.[146]

These cases illustrate that Gordon's market failure approach has become the dominant approach for analyzing the fair use doctrine. However, as should be apparent from the discussion of *Williams & Wilkins* and *Sony* in Part II, while Gordon's approach represents her interpretation of the facts of those decisions, fair use as market failure is clearly at odds with the prevailing reasoning of those decisions. In both cases, the use of copyrighted works was considered fair despite the availability of market cures including licensing and the potential for the development of a market for individual medical articles or time-shifting. It is not surprising that in *Sony* the dissent—not the majority—embraced Gordon's work.[147] The extent of the courts' subsequent adoption of Gordon's analysis despite its inconsistency with *Sony* and *Williams & Wilkins* may be because it provides a coherent underlying rationale for these highly fact-specific decisions. It would appear that Justice Stevens failed to provide a sufficiently coherent competing rationale in *Sony*. While I do not purport to defend the adequacy of the majority opinions in either *Sony* or *Williams & Wilkins*, a coherent economic approach towards fair use based upon creative destruction does emerge from these decisions without having to abandon the decisions themselves. As developed in Part IV, recognizing creative destruction as fair use is important because it is more consistent with the Supreme Court's consumer copying decisions and it represents an important competing conception of the market.

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146. Critics of the market failure approach, especially as the courts have applied it, criticize the tendency to focus almost exclusively on transaction costs. *See* Loren, *supra* note 49, *passim*. For example, Loren argues that this view ignores market failure attributed to the presence of external social benefits. *Id.* at 48; *see also* Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453 (2002) (arguing the strategic behavior of the copyright holders might still create deadweight loss in a world with no transaction costs). Gordon herself is critical of this approach. *See* Gordon, *Market Failure*, *supra* note 111, at 1034 ("Transaction cost barriers are neither the only kind of economic problem to which fair use responds nor the only kind of problem to which fair use should respond."). Her original work on this issue took care to note the possibility of other market barriers including the presence of externalities or nonmonetizable interests such as contributions to "public knowledge, political debate, or human health." Gordon, *Fair Use*, *supra* note 14, at 1631-32.

147. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting) (citing Gordon, *Fair Use*, *supra* note 14, at 1630).

## IV. CREATIVE DESTRUCTION & FAIR USE

While Gordon is clearly correct when she suggests *Williams & Wilkins* and *Sony* turned upon an economic analysis of fair use, the approach was actually one of creative destruction rather than one of market failure. The following explains what I mean by the creative destruction of copyright, and its relation to what I have described elsewhere as the new economics of digital technology. The remainder of this paper argues that the process of creative destruction is not limited to digital technology and peer-to-peer networking. The photocopier and VCR worked to creatively destroy copyright as well. While neither *Williams & Wilkins* nor *Sony* expressly recognized this interpretation, creative destruction as fair use is not only consistent with the facts of both decisions, it is implicit in the decisions themselves.

### A. The Creative Destruction of Copyright

Elsewhere I have argued that the copying and distribution of music facilitated by peer-to-peer networks (beginning with Napster) is not theft as the recording industry would like us to believe.[148] Instead, it is an example of a revolutionary process that should be embraced—the process of creative destruction.[149] According to Joseph Schumpeter, the most important form of competition preventing capitalist markets from becoming monopolistic is not competition regarding price, quality, and effort.[150] Rather, the "fundamental impulse that sets and keeps the capitalist engine in motion" is the process of "creative destruction,"[151] a process "that incessantly revolutionizes the economic structure [by] incessantly destroying the old one, incessantly creating a new one."[152] This form of competition "strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives."[153] Under certain circumstances, new technologies that facilitate copying and distribution of creative works strike at the foundations of copyright and the industries built upon the economics of the printing press.

As discussed in Part II, copyright's *raison d'etre* is to combat free riding and the potential for the underproduction of creative works it creates. By recognizing an exclusive right to copy and distribute creative works,

148. *See generally* Ku, *supra* note 23.

149. *See* SCHUMPETER, *supra* note 24, at 81-86 (describing creative destruction); *see also* Ku, *supra* note 23, at 293-322.

150. SCHUMPETER, *supra* note 24, at 84.

151. *Id.* at 83.

152. *Id.*

153. *Id.* at 84.

copyright is a legal mechanism for ensuring that consumers of those works internalize the costs of their creation and distribution. When creative works are distributed as physical goods (e.g., CDs, books, and videotapes) copyright arguably does what it is supposed to do. The musician must have the incentive to create music, and the recording company must have the incentive to distribute that music in the form of physical goods. When tangible goods are the means of distribution, copyright encourages the substantial investment necessary to distribute music to the public by forcing consumers to internalize those costs.[154] If a competitor could free ride by selling copies of the same work without incurring the same expenses as the first distributor, competition would force prices down to the copier's costs, and the initial distributor would not be adequately compensated. Copyright discourages the subsequent copying that may threaten the initial distributor's investment.

In contrast, digital distribution challenges whether copyright is necessary when creative works are distributed as bits and bytes through the Internet and peer-to-peer networks. At first blush, the massive copying facilitated by the rapidly diminishing costs of duplicating and distributing digital works via the Internet would seem to demand increased copyright protection.[155] After all, the traditional economic analysis of copyright suggests that as the costs of copying decrease, copyright protection must increase.[156] A funny thing happens, however, as the costs of copying approach zero. Consumers begin to invest in distribution directly. In the case

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154. *See* Ku, *supra* note 23, at 295-96. Ku states:

> In 1984, estimates suggested that it cost $125 million just to maintain a national record distribution operation. In part, this is due to the fact that unlike the author's costs of creation, which are fixed, distribution costs include not only fixed costs but also costs that increase with the number of copies produced. Each CD must be manufactured, printed, packaged, and distributed. This requires an investment in material, equipment, personnel, and facilities. Moreover, greater demand for, or wider distribution of, a CD means higher overall costs, both for making additional copies and for expanding the distribution network.

*Id.*

155. *See id*. at 270-74 (describing the costs of digital Internet distribution).

156. *See id*. at 296-97. Ku states:

> As the costs of copying decrease and more individuals are able to afford the technology necessary to copy, one can assume that there will be a greater number of potential copiers. So even though the copying costs for the initial distributors will decrease as well, they will be forced to compete with a greater number of copiers and copies.

*See id.*; Landes & Posner, *supra* 48, at 344 (arguing that "if, over time, growth in income and technological advances enlarge the size of the market for any given work, and the cost of copying declines, copyright protection should expand").

of Napster, by purchasing computers, modems, storage media, and Internet service, the consuming public funds and creates the distribution channels for digital music.[157] Consequently, with respect to distribution, the problem of free riding is arguably absent in cyberspace.

I do not mean to suggest that consumer copying is not a threat to the recording industry or other content distributors. As a matter of common sense, one's willingness to purchase music will certainly be influenced by the opportunity to obtain that music at no extra cost. File sharing, therefore, is a serious threat, one that strikes at the very foundation of a business model based upon distributing content to the public. However, copyright does not protect against this type of threat. Copyright protects the distribution of creative works in general, not a particular industry or business model. While file sharing threatens the recording industry and other content distributors, it does so because in a digital world these middlemen are largely unnecessary. Because the consuming public makes the necessary investments to distribute digital content, the distribution of content in general is not threatened. As such, Internet distribution does not suffer from the free-rider problem that plagued older methods of distribution. Under these circumstances, prohibiting consumer reproduction and distribution of creative works under copyright is unnecessary and unwarranted.[158]

Protecting distribution, however, is only half of copyright's mission. If copying threatens creation, copyright is still needed. While the artist's incentive to create has been often overshadowed by the incentives of distributors,[159] the incentive to create must still be protected even if distributors are no longer necessary. Once unbundled from distribution, however, copyright's role in promoting creation by prohibiting consumer copying is neither clear nor absolute.[160] For example, with respect to music, unre-

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157. *See* Ku, *supra* note 23, at 301.

158. *Id.* at 300-05. Not only is file sharing not a threat to distribution, it arguably improves the public availability of music by making music available to individuals who might otherwise been unwilling or unable to pay the copyright owner's price. Correspondingly, continued recognition of copyright's exclusive rights under these circumstances would appear to undermine copyright's purpose of making works broadly available to the public. *See id*.

159. *Id.* at 294-95.

160. Copyright's reliance upon the right to exclude to transform creative works into commodities may also be undesirable. For example, I have argued that DRM technologies may be designed to facilitate the public funding of creation through a system of levies and the monitoring of aggregate Internet downloading or use. *See id.* at 311-15. Not only could this regime provide the necessary incentives to fund creation, it would do so without denying anyone access to the work because or an inability or unwillingness to

stricted consumer copying may have a marginally negative or even a positive impact upon an artist's financial incentives to create music.[161] The disconnect between copying and creativity is due to the fact that the overwhelming majority of artists earn no royalties from the sale of music.[162] Instead, most musicians earn their livelihood from live performances and other alternative sources of revenue.[163] In other words, consumer copying does little to reduce the incentives for creation because, for the most part, the creation of music is not funded by the sale of copies of that music.

Because copyright is largely irrelevant to the creation of music and is not necessary to ensure digital distribution, I have argued that the Internet and digital technology have creatively destroyed copyright as it pertains to the protection of music.[164] In other words, in light of the new economics of digital technology, the underlying economic justifications for copyright do not support restricting the sharing of music over the Internet.[165] Through ticket sales and by purchasing the components and services that create the digital distribution channels, the consuming public funds the creation and distribution of music without the costs and harms associated with legally created monopoly privileges. As discussed below, not only is this conclusion appropriate as a matter of policy, it is consistent with the doctrine of fair use as well.

### B. Creative Destruction as Fair Use

The principles of creative destruction, rather than market failure, define fair use analysis when dealing with consumer copying. In other words, consumer copying should be considered fair use when two conditions are satisfied: 1) the copy is made by the consumer of the work; and

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pay. Likewise, it would avoid the threat to privacy entailed by tracking individual downloading and usage. *See id.*; *see also* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996) (arguing that DRM threatens individual privacy).

161. *See* Ku *supra* note 23, at 306-11. There are of course many non-financial incentives for becoming an artist. Advocates for greater copyright protection, however, typically assume that financial incentives dominate. For the purposes of my analysis, it is not necessary to challenge this assumption, though as John Perry Barlow has argued, it does have the tendency to equate the greatest of human achievements with pig iron. *See also* John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1994), *available at* http://www.wired.com/wired/archive/2.03/economy.ideas.html (last visited May 4, 2003).

162. *See* Ku, *supra* note 23, at 306-08.

163. *Id.* at 308-11.

164. *See generally id.*

165. *Id.*

2) the creative endeavor does not depend upon funding derived from the sale of copies.[166]

Consistent with the overall purpose of copyright, the first condition recognizes fair use under circumstances where the consuming public is not free riding on distribution because the consumer of the work purchases the components and services that create and distribute the copies. The second condition limits findings of fair use to circumstances in which the consuming public has internalized the costs of creation in other markets. When both criteria are satisfied, copying is not evidence of market failure. Instead, it is a functioning market for creative works in which innovation rather than law addresses the underproduction problem brought about by the public goods nature of creative works. Moreover, the concept of creative destruction explains what might otherwise be considered rather cryptic or unsatisfying opinions by providing a conception of the market to compete with the one offered by the market failure approach.[167]

Both conditions are satisfied in the *Sony* and *Williams & Wilkins* decisions. The facts of *Sony* and *Williams & Wilkins* clearly satisfy the first condition for creative destruction as fair use. In each case, consumers were not free riding with respect to distribution. Instead, they made the necessary investments for distributing copyrighted works themselves. In *Sony*, having purchased televisions, VCRs, tapes, and subscribed to cable or satellite programming, consumers invested in the equipment and materials necessary to receive and record television programming. Similarly, in *Williams & Wilkins*, by purchasing photocopiers, supplies, subscriptions to the medical journals, and by paying employees to make the requested copies, NIH invested the resources needed to enable it to distribute individual medical articles. In both cases the consumers bore the marginal costs of copying and invested in the fixed costs necessary to engage in copying, explaining why the respective courts considered the copying as potentially beyond the reach of copyright.

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166. These two conditions are by no means the exclusive or necessarily the best articulation of when the creative destruction of copyright has occurred. They represent, however, what I believe to be the clearest case for treating creative destruction as fair use. Of course, it is also accurate to suggest that when a competitor makes copies available, the public also bears the cost of distribution, albeit indirectly. However, even if the copying does not threaten future incentives to create, one might question whether for-profit distribution in competition with the creator of a work is a matter of equity rather than economics. *Cf.* Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918) (recognizing a claim for unfair competition in hot news).

167. *Cf.* Fisher, *supra* note 106, at 1670-71 (criticizing the *Sony* majority for not providing a conception of the market to compete with one defined by willingness to pay).

The importance of consumers investing in the means of distribution is also consistent with the opinions themselves. In *Williams & Wilkins* the weight of this condition can be seen in the court's skepticism that Congress ever intended copyright to apply to individual copying.[168] According to the court, copyright law recognizes a distinction between copying by individuals and printing by competitors.[169] While the latter is clearly an example of free riding, the former may not be. As such, the court considered the massive photocopying engaged in by NIH and NLM equivalent to patrons of the Library of Congress photocopying entire articles, lovers exchanging copies of poems and songs, and friends sharing newspaper items.[170] While the libraries' photocopying, like these other daily uses, were candidates for fair use, the ultimate conclusion would depend upon whether the photocopying individual articles harmed journal subscriptions.[171]

The first element of creative destruction also helps tie together the pieces of Justice Stevens' majority opinion in *Sony*. Consider once again the Supreme Court's analysis of the purpose of time-shifting. As discussed earlier, the Court was unwilling to categorically exclude non-productive copying from fair use or to consider time-shifting commercial even though consumers derived an economic benefit from copying. Taken together, these conclusions make sense in light of the Court's emphasis on the public goods nature of television programming. In rejecting the jewel thief analogy, the Court clearly recognized that the public interest in protecting private goods differs from the protection of public goods. Again, one of the concerns with public goods is that free riding will discourage investment in the distribution of creative works. Having rejected the studios' limitations on the types of copying that could be considered fair, the Court could then consider the impact of time-shifting upon distribution. Moreover, because the VCR actually increased distribution by expanding access to television programming, Justice Stevens recognized that its use was actually consistent with the public interest.[172] While this public interest was "not unlimited," it supported a finding of fair use in the absence of any harm to the creation of television programming.[173]

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168. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350-52 (Ct. Cl. 1973).

169. *Id.* at 1351-52, 1353, 1355.

170. *Id.*

171. *Id.* at 1353.

172. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984).

173. *Id.*

Arguably, the most important factor in the analysis of creative destruction as fair use is the second condition that the creative endeavor does not depend upon funding derived from the sale of copies. In *Sony*, this condition was satisfied because the facts showed that theater ticket sales and broadcast advertising funded the creation of television programming. Moreover, the studios admitted that the VCR did not reduce either theater attendance or the size of the television viewing audience.[174] In fact, some evidence suggested that by expanding the television viewing audience, time-shifting might increase ticket sales and advertising revenues.[175]

The copying at issue in *Williams & Wilkins* also satisfied the second condition. The publication of individual medical articles did not depend on sales of individual copies of those articles. Instead, the court found that publication was funded through subscriptions to the journals in which the articles appeared, and that copying of individual articles did not significantly alter the demand for journal subscription.[176] As another court explained:

> [I]n the unique world of academic and scientific articles, the effect on the marketability of composite work in which individual articles appear is not obviously related to the effect on the market for or value of the individual article. Since (1) articles are submitted unsolicited to journals, (2) publishers do not make any payment to authors for the right to publish their articles or to acquire their copyrights, and (3) there is no evidence in the record suggesting that publishers seek to reprint particular articles in new composite works . . . .[177]

This "unique world" is based largely on the fact that public and private libraries are the principal market for journal subscriptions, and have a particular interest in the availability of journals. Unlike the typical individual, libraries are not concerned with the availability of any particular article, but rather have an interest in providing for their patrons or employees with a comprehensive collection of materials including journals relevant to the library's mission.[178] As the majority recognized, while these libraries may purchase multiple subscriptions of certain publications, they will not and cannot "purchase extensive numbers of whole subscriptions . . . on the chance that an indeterminate number of articles in an indeterminate num-

174. *Id.*
175. *Id.* at 452-54.
176. *Williams & Wilkins*, 487 F.2d at 1357-58.
177. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 928 (2d Cir. 1994).
178. *Williams & Wilkins*, 487 F.2d at 1347-49.

ber of issues will be requested at indeterminate times."[179] Correspondingly, individuals are typically interested in only a subset of the articles that appear in the journals, and are unlikely to subscribe to journals "which would only occasionally contain articles of interest to them."[180] So long as the NIH and other medical libraries continue to subscribe to the medical journals, individual articles will be published. Under these circumstances, a finding of fair use is appropriate because the creation of individual articles is funded through subscriptions to the journals in which they appear, and the copying of individual articles does not threaten the market for those journals. If *Williams & Wilkins* viewed fair use through the lens of market failure, the publisher's willingness to create a new market for individual articles through licensing should have defeated the claim. Because copying did not harm the existing market for the underlying work, the court refused to extend the copyright owners' monopoly to encompass a market for individual articles created by the photocopier.[181]

The reasons both courts offered for defining the relevant markets narrowly are also consistent with creative destruction as fair use. According to the majority in *Williams & Wilkins*, including the questioned use as one of "the potential markets" that might be harmed impermissibly assumed the ultimate conclusion of the fair use analysis.[182] Justice Stevens' opinion provides us with more insight as to why this assumption is impermissible. As discussed in Part II.B, *supra*, Justice Stevens rejected the idea of including the market for time-shifting in the analysis of market harm because it would be tantamount to granting copyright owners a monopoly in the VCR. Justice Stevens' initial interpretative principle reveals how he

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179. *Id.* at 1357.

180. *Id.*

181. Copying may impact the availability of journals and the individual articles appearing therein if libraries that might otherwise subscribe to the journals replace their subscriptions with copies available through interlibrary loan. Institutional use of copies to substitute for subscriptions arguably would be fair use because this type of copying would not satisfy the second requirement for creative destruction as fair use. However, to the extent that the lending institution would not otherwise be able to afford a subscription, the copying may very well be justified under Gordon's market failure approach.

182. *Williams & Wilkins*, 487 F.2d at 1357 n.19. The opinion states:

> It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff has a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute 'fair use.' In determining whether the company has been sufficiently hurt to cause these practices to become 'unfair,' one cannot assume at the start the merit of the plaintiff's position . . . .

*Id.*

concluded that this exceeded the scope of copyright protection.[183] When technological change creates ambiguity, copyright must be construed in light of its basic purpose: "promoting broad availability of literature, music, and the other arts."[184] While securing a fair return for an author's labor is a means by which the public's interest may be achieved, "'[t]he sole interest of the United States and the primary object in conferring the monopoly . . . lie[s] in the general benefits derived by the public from the labors of authors.'"[185] When a use does not harm the existing incentives to create, prohibiting the use would be inconsistent with the basic purpose of copyright.[186] Such a prohibition "would merely inhibit access to ideas without any countervailing benefit."[187] In other words, while an unauthorized use might "harm" the studios by denying them revenues that they might otherwise collect, that harm is not the type that concerns copyright. The purpose of copyright is not to maximize the individual wealth of copyright holders, or even to maximize creativity. The purpose of copyright is to remove the obstacles to creation imposed by problems associated with public goods, and to put creation on an even playing field with other endeavors.[188] Because other markets funded the creation of television programming and medical journals, copyright was not necessary to achieve this objective in the new markets for time-shifting or individual medical articles, and could not justify granting copyright owners a legal monopoly in those markets.[189] As illustrated by *Sony* and *Williams & Wil-*

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183. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (quoting Twentieth Century Music Corp. v. Aikens, 422 U.S. 151, 156 (1975)).

184. *Id.* at 431-32.

185. *Id.* at 432 (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

186. *Id.* at 450-51.

187. *Id.*

188. As Glynn Lunney has argued:

> If we broaden copyright, we increase the economic return on any given authorship investment. We can thereby lure resources, in the form of labor and capital, away from other productive endeavors into the production of copyrighted works and lead the market to produce additional works. But to create these additional works, we must strip the resources from other sectors of the economy.

Glynn S. Lunney, Jr., *Reexamining Copyright's Incentive-Access Paradigm*, 49 VAND. L. REV. 483, 487-88 (1996). If there is a danger in being too quick to conclude that a use should be considered fair, there is also a danger in presumptively concluding that a use is within copyright's monopoly because the resulting legal monopoly might lead to more resources being devoted to creative endeavors than their social merit would warrant.

189. Of course, the fair use finding did not prevent the studios from competing in the market created by the VCR. Instead, it denied them a monopoly in that market, and subjected them to competition from time-shifters. Given the strength and size of the current

*kins*, consumer copying made possible by the process of creative destruction constitutes fair use.

I do not mean to suggest that expanding copyright to include control over consumer copying would not increase the incentives to create music or other works of authorship. As Jessica Litman notes, the answer to the question of "whether an increase in copyright protection will lead to the production of more or better works" is always yes.[190] Increased protection, however, also increases the costs and harms associated with the copyright monopoly.[191] Moreover, as Litman has argued:

> Whether to impose a complicated legal regime on individual consumer consumption of copyrighted works is a crucial question on which reasonable people might differ violently. Resolving it requires us to decide what we have a copyright law *for* . . . . This is not the sort of choice that it makes sense to resolve by pretending we settled it years ago. It is not the sort of choice that it makes sense to resolve by relying on linguistic fortuity.[192]

Instead, creative destruction as fair use recognizes that Congress, not the courts, generally decides the question of whether to expand copyright into markets created by new technologies. Regardless of how one interprets *Sony*, this lesson could not be clearer:

> The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress."
>
> One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.
>
> It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in

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market for video rental and sales, it would appear that the creators of television programming are competing quite well.

190. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002) [hereinafter Litman, *War Stories*].

191. *See generally* Ku, *supra* note 23, at 317-321 (summarizing problems associated with expanding the scope of copyright).

192. Litman, *War Stories*, *supra* note 190, at 365 (emphasis added).

> the past. But it is not our job to apply laws that have not yet been written.[193]

While the doctrine of fair use should not be an obstacle if Congress decides to prohibit consumer copying,[194] it is also not a justification or vehicle for delegating the decision to courts.

## V. CONCLUSION

Recognizing creative destruction as fair use rather than market failure as the sole justification for fair use radically alters the terms of today's copyright and DRM debate. Instead of justifying a never-ending expansion of control over creative works, fair use becomes a vital internal limitation upon copyright. As such, if the purpose of DRM is to protect copyright, allowances for fair use (including consumer copying) must be built into DRM technologies. Moreover, legal restrictions on fair use, like those found in the DMCA or pending before Congress, must be understood for what they are: the creation of new rights for copyright owners and the destruction of rights previously enjoyed by the public. If law and technology are used to enforce such restrictions, the public, judges, and policymakers should understand that those restrictions are not justified by copyright. Instead, they are alterations of the "traditional contours of copyright protection."[195] There can be no doubt that new technologies have the potential to "demolish a careful balancing of public good and private interests that has emerged from the evolution of" copyright.[196] We must recognize, however, that sometimes technology destroys this balance to promote the underlying purpose of copyright.

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193. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (internal citations omitted) (quoting Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972)); *see also* Eldred v. Ashcroft, 123 S.Ct. 769, 781 (2003) (deferring to Congress on whether the Copyright Term Extension Act is a rational exercise of the legislative authority conferred by the Copyright Clause).

194. While fair use may not be an obstacle for Congress, other constitutional provisions and legal principles including the First Amendment and internal limits within the Copyright Clause, may prevent or circumscribe such an expansion.

195. *Eldred*, 123 S.Ct. at 790 (suggesting that constitutional scrutiny may be necessary if Congress were to alter "the traditional contours of copyright protection").

196. COMM. ON INTELL. PROP. RIGHTS & EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 2 (Nat'l Academy Press, *available at* http://books.nap.edu/books/0309064996/html/2.html#pagetop, 2000).